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

BOOK OF AUTHORITIES OF PCC REPRESENTATIVE COUNSEL

Motions for Sanction Orders
(Returnable on January 29, 2025)

January 24, 2025

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PCC Representative Counsel

LIST OF AUTHORITIES

CASES

1. *Cappelli v Nobilis Health Corp.*, 2019 ONSC 4521.

2. *Caputo v Imperial Tobacco Ltd.*, [2004] OJ No 299 (SCJ); on January 11, 2006, the Court granted an Order discontinuing *Caputo* on a "with prejudice" basis as against the representative plaintiffs only, [2006] OJ No 537 (SCJ).

3. *Carom v Bre-X Minerals Ltd.*, 2014 ONSC 2507.

4. *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60.

5. *Ford v F. Hoffmann-La Roche Ltd*. (2005), 74 OR (3d) 758 (SCJ).

6. *Imperial Tobacco Canada ltée c Conseil québécois sur le tabac et la santé et al,* 2019 QCCA 358.

7. *Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2013 ONSC 1078, leave to appeal denied 2013 ONCA 456; application for leave to appeal to SCC denied [2013] SCCA No 395.

8. *Létourneau v JTI-Macdonald Corp.*, 2015 QCCS 2382, affirmed *Imperial Tobacco Canada ltée c Conseil québécois sur le tabac et la santé et al*, 2019 QCCA 358.

9. *Markson v MBNA Canada Bank*, 2012 ONSC 5891.

10. *O'Neil v Sunopta, Inc.*, 2015 ONSC 6213.

11. *Parsons v Canadian Red Cross Society*, [1999] OJ No 3572 (SCJ).

12. *Robertson v ProQuest Information and Learning Company*, 2011 ONSC 1647.

13. *Slark (Litigation guardian of) v Ontario,* 2017 ONSC 4178.

14. *Sorenson v Easyhome Ltd.*, 2013 ONSC 4017.

15. *Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2013 SCC 58.

16. *Sutherland v Boots Pharmaceutical PLC* (2002), 21 CPC (5th) 196 (ONSC).

17. *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46.

SECONDAY SOURCES

18. Rachael P. Mulheron, *The Modern Cy-Près Doctrine: Applications and Implications* (Oxon: UCL Press, 2006).

19. Warren K. Winkler et al., *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014). PARA 32

TAB 1

See para. 45

CITATION: Cappelli v. Nobilis Health Corp. 2019 ONSC 4521
COURT FILE NO.: CV-16-544173
DATE: 2019/07/29

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
VINCE CAPPELLI	)	*Hadi Davarinia* for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
NOBILIS HEALTH CORP., HARRY JOSEPH FLEMING, CHRISTOPHER H. LLOYD, ANDREW CHEN, KENNETH J. KLEIN and CALVETTI FERGUSON, P.C.	)	*Alan Lenczner* for the Defendant Nobilis Health Corp.
	)	
	)	
	)	
	)	
	)	
	)	
Defendants	)	
Proceeding pursuant to the *Class Proceedings Act, 1992*	)	**HEARD**: July 29, 2019

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In January 2016, Mr. Cappelli retained counsel to prosecute a class action. Class Counsel is a consortium of Strosberg Sasso Sutts LLP and Morganti & Co. P.C. The Retainer Agreement provides that Class Counsel's fees are to be calculated on the basis of 30% of the amount recovered or a 4x multiplier on counsel's time, whichever is higher.

[2] Pursuant to the *Class Proceedings Act, 1992*[1] and s. 138.3 of the Ontario *Securities Act* and the comparable statutes across Canada,[2] Vince Cappelli sued Nobilis Health Corp., Harry Joseph Fleming, Christopher H. Lloyd, Andrew Chen, Kenneth J. Klein, and Calvetti Ferguson,

[1] S.O. 1992, c. 6.
[2] *Securities Act*, R.S.A. 2000, c. S-4; *Securities Act*, R.S.B.C. 1996, c 418; *Securities Act*, C.C.S.M. c. S50; *Securities Act*, S.N.B. 2004, c. S-5.5; *Securities Act*, R.S.N.L. 1990, c S-13; *Securities Act*, S.N.W.T. 2008, c. 10; *Securities Act*, R.S.N.S. 1989, c. 418; *Securities Act*, S.Nu. 2008, c. 12; *Securities Act*, R.S.P.E.I. 1988, c S-3.1; Securities Act, R.S.Q. c V-1.1; *Securities Act, 1988*, S.S. 1988-89, c. S-42.2; and *Securities Act*, S.Y. 2007, c. 16.

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P.C. for misrepresentation in the secondary market for corporate securities. Mr. Cappelli claimed damages of $24 million.

[3] In 2018, the action settled as against all of the defendants with the exception of Nobilis. On June 14, 2018, I granted a consent or unopposed motion, among other things: (a) dismissing that action as against Messrs. Fleming, Lloyd, Chen, and Klein without costs; (b) certifying the action for settlement purposes as against Calvetti Ferguson, P.C.; (c) approving the settlement with Calvetti Ferguson, P.C.; and (d) approving Class Counsel's request for payment of legal fees and disbursements from the settlement funds.[3]

[4] Under the settlement, Calvetti Ferguson, P.C. paid $1.0 million (USD) for the benefit of the class. Because of the damages cap under the Ontario *Securities Act*, the settlement was at the statutory maximum against Calvetti Ferguson, P.C. Under the settlement, Messrs. Fleming, Lloyd, Chen, and Klein paid nothing and, in effect, the action was discontinued as against them with prejudice.

[5] At the time of the settlement, Class Counsel has incurred work-in-progress of approximately $450,000 and incurred disbursements of $158,568.27. I awarded Class Counsel interim fees of $300,000 (USD) (approximately $400,000 (Cdn) plus reimbursement of $158,568.27 for disbursements, the bulk of which were incurred to pay expert witnesses retained for the pending leave motion as against Nobilis. The Class Proceedings Fund had reimbursed Class Counsel for a portion of those disbursements and that portion was repaid to the Class Proceedings Fund.

[6] With the action having been resolved against the co-defendants, what was left was a proposed class action just against Nobilis for common law negligence and for a statutory misrepresentation claim pursuant to the securities law statutes across the country.

[7] Subsequently, Mr. Cappelli abandoned his common law misrepresentation claims, and he pursued a statutory secondary market misrepresentation cause of action against Nobilis for which leave is required under the Ontario *Securities Act*.

[8] Mr. Cappelli sought certification of a class action and leave to pursue his statutory claim for secondary market misrepresentations as against Nobilis. I, however, declined to grant leave, and I dismissed the certification motion.[4] I decided Nobilis' claim for costs.[5] I awarded it costs of $200,000 on a partial indemnity basis plus disbursements of $311,696.39 for an all-inclusive award of $537,696.39.

[9] Mr. Cappelli appealed; however, the parties have now settled the litigation.

[10] Mr. Cappelli now moves for: (a) leave to amend the Statement of Claim; (b) certification of the action for settlement purposes; (c) leave pursuant to s. 138.3 of the Ontario *Securities Act*; (d) approval of the settlement; (e) approval of Class Counsel's additional fee request of $100,000; (f) an honorarium in the amount of $5,000 to be paid to Mr. Cappelli and $5,000 to Joey Walmsley, who was prepared to act as a Representative Plaintiff in the amended claim; (f) approval of a *cy près* distribution of residual funds held in trust by Class Counsel to be paid to

[3] *Cappelli v. Nobilis Health Corp*., 2018 ONSC 3698.
[4] *Cappelli v. Nobilis Health Corp*. 2019 ONSC 2266.
[5] *Cappelli v. Nobilis Health Corp*. 2019 ONSC 3376.

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the Class Proceedings Fund; and (g) and ancillary relief to implement the settlement.

[11] The main terms of the proposed settlement are: (a) Mr. Cappelli abandons his appeal; (b) Nobilis agrees to $250,000 in costs of the failed leave and certification motion rather than the $537,696.391 ordered; and (c) Nobilis will consent to leave under the Ontario *Securities Act* and to the certification of the new claim, on the condition that the court approves the dismissal of the action.

[12] The motion is brought with the consent of Nobilis.

B. Factual Background

[13] Mr. Cappelli resides in Vaughan, Ontario. On October 5 and 6, 2015, he purchased 3,000 Nobilis common shares, and he held all of those shares at the close of the Class Period.

[14] Nobilis is a company that acquires and manages ambulatory surgical centers and related healthcare facilities. Nobilis was incorporated pursuant to the laws of British Columbia, and is a reporting issuer in all provinces and territories of Canada.

[15] On January 8, 2016, Mr. Cappelli issued a Statement of Claim. The pleading was amended on July 22, 2016, and further amended on December 6, 2016. The present motion seeks to approve an amendment to the pleading for settlement purposes. With the consent of Nobilis, I grant leave to Mr. Cappelli to deliver an amended Statement of Claim.

[16] The Statement of Claim alleges that the Defendants made misrepresentations about the financial state of Nobilis and about the adequacy of its controls and procedures with respect to disclosure and financial reporting during the Class Period. The Claim further alleges that these misrepresentations resulted in the artificial inflation of Nobilis' stock price during the Class Period, thereby causing damage to Class Members once the truth was revealed. The Statement of Claim alleges that the misrepresentations of Nobilis give rise to liability to the Class Members under the Ontario *Securities Act* and at common law.

[17] On April 10, 2019, I denied Mr. Cappelli's motion for leave to proceed with his a claim for secondary securities market misrepresentation. He appealed. While the appeal was pending, the parties agreed to a settlement. Mr. Cappelli had abandoned the appeal. Under the settlement, the action against Nobilis is to be dismissed.

[18] In assessing the wisdom of abandoning the pursuit of some recovery from Nobilis, it should be noted that: (a) its liability insurer, Great American Insurance Company, has denied coverage to Nobilis in respect of Mr. Cappelli's claims; (b) it is being delisted from the New York Stock; (c) it was delisted from the Toronto Stock Exchange on December 2016; (d) it is in default of various debt agreements with its lenders; and (e) it has not filed quarterly financial records since the second quarter of 2018.

C. Certification for Settlement Purposes

[19] Nobilis has consented to certification for the purposes of settlement. While this is not an admission of liability, it is an acknowledgment that the action can be appropriately pursued (and

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settled) as a class action.[6] Nobilis has also consented to leave being granted under Part XXIII.1 of the Ontario *Securities Act.*

[20] Mr. Cappelli proposes the following class definition:

> All persons, other than Excluded Persons as defined in the Second Fresh as Amended Statement of Claim, who acquired Nobilis' common shares listed on the TSX between March 23, 2015 and January 12, 2016, and who held some or all such securities after any of the following dates: October 8, 2015, November 11, 2015, January 5, 2016 and/or January 12, 2016.

[21] He proposes the following common issues:

a. Did Nobilis or any of the former defendants misrepresent the accuracy of the Nobilis financial statements and its compliance with U.S. generally accepted accounting principles ("**GAAP**")? If so, who made the misrepresentation, when, where and how?

b. Did Nobilis or any of the former defendants misrepresent the adequacy of Nobilis' internal controls over financial reporting and/or its disclosure controls and procedures, and if so when, where and how?

c. Did the misrepresentation in (1) and/or (2) constitute a misrepresentation within the meaning of the *OSA* and, if necessary, the analogous provisions of the Equivalent Securities Acts of the other provinces?

d. Were the misrepresentations in (1) and (2) above publicly corrected? If so, when, how and by whom?

e. Is Nobilis vicariously liable, or otherwise responsible, for the acts of the former Individual Defendants and its other officers, directors and employees during the Class Period?

[22] Pursuant to s. 5 (1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims or defences of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

[23] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met.[7] However, compliance with the certification criteria is not as strictly required because of the different circumstances associated with settlements.[8]

[24] I am satisfied that the criterion for certification for settlement purposes are satisfied in the immediate case.

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[6] *Sherman v University Health Network*, [2011] O.J. No 5267 (S.C.J.)
[7] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 22 (S.C.J.).
[8] *Nutech Brands Inc. v. Air Canada*, [2008] O.J. No. 1065 (S.C.J.) at para. 9; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 16 (S.C.J.); *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825 at para. 8 (S.C.J.).

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D. Settlement Approval

[25] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

> ***Discontinuance, abandonment and settlement***
>
> 29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> ***Settlement without court approval not binding***
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> ***Effect of settlement***
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> ***Notice: dismissal, discontinuance, abandonment or settlement***
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceeding;
>
> (b) a statement of the result of the proceeding; and
>
> (c) a description of any plan for distributing settlement funds.

[26] Section 29 (2) of the *Class Proceedings Act, 1992* provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[9]

[27] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[10]

[28] In determining whether to approve a settlement, the court, without making findings of fact about the merits of the litigation, examines the fairness and reasonableness of the proposed

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[9] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 43; *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57.

[10] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 45; *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 58; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.).

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settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[11] An objective and rational assessment of the pros and cons of the settlement is required.[12]

[29] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[13] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[14]

[30] In my opinion, having regard to the various factors used to determine whether to approve a settlement, the settlement in the immediate case should be approved. Given that Mr. Cappelli has already had his leave motion and his motion for certification dismissed, the settlement is in effect an abandonment of an action that has already failed. This abandonment of the action is favourable to the class and its financial underwriter, the Class Proceedings Fund, because it is relieved of its obligation to pay costs for the failed certification attempt. Moreover, assuming that there was chance that an appeal or that a reconstituted action had some merit, the reality is that Nobilis is judgment proof. Putting a permanent end to this litigation is in the best interests of the class.

[31] As already noted, practically speaking, the settlement is a discontinuance or abandonment of the action. I shall treat it as an abandonment, and I see no need for a further settlement approval hearing. In the circumstances of this case, the Class Members are not prejudiced by the discontinuance, and I direct that the only notice required of the dismissal of the action is that a notice be posted on the webpage of Class Counsel.

E. Fee Approval

[32] As noted above, in the settlement with the co-defendants, I approved counsel fees in the amount of $300,000 (USD) (approximately $400,000) plus disbursements of $158,568.27. These fees were calculated on the basis of 30% of the $1 million (USD) recovered from Calvetti Ferguson. Class Counsel is now asking for additional fees of $100,000 with respect to its prosecution of the claim against Nobilis.

[33] Overall, Class Counsel has committed time to this action with a value of approximately $700,000. It expended approximately $200,000 in disbursements, largely for experts and received only $95,000 in funding approval from the Class Proceedings Fund.

[34] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the

[11] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).
[12] *Al-Harazi v. Quizno's Canada Restaurant Corp*. (2007), 49 C.P.C. (6th) 191 at para. 23. (Ont. S.C.J.).
[13] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).
[14] *Fraser v. Falconbridge Ltd*., [2002] O.J. No. 2383 (S.C.J.) at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

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degree of success or result achieved.[15]

[35] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[16]

[36] Class Counsel took on the considerable risk of what, relatively speaking, was a small value class action. This assumption of risk for access to justice for class members with smaller value claims should not be discouraged. From the class members' perspective, although the success achieved by this class action is negligible, I am satisfied that Class Counsel has earned its additional fee of $100,000 in attempting to obtain access to justice for them. I approve Class Counsel's fee.

F. Honourarium

[37] Class Counsel deposed that Mr. Cappelli has been intimately involved with the prosecution of this action and that he himself available for examination on his affidavit in support of leave, regularly met with counsel, and has attended meetings with the Defendants to discuss developments when necessary. There was no evidence of Mr. Walmsley's contribution to the class proceeding.

[38] Because in normal litigation a plaintiff is typically not compensated for his or her own work in instructing counsel and because it is unseemly, unfair, and a conflict of interest for the representative plaintiff the class to receive more than the other members of the class that he or she represents, the payment of honorarium to representative plaintiffs for class actions is exceptional and rarely done unless the representative plaintiff can show that he or she rendered necessary assistance in the preparation or presentation of the case and such assistance resulted in monetary success for the class.[17] An honourarium should not be awarded simply because the representative plaintiff has done what is expected of him or her.[18]

[39] The exceptional nature of an honorarium is even more circumscribed in a *cy-près*

[15] *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.) at para. 25; *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.) at para. 13.
[16] *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, varied 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.) at para. 28.
[17] *Park v. Nongshim Co.*, 2019 ONSC 1997; *Robinson v. Rochester Financial Ltd*., 2012 ONSC 911; *Baker Estate v, Sony BMG Music (Canada) Inc*., 2011 ONSC 7105 at paras. 93-95; *McCutcheon v. Cash Store Inc*. [2008] O.J. No. 5241 at para. 12 (S.C.J.); *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71 (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 at para. 20 (S.C.J.); *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.); *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 at para. 28 (Gen. Div.).
[18] *Park v. Nongshim Co*., 2019 ONSC 1997 at para. 84; *Bellaire v. Daya* [2007] O.J. No. 4819 at para. 71 (S.C.J.).

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settlement where there is no monetary success for the class.[19]

[40] I decline to award any honourarium in the circumstances of the immediate case.

G. Cy-près Distribution

[41] Class Counsel is holding approximately $608,000 from the prior settlement with Calvetti Ferguson. Deducting the $100,000 for additional fees and the costs liability to Nobilis of $250,000 leaves approximately $258,000 being held in trust.

[42] A distribution of this sum to the class is not economically viable. The costs of the notice program and the distribution scheme would wipe out any recovery to the class, which, in any event, would be about $0.01 on the dollar.

[43] Where a *cy-près* award is an aspect of a settlement, the principles that underlie the approval of a settlement apply.[20] From a policy perspective, *cy-près* awards fulfill the compensatory and access to justice purposes of the *Class Proceedings Act, 1992*, and they also fulfill the behaviour modification policy goals of the *Act.*[21]

[44] A *cy-près* distribution should be justified within the context of the particular class action for which settlement approval is being sought, and there should be some rational connection between the subject matter of a particular case, the interests of class members, and the recipient or recipients of the *cy-près* distribution.[22]

[45] Where the expense of any distribution among the class members individually would be prohibitive in view of the limited funds available and the problems of identifying them and verifying their status as members, a *cy près* distribution of the settlement proceeds is appropriate.[23] Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a *cy près* distribution to recognized organizations or institutions that will benefit class members.[24]

[46] The factual circumstances of the immediate justify a *cy près* distribution to the Class Proceedings Fund, which accepted the risk of this class action and without whose support, the class proceeding would not have been viable at all. I, therefore, approve the proposed *cy près* distribution.

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[19] *Park v. Nongshim Co.*, 2019 ONSC 1997 at para. 86; *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 at para. 22 (S.C.J.).
[20] *Carom v. Bre-X Minerals Ltd.*, at para. 141.
[21] *Domage v. Ontario*, 2017 ONSC 4178; *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 at para. 123; *Alfresh Beverages Canada Corp. v. Hoescht AG*, [2002] O.J. No. 79 at para. 16 (S.C.J.).
[22] *O'Neil v. Sunopta, Inc.*, 2015 ONSC 6213 at para. 16; *Sorenson v. Easyhome Ltd*., 2013 ONSC 4017; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at para. 43; *Serhan Estate v. Johnson & Johnson*, 2011 ONSC 128 at para. 59.
[23] *Park v. Nongshim Co.*, 2019 ONSC 1997; *Ali Holdco Inc. v. Archer Daniels Midland Co*., 2019 ONSC 131; *Domage v. Ontario*, 2017 ONSC 4178; *Serhan v. Johnson & Johnson*, 2011 ONSC 128 at paras. 57-59; *Elliott v. Boliden Ltd.*, [2006] O.J. No. 4116 (S.C.J.).
[24] *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 at para. 16 (S.C.J.); *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79 (S.C.J.).

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H. Conclusion

[47] For the above reasons, the motion is granted, and an order should be made accordingly.

Perell, J.

Released: July 29, 2019

2019 ONSC 4521 (CanLII)

CITATION: Cappelli v. Nobilis Health Corp. 2019 ONSC 4521
COURT FILE NO.: CV-16-544173
DATE: 2019/07/29

2019 ONSC 4521 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

VINCE CAPPELLI

Plaintiff

– and –

NOBILIS HEALTH CORP., HARRY JOSEPH FLEMING, CHRISTOPHER H. LLOYD, ANDREW CHEN, KENNETH J. KLEIN and CALVETTI FERGUSON, P.C.

Defendants

REASONS FOR DECISION

PERELL J.

Released: July 29 , 2019

TAB 2

See paras. 29-33, 44, 59, 61, 68, 73, 74, 77, 79

OURT FILE NO.: 95-CU-82186CA
DATE: 20040205

2004 CanLII 24753 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
DAVID CAPUTO, LUNA ROTH, LORI CAWARDINE and DAVID GORDON HYDUK, as Estate Trustee of the Estate of RUSSELL WALTER HYDUK	*Kirk Baert, Richard Sommers Q.C., Robert Hart Q.C.* and *Robyn Matlin,* for the Plaintiffs
Plaintiffs	
- and -	
IMPERIAL TOBACCO LIMITED, ROTHMANS, BENSON & HEDGES INC., RJR-MACDONALD INC.	*Lyndon A. J. Barnes* and *Deborah Glendinning,* for defendant Imperial Tobacco Canada Limited *Earl A. Cherniak Q.C.* and *Susan Wortzman,* for the defendant RJR-Macdonald Inc. *Steven Sofer* and *Marshall Reinhart,* for the defendant Rothmans, Benson & Hedges Inc.
Defendants	
	HEARD: January 12 to 16 and January 19, 2004

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

REASONS FOR DECISION

WINKLER J.

Nature of the Motion

[1] This intended class proceeding is the first piece of major tobacco litigation seeking damages for personal injuries in Canada. The plaintiffs seek to certify a class pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c.6 ("*CPA*"), which is broadly defined to include all residents of Ontario, whether living or deceased, who have ever smoked cigarette products manufactured, marketed, or sold by the defendants. They also seek to include in the proposed class all persons having derivative claims under the *Family Law Act*, R.S.O. 1990, as amended. On the plaintiff's estimate, there are more than 2.4 million persons, not including former smokers, *FLA* claimants, deceased persons or persons under the age of 15 in the proposed class. The defendants give a larger estimate, stating that the class size is greater than 15 million persons, including 6.4 million current, former and deceased smokers, and 9 million *FLA* claimants. To put this in perspective, the defendants' estimated class size numbers almost one-half of the Canadian population and more than the present population of the Province of Ontario.

Background

[2] The action was commenced in 1995. There are four proposed representative plaintiffs, including the estate of one individual who died after the action was commenced. These plaintiffs allege personal injuries caused by their use of the defendants' cigarette products. Each claims personally, apart from the claims asserted on behalf of the proposed class, one million dollars in damages. There are additional claims for aggravated, punitive and exemplary damages. In addition, the plaintiffs seek to have the court issue a mandatory order requiring the defendants to create and fund a treatment center for those class members addicted to nicotine.

[3] The three defendant multinational corporations control almost 100% of the Canadian cigarette products market. The defendant Imperial Tobacco, a subsidiary of Imasco Ltd., dominates this market with a 70% share. The defendant Rothmans, Benson & Hedges is owned by Philip Morris Companies, the world's largest tobacco company. RJR-Macdonald was, at the time this action commenced in 1995, a subsidiary of R.J. Reynolds Tobacco Company.

[4] The plaintiffs' claims are based on the assertion that the defendants designed, manufactured and placed into the stream of commerce an inherently defective and dangerous product in the form of cigarettes. The plaintiffs describe cigarettes as nicotine drug delivery devices, which are promoted and marketed under various brand names, belonging to various product categories, such as "light," "extra-light," "ultra-light," "mild," "ultra-mild," "filtered," etc. It is alleged that the defendants promoted and marketed these products with the knowledge that their products were addictive. The addictive quality allegedly leads to continued use of the products which in turn causes injury to the smokers who are unable to

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stop using the product. The plaintiffs claim that the defendants had full knowledge of the harmful nature of the product, which was not only undisclosed, but rather was deliberately suppressed by the defendants.

[5] The plaintiffs claim that the facts pleaded give rise to nine causes of action, including negligence, strict liability, products liability, breach of a duty to inform, deceit, negligent misrepresentation, unfair business practices, breach of implied warranty, and conspiracy, all of which are compensable in damages and suggest a claim for punitive damages. The defendants deny these allegations and assert that some causes of action are improperly pleaded while others, they state, are not pleaded at all. Further, the defendants contend that certain of the causes of action advanced by the plaintiffs are not known to the law of Ontario. Although no statement of defence has been delivered at this point, the defendants submitted in argument that, in any event, there are numerous defences, including voluntary assumption of risk, expired limitation periods and issues of contributory negligence to be considered.

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Positions of the Parties

[6] The plaintiffs assert that they have satisfied the five necessary elements for certification as a class proceeding, as set out in the *CPA*. In their submission, the pleadings disclose a cause of action; there is an identifiable class; there are common issues; a class proceeding would be the preferable procedure; and finally, that there are plaintiffs capable of representing the class's interests in the proceeding.

[7] The defendants do not contend that there is no cause of action asserted within the meaning of the *CPA*. They do however, take issue with several of the claims asserted. The thrust of their argument in opposition focuses on three points. They submit that the class is overly broad, that the action as framed does not have a sufficient element of commonality and that in any event, a certified class proceeding would be completely unmanageable, a fact that they say is demonstrated by the plaintiffs' failure to provide a workable litigation plan.

[8] In other words, the defendants assert that a class proceeding would not be the preferable procedure because of the vast number of individual issues that must be decided in respect to each of the millions of putative class members, leaving the proceeding hopelessly unmanageable and complex. Further they assert that the plaintiffs have failed to establish the necessary ingredients for certification because they have not produced a litigation plan showing, with sufficient particularity, that the claims of class members can be litigated to finality within the confines of the class proceeding.

[9] The defendants further state that certification of the action as a class proceeding cannot benefit the plaintiffs or the proposed class in this case. They propose that rather than a class proceeding, individual trials are the preferable procedure by which tobacco litigation seeking damages for personal injury ought to be pursued. Further, the defendants submit that proposed class members who began smoking after 1972 are in a different position than those who

commenced before that time because of the existence of express warnings regarding the health risks inherent in smoking.

[10] In substance, therefore, the defendants' position is that the proposed class proceeding lacks the core element of commonality that is necessary to obtain certification.

Analysis

[11] While I do not accept all of the defendants submissions, I have concluded that the motion for certification must be dismissed. The action as presently framed, and in light of the evidentiary record before the court, is not suitable for certification as a class proceeding. My reasons follow.

[12] It is well settled that a class proceeding certification motion is procedural only and does not constitute a determination of the merits of the proceeding. Nevertheless, the record on this strictly procedural motion exceeds 66 volumes and has taken over eight years to assemble. The complexity of the action is manifest.

[13] Nonetheless, it is not the case that complexity alone is a sufficient basis to deny certification of an action as a class proceeding. Regardless of the complexity, if the action meets the five part test set out in s. 5(1) of the *CPA*, it must be certified as a class proceeding by the court:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

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(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

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Cause of Action

[14] The plaintiffs each claim:

(a) Damages in the sum of one million dollars;

(b) Aggravated, punitive and exemplary damages;

(c) A mandatory order for the creation and funding of nicotine addiction rehabilitation centers for those addicted to nicotine…

[15] I have distilled the underlying factual allegations supporting these claims, from paras. 17-37 of the Amended Statement of Claim and the Particulars, as follows:

Addiction

The plaintiffs claim they are addicted to the cigarette products that the defendant tobacco companies designed, manufactured and distributed. More specifically, the plaintiffs allege that they are addicted to the nicotine contained in these products. They claim that the consumption of such products creates "reinforcing behaviour," which compels addicted individuals to consume more.

Intentional Concealment

The plaintiffs claim that, at all material times, the defendants were aware or should have been aware of the addictive nature of the nicotine in their products. They allege that the defendants carried out extensive research, establishing that nicotine was highly addictive and caused cancer. However, the defendants concealed and misinformed the general public about this research. The plaintiffs further claim that the defendants denied the validity of research from governmental and private agencies, which established the addictive effects of nicotine. Instead, the defendants maintained their position that nicotine was not addictive and was not the reason people continued to purchase their products.

Intentional Manipulation

The plaintiffs claim that the defendants have developed or adopted methods to manipulate the nicotine content of their products. They state that the

> defendants hold numerous patents in respect of the alteration of nicotine levels in their products; thus, the defendants are allegedly able to control the amount of nicotine in their products, artificially raising nicotine levels in their products above the levels that naturally occur in tobacco plants. The plaintiffs further state that the defendants have manipulated the nicotine in their low tar cigarettes, raising the nicotine dose to the smoker and ensuring addiction. Moreover, they allege that the defendants are aware that the actual levels of nicotine and tar consumed by smokers are greater than those measured by conventional measurement techniques and those reported to consumers.
>
> ***Awareness and Denial***
>
> The plaintiffs claim that the defendants were aware, at all material times, of the serious and frequently fatal health consequences associated with the consumption of their products; these include cancer, respiratory and cardiovascular disease. Moreover, they allege that the defendants have denied these health consequences.
>
> ***Targeting Minors and Young Adults***
>
> The plaintiffs claim that the defendants engaged in advertising, media, and public relations campaigns designed to increase their sales, which explicitly or implicitly denied all health-related consequences of consuming their products. Further, they allege that the defendants targeted children and young adults, as the defendants' own research indicated that 90% of smokers begin to smoke before age 18 and that it was unlikely for a person to start smoking after the age of 19.

[16] The plaintiffs assert that these factual claims give rise to nine causes of action: negligence, strict products liability, products liability, breach of duty to inform, deceit, negligent misrepresentation, breach of implied warranty, conspiracy and unfair business practices.

[17] The defendants assert that there can be no causes of action founded in strict products liability, breach of implied warranty, conspiracy and *FLA* claims prior to 1978. The plaintiffs conceded on the motion that there can be no *FLA* claims prior to 1978.

[18] The determination of whether a cause of action has been disclosed on a certification motion utilizes the principles to be applied on a motion to strike a pleading under r. 21. Accordingly, the jurisprudence applicable to r. 21 motions is equally applicable to s. 5(1)(a) of the *CPA.* In that respect, the Court of Appeal for Ontario has determined that "the court should not, at this stage of the proceedings, dispose of matters of law that are not fully settled in the jurisprudence". (See *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.)).

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[19] The defendants contend that the there can be no cause of action based on strict product liability, as pleaded by the plaintiffs at para. 40 in their Amended Statement of Claim. They argue that strict liability is not a recognized cause of action in Ontario and that it should therefore be struck. I agree. As Dambrot J. stated in *Anderson v. St. Jude Medical Inc.*, [2002] O.J. No. 260 (S.C.J.):

> While academics and the Law Reform Commission have long argued that strict liability ought to be part of the tort law of Canada, their recommendations have neither been enacted in Ontario nor adopted by the courts. In fact, in four decisions since 1971, the Ontario Court of Appeal has declined to do so, but rather has preferred to subsume product liability under traditional negligence principles, requiring proof of negligence.

[20] The defendants further submit that there is no viable cause of action based on breach of implied warranty, which was set out at paras. 53-4 in the Amended Statement of Claim. Warranties are a contract-based claim. According to the doctrine of privity of contract, where a retailer sells goods to the ultimate consumer, the consumer cannot sue the manufacturer on implied warranties. (*Dunlop Pneumatic Tyre Co. v. Selfridge & Co. Ltd.*, [1915] A.C. 847 (H.L.)).

[21] In this case, the plaintiffs do not allege that the defendant manufacturers sold their products to them and thus the defendants submit that, as they are not the vendors vis à vis the plaintiffs, there can be no claim for breach of implied warranty based on the common law. Further, although not specifically pleaded by the plaintiffs, the defendants contend that the *Sale of Goods Act*, R.S.O. 1990, c.S.1 offers no assistance in maintaining the claim. Section 15 of that Act sets out the circumstances where implied warranties may exist between the buyer and seller. However, a party cannot advance a claim for breach of implied warranty under this section unless there is a privity of contract between the parties (see *Mann-Tattersal (Litigation Guardian of) v. Hamilton (City)*, [2000] O.J. No. 5058 (S.C.J.)).

[22] I cannot accede to the defendants' submissions regarding the breach of implied warranty claim. They turn on the doctrine of privity of contract. While it may have been the case that the law regarding privity of contract was settled for a number of years, it is also the case that a number of exceptions have been developed to this doctrine. Indeed, following its decision in *London Drugs Ltd. v. Kuehne & Nagel Int. Ltd.*, [1992] 3 S.C.R. 299, the Supreme Court of Canada has enunciated a two part test to determine when a new exception should be created. As stated by Iacobucci J. in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 at para. 32:

> In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, regard must be had to the emphasis in *London Drugs* that a new exception first and foremost must be dependent upon the intention of

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> the contracting parties. Accordingly, extrapolating from the specific requirements as set out in *London Drugs*, the determination in general terms is made on the basis of two critical and cumulative factors: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

[23] Clearly, the application of these factors depends on the evidence adduced at trial. At this stage of the proceeding, and given the test enunciated in *Fraser River*, it is not plain and obvious to me that the plaintiffs cannot succeed in establishing that an exception to the doctrine of privity may apply in the circumstances of this case. Further, given the possibility that an exception may be created in the proper circumstances, it cannot be said that the law is "fully settled" as contemplated in *Nash.*

[24] The defendants also argue that a claim of conspiracy should be struck where the unlawful acts are independently actionable and have already been pleaded. Therefore, the defendants contend that the conspiracy claim merges with the specific torts pleaded and "adds nothing," unless special damages are claimed with respect to the conspiracy, citing *Graye v. Filliter* (1997), 25 O.R. (3d) 57. The defendants argue that the plaintiffs allege numerous acts in support of the conspiracy claim and that each act is invoked to support at least one of the other causes of action advanced. As the plaintiffs do not allege any special damages, the defendants contend that the claim is superfluous and should be struck.

[25] I cannot accede to this submission. First, I am not certain that *Graye*, when read in its entirety, stands for the proposition advanced by the defendants. Secondly, there appears to be binding authority to the contrary as to how this issue ought to be dealt with at this stage of the proceeding. In considering a similar argument regarding a plea of conspiracy, Wilson J. stated in *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959 at para. 49 that:

> If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this Court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success.

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and at para. 54 that:

> …while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts.

[26] Nordheimer J. considered the same issue in *Private Equity Management Co. v. Vianet Technologies Inc.* (2000), 48 O.R. (3d) 294 (S.C.J.). Although he acknowledged that there may be a conflict between *Hunt* on the one hand and certain Ontario authorities on the other with respect to the tenability of pleadings sounding in conspiracy, he held that:

> …when faced with a decision of the Supreme Court of Canada that appears to be directly on point and a decision of the Court of Appeal that only alludes to another possible outcome, I am bound to follow the decision of the Supreme Court of Canada until the issue is clarified.

[27] Given the test enunciated in *Nash* with respect to issues of law that arise on pleadings motions, Nordheimer J.'s approach appears to be the proper course. The Ontario cases may be adopted in the future as the correct position but, until then, it cannot be said that the law is "fully settled" on the point. This remains an issue to be determined at trial. Accordingly, it is not appropriate to strike this cause of action at this time.

[28] In the result, the pleadings disclose a cause of action such that the requirement of s. 5(1)(a) is satisfied.

Identifiable Class

[29] Throughout the course of this proceeding, the plaintiffs have proffered constantly changing class descriptions. In their Amended Statement of Claim, they originally sought to certify a class of "addicted" persons who suffered injury as a result of their addiction. The class was defined as follows:

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> Persons who due to the conduct of the defendants, their agents, servants or employees, have become addicted to the nicotine in the defendants' products, namely cigarettes, or who have had such addiction heightened or maintained through the consumption of said products, and who have as a result of said addiction suffered loss, injury and damage, persons with *Family Law Act* claims in respect to the claims of such addicted persons, and estates of such addicted persons.

[30] The plaintiffs subsequently amended the proposed class in their factum on this motion, describing it as follows in para. 4:

> (a) all residents of Ontario, whether living or now deceased,[1] who have ever smoked cigarette products manufactured, tested, marketed, distributed, sold or otherwise placed into the stream of commerce by the defendants; and
>
> (b) persons with *Family Law Act* claims in respect of such smokers and former smokers, and the estates of such smokers and former smokers.[2]

[31] The defendants, in their factum at para. 20, criticized this class definition as follows:

> Class membership is not defined by reference to time or amount smoked or where the class members currently reside, where the tort was committed or where or whether damage has been suffered. The class includes virtually every living or dead person who has ever resided in Ontario and smoked even one cigarette.

[32] In response to this criticism, the plaintiffs amended the proposed class in their reply factum at para. 61:

> (a) all Ontario residents who claim personal injury as a result of consumption of the defendants' cigarette products; and
>
> (b) persons with derivative claims pursuant to the *Family Law Act*, R.S.O. 1990, c.F.3.

[33] They further amended the proposed class during the argument of this motion:

> (a) all current residents of Ontario, whether living or now deceased, who ever purchased and smoked cigarette products manufactured, tested, marketed, distributed, sold or otherwise placed into the stream of commerce by the

[1] Subject to s. 38(3) of the *Trustee Act*, R.S.O. 1990, c.T.23, which provides a 2 year limitation period.
[2] Also subject to s.38(3) of the *Trustee Act*.

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defendants, from January 1, 1950 to the date of the certification order herein; and

(b) persons with *Family Law Act* claims in respect of such smokers and former smokers, and the estates of such smokers and former smokers.

[34] As stated above, they also indicate that the estates claims are prescribed by s. 38(3) of the *Trustee Act*, which creates a two-year limitation period from death. The plaintiffs further concede that there is no cause of action for the derivative *FLA* claims prior to 1978.

[35] The *CPA* mandates in s. 5(3) that each party to a motion for certification shall provide the parties' best information about the number of members in the class. The plaintiffs state, based upon a review of Statistics Canada's 1994 *Survey on Smoking in Canada* that the class size exceeds 2.4 million persons. The defendants estimate the number of persons in the class on or about the date the action was commenced, the same date as chosen by the plaintiffs. The defendants' evidence of class size is adduced through Mr. McCormick, a professional economist, who deposed that in addition to approximately 2 million smokers, the proposed class would include more than 2 million Ontario residents 15 years of age or over, who were former smokers as of January 1995, more than 2 million individuals who died prior to 1995 and approximately 9 million *FLA* claimants. Thus, the defendants state in their factum that a "ballpark estimate" of the size of the class, using both the plaintiffs' and defendants' evidence, would be between 5.5 and 6.4 million smokers or former smokers and up to 9 million *FLA* claimants, although there would be some overlap between the *FLA* claimants and primary class members.

[36] Given the magnitude of the numbers submitted by the parties, it is unnecessary for the court to make a finding on the exact number of class members for the purposes of this motion. It is undisputed on the evidence that the potential class comprises at least 2.4 million members without counting the deceased members, former smokers, minors or those with *FLA* claims alone.

[37] I use the words "potential class" advisedly because the plaintiffs have experienced considerable and continuing difficulty in arriving at an acceptable class definition. The proposed class is currently defined geographically to include all residents of Ontario, living or deceased, who have ever smoked cigarette products manufactured and sold by the defendants. This includes all persons who have ever smoked, regardless of how much they smoked, persons who have quit smoking, and all of the *FLA* claims associated with these persons. The temporal boundary of 1950, which was inserted into the class definition during the plaintiff's argument, is purely arbitrary as it is based on the year that one of the plaintiffs, Russell Hyduk, started to smoke.

[38] The purpose of the class definition was set out in *Bywater v. T.T.C.* (1998), 27 C.P.C. (4th) 172, [1998] O.J. No. 4913 (S.C.J.):

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(a) It identifies those persons who have a potential claim for relief against the defendants;
(b) It defines the parameters of the lawsuit so as to identify those persons who are bound by its result;
(c) It describes who is entitled to notice pursuant to the Act.

[39] Although *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 holds that the plaintiffs can arbitrarily restrict the causes of action asserted in order to make a proceeding more amenable to certification (at 201), the same does not hold true with respect to the proposed class. Here the plaintiffs have not chosen to restrict the causes of action asserted but rather attempt to make the action more amenable to certification by suggesting arbitrary exclusions from the proposed class. This is diametrically opposite to the approach taken by the plaintiffs in *Rumley*, and one which has been expressly disapproved by the Supreme Court in *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158. There, McLachlan C.J. made it clear that the onus falls on the putative representative to show that the "class is defined sufficiently narrowly" but without resort to arbitrary exclusion to achieve that result. As stated at para.21:

> The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad – that is, the class could not be defined more narrowly *without arbitrarily excluding some people who share the same interest in the resolution of the common issue*. (Emphasis added.)

[40] The plaintiffs do appear to be relying on *Hollick* in one respect, however, in their appeal to the court to fashion a class that is certifiable as an exercise of discretion. The court's discretion to alter the class definition was addressed in *Hollick*, also at para. 21., where McLachlin C.J. stated that "where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition the definition of the class be amended."

[41] The plaintiffs prevail upon me to amend the class definition to redefine the class in any way necessary to render this action certifiable. In my view, this approach is not what McLachlin C.J. was advocating in *Hollick.* As I read her reasons, the court may either reject certification where the class is not properly defined or otherwise grant a conditional certification on the basis that the plaintiffs will have to provide an acceptable definition to the court. In some circumstances, it may be appropriate for the court to alter or amend a class definition to be consistent with other findings made on a certification motion. That is not the case here. What the plaintiffs suggest is akin to having the court perform the role of class counsel by making wholesale changes to arrive at a definition that the court itself would accept. That goes beyond a simple exercise of discretion and verges into the prohibited territory of descending "into the arena" with the parties to the motion.

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[42] In this case, it is clear that the plaintiffs are having difficulty in reaching any definition that meets with even their own approval let alone the approval of the court. Further, none of the solutions proffered by the plaintiffs to create an acceptable definition could achieve that result without resort to arbitrary exclusions that *Hollick* holds are improper. As an example, one suggestion the plaintiffs made was to drop the *FLA* claimants. Another was to drop the estate claims. Still another is to limit the class to only current residents. Yet another is to redefine the class in terms of purchasers as opposed to smokers.

[43] There were other suggested definitions. All had the same fatal defect. They contained arbitrary exclusions of "some people who share[d] the same interest in the resolution of the common issue" as the people who would remain in the class.

[44] The plaintiffs have had numerous opportunities to amend their proposed class. The court should not be asked to exercise its discretion in order to produce a more certifiable class when the plaintiffs have not or cannot do so on a principled basis. Moreover, even if I were inclined to produce a class definition appropriate for certification, I could not do so in these circumstances. There is an insufficient evidentiary record upon which any such class definition could be based. As stated in *Hollick*, at para. 25, "the class representative must show some basis in fact for each of the certification requirements", other than the cause of action.

[45] In my view, the present action is an amalgam of potential class proceedings that make it impossible to describe a single class sharing substantial "common issues", the resolution of which will significantly advance the claim of each class member, which is the test to be applied according to *Hollick*. Moreover, this is not a case where the creation of subclasses will address the primary class definition deficiency. Subclasses are properly certified where there are both common issues for the class members as a whole and other issues that are common to some but not all of the class members. This is not the case here. Rather, the plaintiffs have melded a number of potential classes into a single proceeding. The result is an ambitious action that vastly overreaches and which, consequently, is void of the essential element of commonality necessary to obtain certification as a class proceeding. Simply put, the reason that no acceptable class definition has been posited is that no such definition exists.

Common Issues

[46] The third element in the test for certification is that the claims of the class members raise common issues. Although s. 5(1)(c) is silent as to the quality of the common issues that must be present, in *Hollick*, McLachlin C.J. stated at para.18 "an issue will not be common in the requisite sense unless the issue is a substantial ingredient of each of the class members' claims". Further, the common issues must be such that their resolution will "significantly advance the action". (*Hollick* at para. 32).

[47] The plaintiffs and the defendants have diametrically opposed views with respect to whether common issues are raised by the claim pleaded. The plaintiffs submitted that there are

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seven substantial common issues which in turn give rise to over 60 incidental common issues. The defendants on the other hand state that none of the common issues submitted by the plaintiffs meet the *Hollick* threshold and thus should be rejected.

[48] Having made the submission that the plaintiffs common issues should be rejected, the defendants did not proffer any alternative common issues during the hearing. This is not surprising given the defendants contention that the action as framed is still inherently individualistic and unsuitable for certification as a class proceeding.

[49] The substantial common issues advanced by the plaintiffs were set out at para.80 of their factum as follows:

> (a) are the defendants liable to members of the class for damages relating to addiction and/or other injuries, and death;
>
> (b) are members of the class entitled to
>
> i. a global assessment of damages in respect of monies expended by them on the purchases of defendants' cigarette products, from the defendants, from the date class members sought, but were unable, to cease using defendants' cigarette products;
>
> ii. a global assessment of damages in respect of monies expended by them on the defendants' health reassurance cigarette products marketed as "filtered", "light", "extra light", "ultra light", "ultra mild" and similarly described terms, from the defendants, from the date class members switched to such cigarette products;
>
> iii. a global assessment of punitive and exemplary damages in respect of the defendants' alleged intentional, wanton, reckless, and reprehensible conduct directed at the class as a whole;
>
> iv. equitable relief;
>
> (c) should the court impose sanctions or determine other relief in respect of evidence suppression and concealment; in respect of class claims; and
>
> (d) [have limitation periods] begun to run, or are there special circumstances that would toll its running in respect of class claims, given the defendants' past and ongoing tortious conduct?

[50] In my view, the majority of the foregoing proposed common issues proceed on a theory of aggregation that is fundamentally misconceived. First, the claim for damages for addiction, other injuries and death cannot proceed as a common issue through to a

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determination of liability. Although deficient in other respects, the record before the court makes it apparent that, regardless of the common issues asserted and potentially resolved through a single trial, individual issues will remain to be decided before the liability of the defendants to individual class members can be ascertained. Regardless of the conduct of the defendants, they are entitled to a fair procedure, whether by way of a class proceeding or otherwise.

[51] Moreover, the plaintiffs have not put any evidence before the court on this motion that indicates that that liability could be determined as a common issue. Cogent evidence of that fact would be a prerequisite to granting certification of the common issue asserted by the plaintiffs regarding liability to the class as a whole. This principle was enunciated by the Court of Appeal for Ontario in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.) where Feldman J.A. stated at para. 52 "[i]n my view, the motions judge erred in finding that liability could be proved as a common issue in this case. The evidence presented by the appellants on the motion does not satisfy the requirement prescribed by the Supreme Court in *Hollick* of providing sufficient evidence to support certification."

[52] The plaintiffs assertion that there are common issues regarding aggregate damages in respect of monies expended by the class are equally flawed. Section 24(1) of the *CPA* speaks to the requirements that must be met prior to an assessment of aggregate damages in a class proceeding. It provides:

> 24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[53] The plaintiffs asserted common issues regarding monies expended by the class run afoul of both 24(1)(b) and 24(1)(c). There will be individual issues to be determined at the conclusion of a common issue trial. Further, the issues as framed contemplate the need for proof by individual class members. The plaintiffs also propose, in paras. 97-100 of their factum, to have the common issues trial judge determine whether an aggregate assessment of pecuniary damages for cigarette-related injuries including nicotine addiction, lung cancer, oral cancers, respiratory disease and cardiovascular disease can be made on the basis of

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epidemiological, economic and other expert evidence. This damages assessment would have to be based largely on statistical evidence.

[54] This latter proposition contravenes both s. 24 and the procedures governed by the *CPA*. In *Bywater* this court rejected a claim for an aggregate assessment on the grounds that the action involved a claim for damages for personal injuries, property damage and *FLA* claims. These required proof by individual class members and proof of causation. In the final analysis, each claim was fact driven and idiosyncratic in nature. That case involved exposure to smoke in a sub-way fire. As stated at para. 19:

> All of the usual factors must be considered in assessing individual damage claims for personal injury, such as: the individual plaintiff's time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness; and other individual considerations…[t]he property damage claims of class members must be assessed individually as the underlying facts will vary from one class member to the next.

[55] The circumstances there were starkly similar to those in the present case. This case is equally unsuited to an aggregate assessment concerning the damages claimed. There are numerous, and significant, individual issues pertinent to the issue of liability and damages that must be determined. As stated by Feldman J.A. in *Chadha* at para. 49:

> …s.24 of the Class Proceedings Act is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage.

[56] Moreover, the plaintiffs contention that the common issues judge should identify the common issues is ill conceived. That task must be completed at the certification stage and not left for later. As the phrase implies, the judge presiding over the "common issues trial" is there in the role of arbiter of issues that have already been set out. That role is to make findings with respect to issues certified for trial, rather than to decide what issues are to be resolved. Setting the issues for trial is the role of the motions judge on certification.

[57] Nonetheless, there are three issues proposed by the plaintiffs that appear, at first impression, to be amenable to resolution on a class wide basis in general terms. The issues identified in paragraph 54 above as (b)(iii) regarding punitive damages, (c) relating to conduct of the defendants and (d) with respect to limitation periods, are all resolvable after inquiry into the conduct of the defendants and without participation from the class members. This is particularly so with regard to punitive damages. As stated by McLachlin C.J. in *Rumley* at para. 34:

> In this case, resolving the primary common issue will require the court to assess the knowledge and conduct of those in charge of JHS over a long

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> period of time. This is exactly the kind of fact-finding that will be necessary to determine the whether punitive damages are justified…"an award of punitive damages is founded on the conduct of the defendant, unrelated to its effect on the plaintiff." (Internal citation omitted).

[58] However, as McLachlin C.J. went on to say, "[c]learly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue." This is the situation in the present circumstances with respect to the remaining three issues. The proposition is that the assessment or determination of each will be made on a class wide basis. Obviously there must be an identifiable class in existence for whom the assessment or determination applies. Here there is no such class.

[59] In short, for these reasons I reject the plaintiffs common issues.

[60] In *Hollick the* Supreme Court of Canada stated at para. 20 that "…implicit in the 'identifiable class' requirement is the requirement that there be some rational relationship between the class and the common issues.", and later in the same para. that, "it falls to the putative representative to show that the class is defined sufficiently narrowly." In the present case I have concluded that the plaintiffs have failed to meet this requirement of establishing an identifiable class as required by the Act and reinforced by the Supreme Court. Absent a properly defined class, it is not appropriate, nor is it feasible, for me to craft common issues. Any such attempt in these circumstances would be to engage in mere speculation. Accordingly, I decline to exercise my discretion to state common issues with respect to this proceeding.

Preferable Procedure

[61] Notwithstanding that I would dismiss the motion for lack of an identifiable class and common issues, in my view, the proceeding also fails the fourth element of the test for certification, namely, whether certification of this action as a class proceeding would be the preferable procedure for the resolution of the "the class members' claims". (*Hollick* at para. 29). The test to be applied in determining whether a class proceeding is the preferable procedure is set out at para. 28 in *Hollick*

> The report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on".

[62] To paraphrase McLachlin C.J., a two-part test is to be applied on a preferable procedure determination. As such, it is not enough for the plaintiffs to establish that there is no

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other procedure which is preferable to a class proceeding. The court must also be satisfied that a class proceeding would be fair, efficient and manageable. Both parts of the test must be considered in the context of the three goals of the *CPA*, judicial economy, access to justice and behavioural modification of tortfeasors.

[63] The defendants assert that individual proceedings are preferable to a class proceeding in the present factual matrix. I am not persuaded that such is the case. The time, and doubtless many lawyer hours, spent on simply getting this action before the court on a certification motion, let alone an examination of the positions taken in the expert evidence filed by the defendants, is indicative that an individual attempting to pursue litigation would likely find his or her resources taxed beyond sustainable limits.

[64] In like fashion, I am unable to accede to the defendants' submission that an "admission" such as that set out in their factum at para. 107 would render individual proceedings preferable. Paragraph 107 reads:

> The defendants acknowledge that there are significant health risks associated with smoking. Accordingly, there is no issue on this motion as to whether tobacco products are capable of causing or contributing to disease. The only causation issue will be whether or not a potential class member can establish whether his or her individual disease was caused or contributed to by the use of tobacco products.

[65] In my view, the supposed "admission" is of little use to any plaintiff in an individual proceeding. It would not advance any particular proceeding to a significant degree and in any event, an admission made on this motion in the absence of a certification order does not bind the defendant to the class members. (*Bywater* at paras. 13-14; See also Griffith v. Winter, [2003] B.C.J. No.1551 (C.A.) at para. 20; *Dalhuisen (Guardian ad litem of) v. Maxim's Bakery Ltd.*, [2002] B.C.J. No. 729 (S.C.) at para. 8) As stated in *Bywater*:

> [para13] Here, the defendant admits liability for the cause of the fire. This admission, it contends, eliminates the common issue of liability. Since this, it asserts, is the only common issue, the certification motion must fail.
>
> [para14] I cannot accede to this submission. This is not to in any way detract from the commendable and timely admission of fault by the defendant. However, an admission of liability in the air does not advance the litigation or bind the defendant in respect of the members of the proposed class. Without a certification order from this court no public statement by the defendant, and no admission in its defence to the nominal plaintiff, binds the defendant in respect of the members of the proposed class.

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[66] It is clear that, were it possible to do so, resolving the claims of class members in single class proceeding would be preferable to any other procedure.

[67] Nonetheless, as stated above, the plaintiffs must additionally demonstrate that a class proceeding will be "fair, efficient and manageable". However, in as much as the defendants cannot simply assert to any effect that there are other procedures that would be preferable without an evidentiary basis, neither can the plaintiffs satisfy the onus with argument alone. It must be supported by some evidence. As stated in *Hollick* at para. 25 "the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action".

[68] In respect of this aspect of the preferable procedure element. the plaintiffs' evidence must establish that a class proceeding will be "fair, efficient and manageable" and capable of achieving the goals of the *CPA.* In my view, the plaintiffs have failed to satisfy this onus on the evidentiary record proffered in support of this motion.

[69] It is self evident that the scope and complexity of a proceeding bears directly on its manageability and the steps that will have to be taken to ensure that it proceeds in a fair and efficient manner. With respect to issues regarding the "fairness" of a class proceeding, it is most often the case that the defendants raise concerns. Here, however, the magnitude of the potential class leaves me with concerns as to whether the proceeding would be fair to either the proposed class members or the defendants.

[70] While the opt out provision in the *CPA* permits individual claimants to attempt to pursue their own individual litigation if this action were certified as a class proceeding, for the reasons stated above, such pursuit is unlikely. Accordingly, the members of any certified class may well perceive that a court approved class proceeding offers the best prospect for recovery of any possible claim they may have. In that case, those who choose to remain in the class are in essence captive to the litigation until its conclusion. In the result, it is incumbent on the court to ensure that a proceeding will be capable of achieving a resolution for the class members so that the decision to remain accords the benefits envisioned by the legislature in enacting the *CPA.* In that regard, the legislature chose to impose the requirements set out in s. 5(1) prior to certification as, in part, "safeguards" to ensure that plaintiffs were not disadvantaged. As stated in the *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990), "safeguards must provided to protect those involved, whether as representative plaintiff, as defendants or as class members".

[71] The *Report* continues on to state that "[this concern arises] from the fact that a class action is brought by an individual representative plaintiff on behalf of a group of absent class members. These absent plaintiffs are not necessarily present before the court and lack any real ability to determine the course of litigation which may affect their individual rights." Accordingly the court must carefully scrutinize any prospective class proceeding before granting certification. This is particularly so where the manageability of a proceeding is suspect on the face of the record.

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[72] Here, notwithstanding the inability of the plaintiffs to define an acceptable class in relation to the causes of action alleged, it appears that any class would be comprised of at least several million people. The eight remaining legal bases for asserting claims allegedly arise from multiple fact situations spanning at least 50 years, during which prevailing circumstances changed dramatically. The legal principles underlying the claims asserted require inquiry into the circumstances of each individual class member in order even to ascertain liability, let alone damages. This would be necessary on a procedural basis to ensure that the defendants are treated fairly but would also be necessary from the perspective of the members of the class so that each would receive fair compensation. Further, even if the defendants were to only contest a portion of the individual claims, and each dispute could be concluded in one day, simple mathematics indicate that such a process would require the equivalent of 1,000 years of litigation, if it were to be conducted sequentially.

[73] In my view, a class proceeding based on the present action would not be "fair, efficient and manageable" and, therefore, it does not meet the fourth element of the test for certification.

Representative Plaintiffs with a "Workable" Litigation Plan

[74] The final element in the test for certification is that there be a representative plaintiff who "would fairly and adequately represent the interests of the class.". There are four proposed representative plaintiffs: David Caputo, Luna Roth, Lori Carwardine and the Estate of Russell Hyduk. Although the choice to posit arbitrary exclusions from the class definitions in obvious disregard for the persons so affected causes me concern, I am satisfied that, on balance, the proposed representative plaintiffs are capable of fairly and adequately prosecuting an action on a representative basis. In the present case the first problem, however, lies in the fact that there is no identifiable class for them to represent. Further, they have not provided a workable litigation plan for the class they propose in any event. Accordingly, the last element in the test is not met.

[75] The *Act* mandates that the representative plaintiffs produce a "plan" that sets out a "workable method of advancing the proceeding on behalf of the class…".McLachlin C.J. held in *Hollick* that the preferability analysis must be conducted through a consideration of the common issues in the context of the claims as a whole. (para. 30) In this context, the litigation plan is often an integral part of the preferability analysis. Frequently, in more complex cases, it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of "preferability" as it pertains to manageability, efficiency and fairness.

[76] Here the plaintiffs have tailored the proposed class proceeding in such a way as to attempt to remove the overburden of individual issues. They have endeavored to achieve this through the use of aggregate assessments combined with an argument that the common issues trial judge should bear the burden of both determining whether individual issues exist and

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fashioning a method for their resolution. This approach is unacceptable. It is apparent that individual issues exist and that they must be dealt with in order for the class members to obtain relief even if a common issues trial were to be decided in their favour. Consequently, by neglecting to address the presence of individual issues and an acceptable method for dealing with them, the plaintiffs have a proposed litigation plan, such as it is, that is "unworkable".

[77] The court now has a number of large class proceedings under case management. My experience with these cases is that even where liability is not an issue because of a global settlement, the sheer volume of work required to process claims on behalf of class members is gargantuan. Any shortcomings in the process will detrimentally affect the class members. Here, with a proposed class of somewhere between 2.4 and 15 million, substantial resources will be required to move a class proceeding forward if certified. Further, as noted in the *Report of the Attorney General's Advisory Committee*, certification makes class members captive to the proceeding. Mindful of this, and in light of the other considerations above, the litigation plan produced by the plaintiffs is unacceptable.

[78] In my view, in a proceeding of this size and complexity, a proper litigation plan should reflect a clear acknowledgement of the massive undertaking involved. Thus, the plan should contain, at a minimum, information as to the manner in which individual issues will be dealt with, details as to the knowledge, skill and experience of the class counsel involved, an analysis of the resources required to litigate the class members claims to conclusion, and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined. In respect to the latter point, I do not wish to be taken as holding that only large firms can prosecute class actions nor that the proposed representative plaintiffs must be themselves sufficiently wealthy to finance litigation. Rather, the plan should satisfy the court as to how the resources available to the plaintiffs can be brought to bear to ensure that the litigation can be conducted in such a way so as to protect the interests of the class members. The detail required with respect to each of these elements is relative to the nature of the action. With respect to the financing of the action, it is to be kept in mind that the purposes of certain sections of the *CPA*, and related legislation, is to permit proposed representative plaintiffs to commence and maintain class proceedings through means not available in ordinary litigation.

[79] In consideration of the foregoing, and given the paucity of information proffered in the certification motion record, the plaintiffs have not met the requirement of providing a "workable" litigation plan to the court. Were it the case that this was the only defect, I would normally be inclined to grant a conditional certification, subject to the plaintiffs producing an acceptable litigation plan. However, in this case, the other deficiencies are such that, without changing the entire theory of the case, it is not possible for the plaintiffs to satisfy the requirement.

Conclusion and Disposition

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[80] In my view, the action as advanced is not appropriate for certification as a class proceeding. The best estimates of the number of class members is a range between 2.4 and 15 million persons. The plaintiffs proceed on the basis that tobacco is inherently dangerous and therefore the class should include everyone who smokes or has ever smoked in Ontario, whether alive or deceased, and regardless of individual differences pertaining to smoking habits or the effects of smoking on any particular individual class member. It is apparent on any careful analysis of the proposed class in the context of the conduct complained of and the allegations set out in the Amended Statement of Claim, that the plaintiffs have combined at least five, and possibly more, classes, not to mention innumerable subclasses, into one globally defined class for the purpose of seeking certification. In adopting this strategy, the plaintiffs have presented an action lacking a core of commonality that would permit the court to approve, or frame, common issues that would significantly advance the proceeding.

[81] Moreover, there must be a rational connection between the class and the common issues. These must in turn emerge from the causes of action asserted, which similarly must have a basis in the class. Thus, if there is no class which is defined sufficiently narrowly, it is impossible for the court to craft common issues. In the present case, the plaintiffs have not provided the court with any principled or evidentiary basis for varying the class definition they propose. Therefore, this is not an appropriate case for the court to exercise its discretion to amend the class definition on its own motion for the purpose of granting certification.

[82] The defective class definition cannot be remedied by the plaintiffs' attempt to construct common issues regardless. The issues of significance proposed by the plaintiffs cannot be accepted for the purposes of certification because they rely on either a mistaken assumption with respect to class definition or an ill conceived theory of aggregation. Any assistance that the court might, in its discretion, provide with respect to framing common issues is foreclosed by the deficiencies in the evidentiary record and the flawed class description.

[83] In like fashion, the action does not meet the "preferable procedure" element of the test for certification as a class proceeding. There are obvious individual issues flowing from the causes of action asserted in the Amended Statement of Claim. The Supreme Court has held that the certification analysis must take into account the fairness, efficiency and the manageability of the proceeding as a whole, including those individual issues that might exist. As McLachlin C.J. stated in *Hollick* at para. 30, "I cannot conclude… that the drafters intended the preferability analysis to take place in a vacuum." Individual issues cannot be ignored. Similarly, their presence or importance in the certification analysis cannot be diminished by a creative, but ultimately flawed, assertion that obvious individual issues can be dealt with as though they were in fact common to the class as whole.

[84] The presence of these numerous individual issues and the corresponding lack of commonality lead me to the conclusion that even if there were a class to work with, a class proceeding would not be the preferable procedure for dealing with these claims. In other words, a class proceeding such as the one proposed by the plaintiffs could not be manageable,

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efficient and fair. The plaintiffs litigation plan provides no assistance to the court in this respect. In my view, it does not contain the minimum level of information necessary to establish that it is "workable" as required under the *CPA*.

[85] In essence, the plaintiffs seek certification of an amorphous group of people comprised of individuals of different ages, covering different decades, who knew different things concerning the risks inherent in smoking and who began to smoke for different reasons. They smoked different products, in different amounts, received different information about the risks of smoking, quit smoking or continued to smoke for different reasons and developed or failed to develop different diseases or symptoms associated with different risk factors. The only apparent common element in this action is that all of the proposed class members allegedly smoked cigarettes at one time or another.

[86] The plaintiffs have not met the test for certification. The motion must be dismissed. However, I do not intend that these reasons should stand for the proposition that no class proceeding relating to tobacco use can ever be certified under the *CPA*. My reasons for refusing certification relate to defects in this particular action, not such litigation in general. As always, and to reiterate the words of McLachlin C.J. in *Hollick*, the "question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the facts of the case."

[87] Counsel may make brief submissions, in writing, as to costs.

_____

WINKLER J.

Released: February 5, 2004

2004 CanLII 24753 (ON SC)

COURT FILE NO.: 95-CU-82186CA
DATE: 20040205

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DAVID CAPUTO, LUNA ROTH, LORI CAWARDINE and DAVID GORDON HYDUK, as Estate Trustee of the Estate of RUSSELL WALTER HYDUK

Plaintiffs

- and –

IMPERIAL TOBACCO LIMITED, ROTHMANS, BENSON & HEDGES INC., RJR-MACDONALD INC.

Defendants

REASONS FOR DECISION

WINKLER J.

Released: February 5 , 2004

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TAB 3

See para. 124

CITATION: Carom v. Bre-X Minerals Ltd., 2014 ONSC 2507
COURT FILE NO.: 97-GD-39574CP
COURT FILE NO.: 97-GD-42399
DATE: 20140423

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DONALD CAROM, 3218520 CANADA INC., 662492 ONTARIO LIMITED and OSAMU SHIMIZU

Plaintiffs

– and –

BRE-X MINERALS LTD., BRESEA RESOURCES LTD., now known as SASAMAT CAPITAL CORPORATION, JOHN B. FELDERHOF, JEANNETTE WALSH, Estate Trustee of the Estate of DAVID G. WALSH, deceased, JEANNETTE WALSH, personally, T. STEPHEN McANULTY, NANCY JANE McANULTY, JOHN B. THORPE, ROLANDO C. FRANCISCO, HUGH C. LYONS and PAUL M. KAVANAGH

Defendants

AND BETWEEN:

DONALD CAROM, 3218520 CANADA INC., 662492 ONTARIO LIMITED and EUGENE SCHONBERGER

Plaintiffs

– and –

INGRID FELDERHOF and SPARTACUS CORP.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

Paul J. Pape, for the Plaintiffs

Angus T. McKinnon, for Deloitte Restructuring Inc., Trustee in Bankruptcy for Bre-X Minerals Ltd.

Martin Aquilina, for James F. Roache, a Class Member

HEARD: April 2, 2014

PERELL, J.

2014 ONSC 2507 (CanLII)

REASONS FOR DECISION

A. INTRODUCTION

[1] In a certified class action, known as *Carom v. Bre-X Minerals Ltd.*, the Plaintiffs bring a motion for the following orders:

- An Order relieving Class Counsel, Paul J. Pape and Sutts, Strosberg LLP from the undertaking they made to the Court on April 6, 2005 to continue to prosecute *Carom v. Bre-X Minerals Ltd.*
- An Order dismissing *Carom v. Bre-X Minerals Ltd.* without costs.
- An Order dismissing *Carom v. Felderhof*, a companion uncertified class action, without costs.
- An Order paying Sutts, Strosberg LLP a counsel fee of $458,515, which is the balance of funds being held in trust under paragraph 27(a) of the Amended Bresea Settlement Agreement (the "Bresea Settlement Agreement").
- An Order declaring that the approximately $500,000 that is being held in trust under paragraph 27(c) of the Bresea Settlement Agreement as a reserve for an adverse costs award should be allocated 67% in favour of the Canadian Class and 33% to the U.S. Class.
- An Order declaring that the balance of the Class Action Claimants Fund that would be payable to Canadian Class Members (approximately $4.2 million) under paragraph 27 (d) of the Bresea Settlement Agreement should be paid *cy-près* to the Access to Justice Fund of the Law Foundation of Ontario or alternatively directing that Deloitte Restructuring Inc., Bre-X's Trustee in Bankruptcy administer a claims process.

[2] Deloitte Restructuring Inc., formerly Deloitte & Touche Inc., the Trustee in Bankruptcy of Bre-X Minerals Ltd., ("the Trustee") brings an unopposed cross-motion for the following orders:

- An Order directing the payment to it of $35,000 for work performed for the U.S. claims process of the Bresea Settlement Agreement.
- An Order directing the payment to it of $50,000 for work performed in managing the Bresea Settlement Agreement funds.
- An Order determining whether the aforesaid $35,000 and $50,000 should be paid from: (a) the Class Action Claimants Fund (paragraph 27 (d) of the Bresea Settlement Agreement) or (b) the Adverse Costs Award Fund (paragraph 27 (c) of the Bresea Settlement Agreement).

[3] The Trustee takes no position with regard to the relief sought on the Plaintiffs' motion. To the extent that the Trustee's consent is required to the without costs dismissal of *Carom v. Bre-X Minerals Ltd.*, the Trustee consents.

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B. FACTUAL BACKGROUND

1. The Bre-X Class Action and Related Actions

[4] On April 3, 1997, a proposed class action, *Carom v. Bre-X Minerals Ltd.*, was commenced in Ontario for persons in Canada who purchased shares in Bre-X between May 1, 1993 and March 26, 1997 and suffered a "net trading loss." The gist of the action was that a stock fraud had been committed by certain Defendants misrepresenting the evidence that Bre-X had discovered gold at a mine site in the Philippines and the purchasers of shares suffered losses in trades of Bre-X shares.

[5] There was a companion class action in the United States in the District Court in Texas for American purchasers of shares. The U.S. Class was smaller than the Canadian Class.

[6] Although the quantum of the losses has never been adjudicated, the losses were estimated to exceed $1 billion.

[7] The Plaintiffs in the *Carom* v. *Bre-X* action are: Donald Carom; 3218520 Canada Inc., whose president is Greg Winsor; 662492 Ontario Limited, whose president is Ivo Battistella; and Osamu Shimizu, who died on December 19, 2010. There was not an order to proceed after Mr. Shimizu died. Donald Carom was never named a representative plaintiff.

[8] Pape Barristers PC and Sutts, Strosberg LLP became Class Counsel. They did not provide an indemnity for costs to the Plaintiffs.

[9] The Defendants in the class action were: Bre-X Minerals Ltd., Bresea Resources Ltd., John B. Felderhof, Jeannette Walsh, Estate Trustee of the Estate of David G. Walsh, deceased, Jeannette Walsh, personally, T. Stephen McAnulty, Nancy Jane McAnulty, John B. Thorpe, Rolando C. Francisco, Hugh C. Lyons, and Paul M. Kavanagh.

[10] By consent order dated April 4, 2002, the Bre-X Class Action was dismissed without costs against John B. Thorpe, Rolando C. Francisco, Hugh C. Lyons, and Paul M. Kavanagh.

[11] The remaining Defendants are: (1) John Felderhof; (2) Jeannette Walsh in her capacity as the Estate Trustee of David G. Walsh, deceased; (3) Jeannette Walsh personally; (4) T. Stephen McAnulty; (5) Nancy Jane McAnulty, and (6) Bre-X Minerals Ltd., although the action against it is stayed pursuant to s. 69 of the *Bankruptcy and Insolvency Act*.[1]

[12] As a result of the revelation that there was no gold discovery, Bre-X's business failed, and on November 5, 1977, it made an assignment into bankruptcy in the Alberta Court of Queen's Bench.

[13] Deloitte & Touche Inc., now known as Deloitte Restructuring Inc., (the "Trustee"), was appointed the Trustee in Bankruptcy for the Estate of Bre-X Minerals Ltd., a bankrupt.

[14] With Bre-X in bankruptcy, there was a derivative action under Ontario's *Business Corporations Act*,[2] brought in the bankruptcy proceedings, known as *Deloitte & Touche Inc. v. Felderhof*, in which the Trustee was the Plaintiff. The Defendants in that companion action came

[1] R.S.C. 1985, c. B-3.
[2] R.S.O. 1990, c. B-16.

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to be: (1) John Felderhof; (2) Ingrid Felderhof, his former wife; and (3) Jeannette Walsh in her capacity as the Estate Trustee of David G. Walsh, deceased.

[15] To be somewhat more precise, following the Trustee's appointment and in accordance with the directions of the Inspectors of the Bankruptcy Estate and the Alberta Court of Queen's Bench in Bankruptcy, the Trustee pursued claims against various parties in an attempt to recoup monies on behalf of the Bre-X Bankruptcy Estate. Amongst the matters pursued were: (a) the Derivative Action, which had been commenced in the company's name in Ontario before the company's bankruptcy against insiders, including John Felderhof, David Walsh and Bresea Resources Ltd.; (b) an action that was commenced in Alberta in respect of business expenses improperly charged to the company; (c) proceedings in the Philippines against certain of Bre-X former junior geologists; (d) the dissolution of a $10M Trust that had been established by Bre-X in the Channel Islands to fund the defence costs of the company's Officers and Directors; (e) an action in the Cayman Islands against John and Ingrid Felderhof and companies controlled by them in which the Trustee obtained a Marvea injunction freezing the Felderhofs' assets; and (f) an action in the Bahamas against the Estate of David Walsh and companies controlled by him in which the Trustee obtained a Mareva injunction freezing Walsh's assets.

[16] In December 1997, the Plaintiffs commenced a separate proposed class action against Ingrid Felderhof and her company, Spartacus Corp. The Plaintiffs, however, never brought a motion to certify that action as a class proceeding.

[17] The *Carom v. Bre-X Minerals Ltd.* action was certified as a class proceeding by order dated June 23, 1999 as amended by the order of the Court of Appeal dated October 31, 2000.

[18] By the order of June 23, 1999, the *Carom v. Bre-X Minerals Ltd.* action was stayed against Nancy Jane McAnulty, but she was ordered to be bound by the results of any trial.

[19] Class Counsel in the Bre-X Class Action and Counsel for the Trustee in the Derivative Action worked together to prosecute the two actions but progress was slow because a decision was made to idle the actions to await the outcome of criminal proceedings brought by the Ontario Securities Commission against Mr. Felderhof.

[20] The Bre-X Class Action did advance for the purpose of a partial settlement involving Bresea Resources, which is discussed below, and eventually the examinations for discovery were completed subject to outstanding undertakings being answered.

[21] The U.S. Class Action was certified for the purpose of approving the settlement with Bresea Resources.

2. The Bre-X Claims Process

[22] Following the bankruptcy of Bre-X in 1997, in order to determine the extent of possible claimants in the bankruptcy, the Trustee ran a claims submission process that terminated in 2003. It produced slightly over $1 billion in claims.

[23] No steps have been taken since 2003 to update the information received by the Trustee from the claims process.

[24] It is to be noted that the claims process asked claimants to estimate the "amount of loss claimed against Bre-X Minerals Ltd." The class definition, however, requires the class member to suffer a "net trading loss".

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[25] For the purposes of a distribution program, the Trustee has described the claims process as having serious limitations for several reasons. First, no steps have been taken to verify the validity of the claims submitted. Second, no steps have been taken to determine whether the claim amount reflects the Canadian Class Definition ("Net Trading Loss") or whether submitted claims reflect the gross loss suffered on the collapse of the company's share prices. Third, the Trustee is not aware of whether any of the claimants opted out of the Canadian Class Action following certification.

[26] Class Counsel has analyzed the data available from the claims process and advises that there were 5,051 Canadian claimants. There were 482 U.S. claimants.

[27] Of the Canadian claimants: (a) 3,230 have claims below $10,000, with an average individual claim of $3,133 ($10 million in the aggregate); (b) 1,549 have claims between $10,000 and $100,000, with an average claim of $28,019.00 ($43 million in the aggregate); and (c) 249 have over $100,000, with an average claim of $227,644 ($57 million in the aggregate.) The total claimed by Canadian claimants is approximately $110 million.

[28] The Trustee has estimated a fixed price of $450,000 to complete the claims process with a distribution process. This sum, however, does not include advertising costs, referee costs, and legal fees, and the price would increase if the class size exceeded 5,000 claimants.

[29] Class Counsel estimate advertising costs will be significantly in excess of $100,000 for a distribution process.

3. The Bresea Resources Settlement Agreement

(a) The Settlement with Bresea Resources

[30] Between 2002 and 2005, the Plaintiffs in the *Carom v. Bre-X Minerals Ltd.* action and the Trustee in the Derivative Action settled the claims against the Defendant Bresea Resources for $9 million, subject to approval by courts in Alberta, Ontario and Texas. Of this sum, approximately $7 million was available for the Canadian and U.S. Class Actions. This settlement took the Defendant Bresea Resources out of the various proceedings.

[31] The Bresea Settlement Agreement arose from claims by the Trustee and by the Ontario and Texas Class Action Plaintiffs based on allegations of insider trading.

[32] In addition, Bre-X was, at the time of its bankruptcy, the owner of shares in Bresea and Bresea was the owner of Bre-X shares. The Bresea Settlement Agreement provided for the payment by Bresea of the sum of $7 million to the Class Action. It provided that the Settlement Amount was to be delivered to the Trustee and applied by it in a specified fashion. The $2 million Bresea Share Purchase Amount was to be paid to the Trustee for the benefit of the Bankruptcy Estate.

[33] The questions for the motions now before the court largely concern the distribution of the funds from the settlement with Bresea Resources.

[34] The Bresea Settlement Agreement required the approval of the Texas Court. Ultimately, the Bresea Resources Settlement was approved by the courts of Alberta, Ontario, and Texas. It was approved by the Alberta and Ontario Courts respectively in June 2002 and approved by the Texas Court in September 2004.

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[35] The settlement funds from the Bresea Resources Settlement have been held by the Trustee.

[36] The Bresea Settlement Agreement provides that the Trustee shall be paid its reasonable costs of administering and distributing the Bresea Settlement Funds.

[37] Under the Bresea Settlement Agreement, approximately $7 million was allocated to four funds as follows:

- The paragraph 27(a) "Costs Reserve Fund," being $1,750,000 for legal costs and disbursements for the Plaintiffs' counsel in the Canadian and U.S. class actions.
    - There is now $458,515 in this fund. In the motion now before the court, Class Counsel asks for payment of this sum.
- The paragraph 27(b) fund, being $200,000 for the payment of the fees and disbursements of Siskinds LLP. This fund has been spent.
- The paragraph 27(c) "Adverse Costs Award Fund," being US$500,000 to pay any adverse costs award in the Ontario or U.S. class actions to a maximum of $250,000 per jurisdiction. There is now approximately US$575,000 in this fund.
- The paragraph 27(d) "the Class Action Claimants Fund," being the balance of the Bresea Settlement funds. Subject to certain adjustments that I shall discuss, there is now $5,144,828 in this fund. The Trustee is holding 33% of this fund for the benefit of the Class Members of the American Class Action. The balance available for the Canadian Class is $3,447,035.
    - Class Counsel in the Canadian Class Action seeks an order that 67% of the Canadian Class Action Claimants Fund plus $250,000 from the Adverse Costs Award Fund be distributed *cy près* rather than a distribution of these funds to Canadian Class Members.

[38] The Bresea Settlement Agreement did not determine what portion of the Class Action Claimants Fund was to be for the benefit of U.S. Class Members and what portion was to be for the benefit of Canadian Class Members. As will be mentioned below, the allocation was settled by court orders that followed negotiations between Canadian and American Class Counsel.

(b) The Paragraph 27 Funds of the Bresea Settlement Agreement

[39] Paragraph 27 of the Bresea Settlement Agreement is the source of the various funds discussed above; it states:

> 27. The Settlement Amount delivered by Bresea to Deloitte shall be applied by Deloitte as follows: …
>
> (a) First, Deloitte shall set aside and hold $1,750,000 less amounts paid pursuant to Section 40 of the Settlement Amount as payment of legal fees, costs, disbursements and taxes in the Ontario Class Action and the U.S. Class Action allocated as follows …
>
> (c) Third, Deloitte shall set aside and hold US$500,000 of the Settlement Amount as a reserve for the purpose of paying any award of Court costs to Defendants in either the Ontario Class Action or the U.S. Class Action, up to a maximum of US$250,000 per action; such payments of Court costs will be made only provided (1) an award of Court

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> costs is made in Defendants' favour in either the Ontario Court or the Texas Court; and (2) such Court authorizes the payment of Court costs by Deloitte from this reserve. The reserve created by this sub-Section will terminate only upon the expiration of all appeal periods in both the Ontario Class Action and the U.S. Class Action, or no later than December 31, 2006, without Court authorization to the contrary.
>
> (d) Fourth, the remainder of the Settlement Amount, (the "Class Action Claimants Fund") shall be distributed among the Ontario Class Members and the U.S. Bre-X Class Members who file a proof of claim in accordance with the directions given by the Ontario Court and the Texas Court. Deloitte shall be paid its reasonable costs of administering and distributing the Class Action Claimants Fund, as well as its reasonable costs of administering the claims process described in Sections 15-19, which costs shall be paid from and form a first charge on the Class Action Claimants Fund.

(c) The Paragraph 27 (a) Fund and Class Counsel's Undertaking

[40] Subject to court approval, the funds under paragraph 27(a) of the Bresea Settlement Agreement could be drawn down during the course of the litigation to pay the lawyers for the work they were doing.

[41] On April 6, 2005 Canadian Class Counsel moved for approval of payment pursuant to paragraph 27(a). Class Counsel sought payment of 50% of the value of the work they had performed from November 30, 1999 to March 20, 2005 plus G.S.T. and disbursements.

[42] On April 6, 2005, Justice Winkler made the following Order:

> 1.THIS COURT ORDERS that Deloitte & Touche Inc., as Trustee of the Estate of Bre-X Minerals Ltd. ("Deloitte"), be and is hereby authorized and directed to pay out of the Canadian Trust established by the Amended and Restated Settlement Agreement made as at May 1, 2002 among Deloitte, Bresea Resources Ltd., now known as Sasamat Capital Corporation, Harvey T. Strosberg, Class Counsel in the Ontario Class Action, Yetter & Warden, as representative of Lead Plaintiffs and Proposed Class Representatives in the U.S. Class Action, Siskinds, Cromarty, Ivey and Dowler, Counsel on behalf of the Plaintiffs in the Ontario Bresea Action, and Docken & Co., Counsel on behalf of the Plaintiffs in the Alberta Action:
>
> (a) to Sutts, Strosberg LLP, the sum of $564,978.87, being $393,187.05 as the value of 50% of the work performed from November 30, 1999 to March 20, 2005, plus GST thereon of $27,523.09, plus disbursements of $144,268.73 inclusive of GST; and
>
> (b) to Paul J. Pape, Barristers, the sum of $98,969.73, being $81,477.55 as the value of 50% of the work performed from November 18, 1999 to March 20, 2005, plus GST thereon of $5,703.43, plus disbursements of $11,788.75 inclusive of GST.
>
> 2. THIS COURT ORDERS that Sutts, Strosberg LLP and Paul J. Pape Barristers be and are hereby authorized to apply to this Court at intervals no less than quarterly for authorization for Deloitte to pay to them out of the Canadian Trust further payments on the basis of 50% of the value of work performed plus GST plus disbursements plus applicable taxes.

[43] In the context of seeking the April 6, 2005 order, Class Counsel made the following undertaking to the Court:

> AND UPON HEARING counsel for the plaintiffs and receiving the undertaking of Sutts, Strosberg and Paul J. Pape to complete this action even if the Canadian Trust Fund is exhausted before this action is completed ("Undertaking")

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[44] Class Counsel believed, that because of the injunctions in the Cayman Islands and the Bahamas and their working relationship with the Trustee, it was reasonable to give the Undertaking because it seemed that there would a meaningful recovery of funds from the Defendants.

[45] On December 11, 2012, at the request of Class Counsel, pursuant to paragraph 27(a), I ordered the payment of disbursements only; namely: $7,002.56 to Pape Barristers P.C.; and $114,397.36 to Sutts Strosberg LLP. There have been no other payments under paragraph 27(a) The current balance of the fund pursuant to paragraph 27(a) is $458,515.

[46] As of December 9, 2013, Sutts, Strosberg LLP has incurred unbilled disbursements of $25,873.20 and Pape Barristers PC has incurred unbilled disbursements totaling $1,149.74.

[47] From November 30, 1999 to December 2013, at usual hourly rates, Sutts, Strosberg LLP has unbilled work in progress totaling $1,265,080 without a calculation of applicable taxes and Pape Barristers PC has unbilled work in progress totaling $384,530 without a calculation of taxes.

(d) The Paragraph 27 (c) Trust Fund

[48] The Paragraph 27(c) fund was designed to be a contingency fund to protect the Plaintiffs in Canada and in the United States for their exposure to an adverse costs award.

[49] The Bresea Agreement did not close until February 4, 2005, and thus the date of "December 31, 2006" in paragraph 27(c) of the Settlement Agreement should have been deleted, but this was overlooked. By my order dated March 4, 2013, I ordered that s. 27(c) of the Bresea Settlement Agreement be amended to: delete the date of December 31, 2006. I ordered that Deloitte continue to hold in trust US$573,153 plus future interest as a reserve for the purposes of paying any adverse costs award.

[50] Given that Class Counsel proposes that the Bre-X class action be dismissed on consent without costs and given that an adverse costs award is not possible in the U.S. class action, which was certified only for settlement purposes, there is no possibility of an adverse costs award being made against the Plaintiffs.

[51] However, the agreement makes no provision for the distribution of the Adverse Costs Award Fund under paragraph 27(c) if the fund is unused.

[52] Class Counsel submits that this fund be divided so that the Canadian Class Members receive the benefit of 67% and the American Class Members receive the benefit of 33%. American Class Counsel, however, submits that this fund should be divided equally.

(e) The Paragraph 27(d) Funds for Class Members

[53] Section 27(d) of the Bresea Settlement Agreement provides that the remainder of the settlement funds paid pursuant to the Bresea settlement are to be distributed between the Canadian Class Members and the U.S. Bre-X Class Members. The Agreement, however, did not provide for how the funds were to be divided between the Canadian Class and the U.S. Class.

[54] The matter of the allocation of the paragraph 27(d) funds became a matter of negotiation between Canadian and American Class Counsel and the approval of the respective courts.

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[55] On August 5, 2010, Judge Folsom of the U.S. District Court approved the allocation of the money held in the paragraph 27(d) trust on the basis of a division of 67% in favour of the Canadian Class and 33% to the U.S. Class.

[56] On March 7, 2013, I ordered that the money held in the paragraph 27(d) trust be divided 67% to the Canadian Class and 33% to the U.S. Class.[3]

[57] On May 30, 2013, Justice LoVecchio of the Alberta Court ordered that the approximately $5.2 million in trust be divided 67% to the Canadian Class and 33% to the U.S. Class.

4. Recoveries by the Trustee in Bankruptcy

[58] The Trustee was able to recover two significant sums of money during the course of its administering the Estate.

[59] A settlement of the Trustee's challenge to the Channel Island Trust resulted in the net recovery of some $5 million (some $10 million was recovered and in accordance with the settlement terms some $5 million was paid out to fund a series of individual defence funds for the benefit of certain of Bre-X former officers and directors).

[60] In addition, as noted above, the Trustee recovered funds as a part of the Bresea Settlement Agreement in payment for certain shares of Bresea owned by Bre-X at the time of the company's bankruptcy.

[61] With the approval of the Inspectors of the Bre-X Estate and the Alberta Court of Queen's Bench, in Bankruptcy, the Trustee utilized the funds it recovered for the Bre-X Estate to pursue litigation on behalf of the Estate.

[62] When the Trustee concluded that it lacked sufficient financial resources to continue the litigation and that, based on its investigations, there was no reasonable prospect of a meaningful financial recovery, it entered into a settlement with the remaining Defendants and sought and, as mentioned again below, obtained Court approval for a without costs discontinuance of the various outstanding actions it controlled, including the Ontario Derivative Action.

[63] Approval was granted in Ontario on March 7, 2013, by the Alberta Court of Queen's Bench on May 30, 2013, and by the High Court of the Grand Cayman Islands on August 7, 2013. A final discontinuance of the Bahamas proceedings was recently obtained.

5. The Trustees Claim to a Portion of the Bresea Funds

[64] As noted above, the Trustee was involved in the claims process that was conducted in part for the purpose of determining eligibility by U.S. Class Members for the U.S. portion of the Class Action Claimants' Funds.

[65] Based on a review of the Trustee's time records, the Trustee has estimated that it incurred professional fees of approximately $35,000 in connection with its work on the U.S. claims process.

[66] The Trustee has been holding the Bresea Settlement Funds since 2005 and has incurred professional and legal fees in connection with responding to enquiries from the public and Class

[3] See *Deloitte & Touche Inc. v. Felderhof*, [2013] O.J. No. 1024 (S.C.J.).

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Counsel concerning the funds, disbursing portions of the Canadian and U.S. Trusts, and attempting to assist Ontario and U.S. Class Counsel in resolving their various disputes.

[67] In response to Canadian Class Counsel's request, the Trustee reviewed its time records and estimated that it incurred some $50,000 in professional fees and disbursements in connection with managing the Bresea Settlement Funds. Canadian Class Counsel has expressed the view that the Trustee's claim for this $50,000 is reasonable.

[68] The Trustee seeks payment to it of a total of $85,000 from the Bresea Settlement Funds to repay the costs it incurred in assisting in the U.S. Claims process and in administering the Bresea Settlement Funds.

[69] The Trustee now faces the prospect of suffering a shortfall in the funding of the Bre-X Bankruptcy Estate. Specifically, as at January 15, 2014, the Trustee had only $158,497 cash on hand and outstanding receivables for legal and professional fees totaling $295,561.

[70] The Trustee has estimated that it will incur further legal and professional fees and disbursements of some $278,494 to wind up the Bre-X Estate. While this funding shortfall may be covered if the Trustee recovers a significant portion of the Defence funds arising from the dissolution of the Channel Island Trust, the Trustee will not know how much of the approximately $700,000 that is currently available will be recovered until after this action is dismissed and the Trustee is in a position to call for the return of the balance of the Defence funds.

6. The Denouement of the Class Action

[71] Recently, as noted above, the Trustee ran out of money to prosecute the Derivative Action. The Trustee decided to end the action and the action in the Cayman Islands, and it sought to discontinue the actions, which requires court approval.

[72] The Trustee brought a motion to discontinue. On March 7, 2013, I concluded that given the current circumstances of the case at bar, a discontinuance without costs of the Derivative Action was the most reasonable resolution of the action and that it was appropriate to grant leave pursuant to s. 249 of the *Ontario Business Corporations Act* to dismiss the Ontario Derivative Action.[4]

[73] On May 30, 2013, Justice LoVecchio of the Alberta Court of Queen's Bench ordered that the Trustee could discontinue the Ontario Derivative Action, *nunc pro tunc*. He also instructed the Trustee to consent to the dismissal of the action in the Cayman Islands.

[74] On August 7, 2013, the Trustee's action in the Cayman Islands Court was dismissed without costs, on consent, and the Mareva injunction was dissolved.

[75] The Trustee is in the process of winding up the estate in bankruptcy. When this is completed, it will pass its accounts and seek a discharge from the Alberta Court of Queen's Bench.

[76] As a result of these orders described above, the Bre-X Class Action and the action against Ms. Felderhof are the only currently active actions.

[4] See *Deloitte & Touche Inc. v. Felderhof*, [2013] O.J. No. 1025 (S.C.J.).

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[77] Class Counsel now believes that no purpose would be served by continuing the *Carom v. Bre-X Minerals Ltd.* action or the *Carom v. Felderhof* action. As a result of the evidence produced in the motion for a discontinuance of the Derivative Action, it appears that that most of the money in the Cayman Islands, which was subject to the Mareva injunction, has been dissipated for living expenses and legal expenses.

[78] It appears that there is no reasonable prospect of a recovery from any of the Defendants, even if the outstanding actions were successful.

[79] Ivo Battistella, on behalf of 662492 Ontario Limited, and Greg Winsor, on behalf of 3218520 Canada Inc., agree with Class Counsel's opinion and consent to the dismissal of the Class Actions without costs, subject to Court approval.

[80] Following the giving of notice that an order dismissing the actions without costs would be sought, no Class Member has objected to such an order being made.

[81] The Plaintiffs and the Defendants, save for Bre-X against whom the action is stayed, consent to the dismissal of the outstanding actions without costs.

7. The Proposal for a *Cy-Près* Distribution

[82] The Plaintiffs are requesting a *cy-près* award rather than a distribution process for the approximately $3.5 million being held for Canadian claimants under paragraph 27(d) of the Bresea Settlement Agreement. It seems likely that the cost of a distribution process would reduce the amount to be distributed to around $2.5 million or perhaps less given the cost of determining net trading losses. By my reckoning a distribution process would mean a recovery for Class Members of about 0.2 cents on the dollar.

[83] Based in part on their analysis of the information from the claims process and the estimated costs of a distribution process, Class Counsel have concluded that it would be most cost effective to distribute the funds held under paragraph 27(d) of the Bresea Settlement Agreement, *cy-près* to the Access to Justice Fund operated by the Law Foundation of Ontario ("LFO").

[84] The Access to Justice Fund was created for class action *cy-près* awards following this Court's order in *Cassano v. Toronto Dominion Bank*.[5] Since then, at least four other *cy-près* payments to the Fund have been approved.[6]

[85] No Class Member has objected to a *cy-près* award.

[86] James F. Roache, a Class Member, who is on the faculty of the University of Ottawa intervenes through counsel and asks that the funds be paid *cy-près* to the Telfer School of Business at the University of Ottawa.

[87] The Law Foundation has been advised of this proposal.

[88] Elizabeth Goldberg, C.E.O. of the LFO has advised Class Counsel that these proposed initiatives could be within the LFO objects.

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[5] 2009 ONSC 3573.

[6] *Skopit v. BMO Nesbitt Burns Inc.*, 2010 ONSC 6039; *Smith Estate v. National Money Mart*, 2010 ONSC 1334; *Wein v. Rogers Cable Communications Inc.*, 2011 ONSC 7290; *Markson v. MNBA Canada Bank*, 2012 ONSC 589.

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[89] While Class Counsel agrees the Telfer School of Business at the University of Ottawa would be a worthy and appropriate recipient of a *cy-près* award, it does not recommend that an award be made because it submits that there are many other such institutions in Canada which would also be worthy recipients and it would be unfair to them to make an award in this manner as a part of the resolution of a class action.

[90] Rather, Class Counsel suggests that it would be fairer to pay the funds to the Access to Justice Fund, leaving it the Telfer School to apply and compete with other applicants for the funds. Thus, it would be for the LFO, which is institutionally equipped to address grant requests to make an informed choice.

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C. DISCUSSION AND ANALYSIS

1. The Dismissal of *Carom v. Bre-X Minerals Ltd.* and *Carom v. Felderhof*

[91] *Carom v. Felderhof* was never certified as a class proceeding, and it can be dismissed on the consent of the parties and without court approval.

[92] The Representative Plaintiffs and Plaintiffs of *Carom v. Bre-X Minerals Ltd.* seek court approval of the dismissal of that action on consent and without costs. Thus, at first blush, it would appear that what is now being sought is settlement approval. However, the settlement approval request for a dismissal is unusual because the proposed dismissal is not meant to bind the Class Members and, practically speaking, the settlement is more like a discontinuance than a settlement, which usually involves a release of claims.

[93] Because the request is unusual, it is not clear what test the court should apply to determine whether to grant or refuse approval.

[94] Section 29 of the *Class Proceedings Act, 1992*,[7] provides for the discontinuance, abandonment (which is how a proceeding by application may be discontinued), and the settlement of class actions. Section 29 states:

> *Discontinuance, abandonment and settlement*
>
> 29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> *Settlement without court approval not binding*
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> *Effect of settlement*
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.

[7] S.O. 1992, c. 6.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.

[95] It may be noted that s. 29 (2) provides that a settlement of a class proceeding is not binding unless approved by the court. It is ss. 27 (2) and (3) of the *Act*, that prescribes the binding effect of a judgment on common issues. Sections 27 (2) and (3) state:

Effect of judgment on common issues

27. (2) A judgment on common issues of a class or subclass does not bind,

(a) a person who has opted out of the class proceeding; or

(b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

Idem

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

(a) are set out in the certification order;

(b) relate to claims or defences described in the certification order; and

(c) relate to relief sought by or from the class or subclass as stated in the certification order.

[96] It may be noted that s. 29 (4) of the *Act* provides for the dismissal of a proceeding for delay, which suggests that the jurisprudence about dismissal of an action or application for want of prosecution would guide the court for those circumstances.

[97] Case law interpreting s. 29 provides that the test for approving discontinuance is different from the test for approving a settlement.

[98] The central question on a motion for a discontinuance is whether the putative class members will be prejudiced.[8] The abandonment or discontinuance does not have to be beneficial or in the best interests of the putative class members.[9] Where the motion for leave to discontinue has been made in good faith and on reasonable grounds, the court must strike a balance between protecting the interests of absent class members and permitting the low cost resolution of marginal cases.[10]

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[8] *Durling v. Sunrise Propane Energy Group Inc.* (2009), 98 C.P.C. (6th) 48 at paras. 14-29; *Sollen v. Pfizer*, 2008 ONCA 803, aff'g (2008), 290 D.L.R. (4th) 603 (S.C.J.).

[9] *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974 (S.C.J.) at paras. 30-39. See also: *Coleman v. Bayer Inc.*, [2004] O.J. No. 2775 (S.C.J.).

[10] *Westland v. Ontario Hospital Assn.*, 2013 ONSC 4631 at para. 7; *Durling v. Sunrise Propane Energy Group Inc.*, [2009] O.J. No. 5969 (S.C.J.) at para. 18; *Chopik v. Mitsubishi Paper Mills Ltd.*, [2003] O.J. No. 192 (S.C.J.) at para. 17.

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[99] In comparison, to approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[11]

[100] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[12]

[101] In my opinion, it is not necessary to decide what test to apply to grant approval for the Orders requested in the case at bar because the Orders requested satisfy both tests. Quite simply, there is no purpose to be served by continuing the remaining actions. Those actions would likely be dismissed for want of prosecution in any event and some decisions would then have to be made about the distribution of funds being held by the Trustee in the bankruptcy proceedings, which are also in the process of coming to an end.

[102] Accordingly, I grant approval for the dismissal of *Carom v. Bre-X Minerals Ltd.* and *Carom v. Felderhof* without costs.

2. The Discharge of Class Counsel's Undertaking

[103] As sometimes happens in class actions, there is a partial settlement where the class settles with one defendant with the plan of continuing the action against the remaining defendants. The partial settlement funds are sometimes used to finance the litigation and they are not paid out to the class members. In the case at bar, a partial settlement was reached when the Canadian Class and the American Class settled with Bresea Resources, and Canadian Class Counsel applied to be paid its legal fees from the funds set aside for that purpose.

[104] It was in this context that Canadian Class Counsel gave an undertaking to complete the action even if the paragraph 27(a) funds were exhausted before the action was completed.

[105] Class Counsel have now reached the conclusion that there is no reasonable prospect of recovery of money even if the class action was successful. They, therefore, ask the Court to relieve and release them of their Undertaking.

[106] The undertaking now serves no useful purpose.

[107] Accordingly, I order that the undertaking is discharged.

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[11] *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.), at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[12] See: *Fantl v. Transamerica Life Canada*, supra at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.), at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre, supra*, at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

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3. The Approval of Class Counsel's Fee

[108] Class Counsel seeks the payment of the balance of fund under paragraph 27(a) of the Bresea Settlement Agreement on account of their outstanding disbursements and as compensation for the unbilled work on this matter.

[109] There is $431,493 available for fees and HST after outstanding disbursements are paid. When this sum is reduced by HST (13%), $375,399 will then be available for current unbilled and unpaid fees.

[110] If that is paid, Class Counsel will have received $850,063 for the prosecution of the Bre-X litigation from November 1999 to December 2013.

[111] Against that recovery of fees, they will have incurred $2.6 million for fees at their usual rates during the same period. This recovery for fees will represent 33% of their time invested in the prosecution of the litigation.

[112] Class Counsel's fee request is fair and reasonable in all the circumstances, and I approve the payment from the fund established by paragraph 27(a).

4. The Allocation of the Costs Reserve Fund

[113] The Cost Reserve Fund was created as a contingency fund for a contingency that cannot occur. There will not be an adverse costs award made against the American or the Canadian litigants.

[114] In these circumstances, Class Counsel in *Carom v. Bre-X Minerals Ltd.* submits that the funds should fall into the fund established under paragraph 27(d), for which the courts in Alberta, Ontario, and Texas have already decided that the funds should be allocated 33% to the U.S. Class Members and 67% to the Canadian Class Members.

[115] Class Counsel's argument is a reasonable one, and it provides a possible interpretation of the Bresea Settlement Agreement either as a matter of an implied term or as a matter of interpreting paragraph 27 of the Agreement.

[116] In opposition, U.S. Class Counsel's argument is that the paragraph 27(c) funds should be allocated 50:50. This too is a reasonable argument and a possible interpretation of the Agreement.

[117] Indeed, the U.S. Class Counsel's interpretation is the interpretation that I prefer.

[118] Paragraph 27(c) is structured based on a 50:50 allocation notwithstanding that it was known that the Canadian Class was much larger than the American Class. In contrast, the paragraph 27(d) 33:67 ratio was arrived at later based on negotiations and the sensible conclusion that the distribution of settlement funds should be proportionate to the class size. That rationale does not of necessity apply to the exposure of the Plaintiffs to an adverse costs award. Further, a 50:50 distribution is fair and reasonable.

[119] I think a 50:50 distribution of these unused funds is appropriate, and I order accordingly.

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5. The Payment of the Trustee in Bankruptcy's Fees

[120] The Trustee assisted in conducting the U.S. Claims process and, as set out above, incurred professional fees of some $35,000. In accordance with s. 27(d) of the Bresea Settlement Agreement, the Trustee is entitled to be paid this amount from the U.S. portion of the Class Action Claimants Fund as the U.S. claims process benefitted U.S. Class Members exclusively. I so order.

[121] The Trustee incurred professional and legal fees of some $50,000 in connection with maintaining and administering the Bresea Settlement Funds. These costs were incurred for the benefit of both Ontario and U.S. Class Members and ought to be paid from the Canadian and U.S. portions of the paragraph 27(d) Class Actions Claimants Fund in the established ratio of 33:67. I so order.

6. A Scheme of Distribution or a *Cy-près* Payment

[122] Class action statutes envision the possible distribution of funds *cy-près*.[13] The *Act* contemplates that the distribution will indirectly benefit the class. The Ontario Law Reform Commission in its *Report on Class Actions*, said that the purpose of a *cy-près* distribution was compensation for class members through a benefit that "approaches as nearly as possible some form of recompense for injured class members." [14]

[123] By benefiting the class, at least indirectly, the *cy-près* distribution provides access to justice and the expenditure at the expense of the defendant may provide some behaviour modification. In considering whether to approve a settlement, the court should have regard to the objectives of access to justice for class members and behaviour modification of the defendant as factors in considering whether or not to approve a particular *cy-près* award.[15]

[124] As a general rule, *cy-près* distributions should not be approved where direct compensation to class members is practicable.[16] Where the expense of any distribution among the class members individually would be prohibitive in view of the limited funds available and the problems of identifying them and verifying their status as members, a *cy-près* distribution of the settlement proceeds is appropriate.[17] Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members, the court may approve a *cy-près* distribution to credible organizations or institutions whose services or programs would benefit class members.[18]

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[13] *Gilbert v. Canadian Imperial Bank of Commerce*, [2004] O.J. No. 4260 at paras. 14-15 (S.C.J.); *Cassano v. Toronto Dominion Bank* 2009 ONSC 3573 at para. 14.

[14] Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982) vol. 2 at p. 573.

[15] *Cassano v. Toronto Dominion Bank*, 2009 ONSC 3573 at paras. 14-49.

[16] *Cassano v. Toronto Dominion Bank*, 2009 ONSC 3573 at para. 17.

[17] *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at para. 27; *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at para. 11; *Elliot v. Boliden Ltd.* (2006), 34 C.P.C. (6th) 399 (Ont. SCJ); *Serhan v. Johnson & Johnson*, 2011 ONSC 128 at paras. 57-59.

[18] *Sutherland v. Boots Pharmaceutical plc* (2002), 21 C.P.C. (5th) 196 (Ont. S.C.J.) at para. 16; *Alfresh Beverages Canada Corp v. Hoechst AG* (2002), 16 C.P.C. (5th) 301 (Ont. S.C.J.).

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[125] In *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd ed.),[19] B.J. Rothstein & Thomas E. Willging have the following suggestions for judges considering approval of a *cy-près* distribution:

> *Cy près* relief must come as close as possible to the objective of the case and the interests of the class members. Question whether the class members might feasibly obtain a personal benefit. Look for evidence that proof of individual claims would be burdensome or that distribution of damages would be costly. If individual recoveries do not seem feasible, examine the proximity or distance between the *cy près* recipient's interests or activities and the particular interests and claims of the class members. When *cy près* relief consists of distributing products to charitable organizations or others, press for information about whether the products in question have retained their face value or might be out-of-date, duplicative, or of marginal value.

[126] In my opinion, the case at bar is an appropriate case for a *cy-près* award. I further conclude that the award should be made 80% to the the Access to Justice Fund of the LFO and 20% to the Telfer School of Business at the University of Ottawa.

[127] I make this award because: (a) s. 27(d) of the Bresea Settlement Court provides that the fund shall be distributed in accordance with the directions given by the Ontario Court; (b) Class Counsel conceded that both the Telfer School and the Access to Justice Fund were worthy recipients, and (3) in my opinion, Class Counsel's concerns about unfairness to other worthy claimants is misguided.

[128] In my opinion, Class Counsel cannot delegate an important part of its responsibility of selecting a *cy-près* award recipient when making a recommendation that there should be a *cy-près* award; i.e. Class Counsel cannot delegate its responsibility in identifying the ultimate recipient of the award.

[129] To explain my opinion about how a *cy-près* award should be made in the circumstances of the *Carom v. Bre-X Minerals Ltd.* class action, it is necessary to emphasize that while the normal principles about the approval of a *cy-près* award are relevant, the request in the case at bar is made as a part of the court's administration of the Bresea Settlement Agreement that has already been approved leaving it to the court to decide how the settlement funds should be distributed.

[130] The courts in Ontario and Texas have already exercised that authority to allocate the paragraph 27(d) funds 33:67, and now the court in Ontario is being asked whether to distribute the Canadian Class Members' allotment *cy-près* as part of its authority to administer the settlement.

[131] Under s. 29 of the *Act*, the court's choices are to approve or reject the settlement as proposed. However, in the case at bar, the court has already approved the settlement and the court is being asked how to administer the settlement in circumstances where a *cy-près* award under paragraph 27(d) of the Bresea Settlement Agreement is appropriate.

[132] In the case at bar, once it was determined that a *cy-près* award was appropriate, Class Counsel had the responsibility of designating the beneficiary. If one approaches the problem of identifying a worthy recipient in accordance with the principles that justify making a *cy-près*

[19] (Federal Judicial Center, 2010) at p.19.

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award, it follows that Class Counsel should consider the views of individual class members about whom should be a recipient of the Class's largesse.

[133] Although the ultimate responsibility of identifying a worthy recipient rests with Class Counsel, how better to determine what is in the collective interest of Class Members than to listen to the views of the Class Members themselves? Ascertaining Class Members' views will be possible because Class Counsel will give notice of the proposed settlement that will include its recommendation for a *cy-près* award recipient. In the case at bar, Class Members were notified about Class Counsel's proposal for the allocation of the paragraph 27(d) funds. Class Members were thus given the opportunity to object or to suggest alternative recipients as a part of the notice process. This dialogue occurred in the case at bar and only the Telfer School responded with a suggestion.

[134] Whether as part of a proposed settlement or as part of an administration of an already approved settlement, a proposed *cy-près* award should provide a benefit to *all* the Class Members. When a Class Member (in this case, James F. Roache who is on the faculty of the Telfer School) asks that the funds be paid *cy-près*, Class Counsel will have to be satisfied that the request is not a self-serving request that does not benefit all Class Members. The opportunity to respond to a notice about a proposed *cy-près* award is not an opportunity for a Class Member to enrich their favourite charity, unless, coincidentally, the award to that charity is in the collective interest of the Class Members in the context of the purposes of the particular Class Action.

[135] Whether a particular *cy-près* award satisfies the purposes of the *Class Proceedings Act, 1992*, can be a matter of debate, because there may be many worthy candidates that could arguably be connected to the collective or common interests of the Class Members and the goals of the particular class action, but Class Counsel should, at least, consider the views of Class Members. In the case at bar, Class Counsel was satisfied that the Telfer School was an appropriate candidate for a *cy-près* award.

[136] The ultimate decision, however, remains with Class Counsel, and for the purposes of a settlement approval hearing, Class Counsel's recommendation will generally be respected because the court's role is not to remake the Agreement or to adjudicate the dispute between the Representative Plaintiff who gave instructions to Class Counsel and Class Members who might have given different instructions to Class Counsel.

[137] Repeating again that Class Counsel conceded that both the Telfer School and the Access to Justice Fund were worthy recipients of a *cy-près* award, which is to say that both recipients would provide a benefit to class members in the context of the *Carom v. Bre-X Minerals Ltd.* Class Action and in the absence of any appropriate reason to disqualify the Telfer School, Class Counsel ought to have included a worthy recipient in its *cy-près* award proposal.

[138] Given the court's jurisdiction in the case at bar to administer the settlement, I conclude that the award should be made 80% to the the Access to Justice Fund of the LFO and 20% to the Telfer School of Business at the University of Ottawa.

[139] I wish to make it clear, because the case at bar may have implications for other cases about the administration of a settlement agreement, the court will normally not second guess the

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decision of Class Counsel between worthy and appropriate recipients of a *cy-près* award. The problem in the immediate case, however, is that Class Counsel's recommendation was, in effect, a recommendation that the LFO, which in and of itself is a worthy candidate, should decide who are the other worthy candidates.

[140] In the case at bar, Class Counsel did not consider that it could change its original recommendation and accommodate Mr. Roache's recommendation on grounds of unfairness to other Class Members who did not take the opportunity to express a view. Class Counsel was in no way obliged to change its recommendation and it could have rejected Mr. Roache's suggestion on the basis that the Telfer School was not sufficiently connected to the purposes of the *Carom v. Bre-X Minerals Ltd.* class action or on the basis that the Access to Justice Fund would be the better recipient to serve the purposes of a *cy-près* award in the context of a class proceeding. Had Class Counsel proceeded in that fashion, I would not have second guessed its decision notwithstanding that the court was empowered under the Bresea Settlement Agreement to form its own opinion about allocating the s. 27(d) funds.

[141] *Cy-près* awards are somewhat controversial, and academics have debated whether and how such awards advance the purposes and public law policies of class actions.[20] There has been some academic criticism about the transparency and rationale for how courts approve the recipients of *cy-près* awards. The simple answer is that courts are not in the business of being a grant approving institution and the issue of a *cy-près* award arises in the context of an adversarial system in which the court is responsive to the submissions of the parties and treats a *cy-près* award as subject to the same approach and the same principles that apply to the rest of the proposed settlement or to the administration of an approved settlement.

[142] Applying those principles to the case at bar, I conclude that the case at bar is an appropriate case for a *cy-près* award. I further conclude that the award should be made 80% to the the Access to Justice Fund of the LFO and 20% to the Telfer School of Business at the University of Ottawa.

D. CONCLUSION

[143] For the above reasons and in the manner described above, the Plaintiffs' motion and the Trustee's motion are granted. There should be no order as to costs.

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[20] L. A. Bihari, "Saving the Law's Soul: A Normative Perspective on the *Cy Près* Doctrine" (2011), 7 Can. Class Action Rev. 293; C. Sgro, "The Doctrine of *Cy Près* in Ontario Class Actions: Towards a Consistent, Principled, and Transparent Approach" (2011), 7 Can. Class Action Rev. 265; J. Berryman, "Nudge, Nudge, Wink, Wink: Behavioral Modification, *Cy près* Distributions and Class Actions" in *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (Markham, Nexis Lexis, 2011); J. Kalajdzic, "Access to Justice: Revisiting Settlement Standards and *Cy près* Distributions" (2010), 6 Can. Class Action Rev. 215; E. R. Potter and N. Razack, "*Cy Près* Awards in Canadian Class Actions: A Critical Interrogation of what is Meant by "as near as possible" (2010), 6 Can. Class Action Rev. 297; J. Berryman, "Class Actions and the Exercise of *Cy près* Doctrine: Time for Improved Scrutiny in J. Berryman & R. Bigwood, *The Law of Remedies: New Directions in the Common Law* (Toronto: Irwin Law, 2009; J.C. Kleefeld, "Book Review: The Modern *Cy près* Doctrine: Applications and Implications by Rachael P. Mulheron" (2007), 4 Can. Class Action Rev. 203; Martin H. Redish, Peter Julian & Samantha Zyontz, "Cy près Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis" (2010) 62 Florida L. Rev. 617.

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Perell, J.

Released: April 23, 2014

2014 ONSC 2507 (CanLII)

CITATION: Carom v. Bre-X Minerals Ltd. 2014 ONSC 2507
COURT FILE NO.: 97-GD-39574CP
COURT FILE NO.: 97-GD-42399
DATE: 20140423

2014 ONSC 2507 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DONALD CAROM, 3218520 CANADA INC., 662492 ONTARIO LIMITED and OSAMU SHIMIZU

Plaintiffs

- and -

BRE-X MINERALS LTD., BRESEA RESOURCES LTD., now known as SASAMAT CAPITAL CORPORATION, JOHN B. FELDERHOF, JEANNETTE WALSH, Estate Trustee of the Estate of DAVID G. WALSH, deceased, JEANNETTE WALSH, personally, T. STEPHEN MCANULTY, NANCY JANE McANULTY, JOHN B. THORPE, ROLANDO C. FRANCISCO, HUGH C. LYONS and PAUL M. KAVANAGH

Defendants

AND BETWEEN:

DONALD CAROM, 3218520 CANADA INC., 662492 ONTARIO LIMITED and EUGENE SCHONBERGER

Plaintiffs

– and –

INGRID FELDERHOF and SPARTACUS CORP.

Defendants

REASONS FOR DECISION

Perell, J.

Released: April 23, 2014

TAB 4

See paras. 15, 58, 59, 61, 66, 68, 70

Century Services Inc. *Appellant*

v.

Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada *Respondent*

INDEXED AS: CENTURY SERVICES INC. *v.* CANADA (ATTORNEY GENERAL)

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. *Appelante*

c.

Procureur général du Canada au nom de Sa Majesté la Reine du chef du Canada *Intimé*

RÉPERTORIÉ : CENTURY SERVICES INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

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The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« *LTA* ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« *LFI* »). Toutefois, le par. 18.3(1) de la *LACC* prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la *LACC* a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la *LFI*. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la *LTA*, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la *LACC* ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la *LACC*, de la fonction de cette loi parmi

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Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

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recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

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No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

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Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44*f*) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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Cases Cited

By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4th) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

Statutes and Regulations Cited

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and

Jurisprudence

Citée par la juge Deschamps

Arrêt renversé : *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinction d'avec l'arrêt :** *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862; **arrêts mentionnés :** *Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659; *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII); *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4th) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

Citée par le juge Fish

Arrêt mentionné : *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

Citée par la juge Abella (dissidente)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Société Télé-Mobile Co. c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305; *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862; *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663.

Lois et règlements cités

Loi d'interprétation, L.R.C. 1985, ch. I-21, art. 2 « texte », 44*f*).

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the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, ss. 69, 128, 131.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 81.1, 81.2, 86 [am. 1992, c. 27, s. 39; 1997, c. 12, s. 73; 2000, c. 30, s. 148; 2005, c. 47, s. 69; 2009, c. 33, s. 25].

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [am. 2005, c. 47, s. 128], 11.02 [ad. *idem*], 11.09 [ad. *idem*], 11.4 [am. *idem*], 18.3 [ad. 1997, c. 12, s. 125; rep. 2005, c. 47, s. 131], 18.4 [*idem*], 20 [am. 2005, c. 47, s. 131], 21 [ad. 1997, c. 12, s. 126; am. 2005, c. 47, s. 131], s. 37 [ad. 2005, c. 47, s. 131].

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36 [am. 1952-53, c. 3].

Employment Insurance Act, S.C. 1996, c. 23, ss. 86(2), (2.1).

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 227(4), (4.1).

Interpretation Act, R.S.C. 1985, c. I-21, ss. 2 "enactment", 44(*f*).

Winding-up Act, R.S.C. 1985, c. W-11.

Loi de l'impôt sur le revenu, L.R.C. 1985, ch. 1 (5e suppl.), art. 227(4), (4.1).

Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence, L.C. 2005, ch. 47, art. 69, 128, 131.

Loi sur l'assurance-emploi, L.C. 1996, ch. 23, art. 86(2), (2.1).

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 67, 81.1, 81.2, 86 [mod. 1992, ch. 27, art. 39; 1997, ch. 12, art. 73; 2000, ch. 30, art. 148; 2005, ch. 47, art. 69; 2009, ch. 33, art. 25].

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11 [mod. 2005, ch. 47, art. 128], 11.02 [aj. *idem*], 11.09 [aj. *idem*], 11.4 [mod. *idem*], 18.3 [aj. 1997, ch. 12, art. 125; abr. 2005, ch. 47, art. 131], 18.4 [*idem*], 20 [mod. 2005, ch. 47, art. 131], 21 [aj. 1997, ch. 12, art. 126; mod. 2005, ch. 47, art. 131], 37 [aj. 2005, ch. 47, art. 131].

Loi sur les arrangements avec les créanciers des compagnies, S.C. 1932-33, ch. 36 [mod. 1952-53, ch. 3].

Loi sur les liquidations, L.R.C. 1985, ch. W-11.

Régime de pensions du Canada, L.R.C. 1985, ch. C-8, art. 23.

Authors Cited

Canada. Advisory Committee on Bankruptcy and Insolvency. *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*. Ottawa: Minister of Supply and Services Canada, 1986.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, 15:15.

Canada. Industry Canada. Marketplace Framework Policy Branch. *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Corporate and Insolvency Law Policy Directorate, 2002.

Canada. Senate. *Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, p. 2147.

Canada. Senate. Standing Committee on Banking, Trade and Commerce. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Senate of Canada, 2003.

Canada. Study Committee on Bankruptcy and Insolvency Legislation. *Bankruptcy and Insolvency: Report of*

Doctrine citée

Canada. Chambre des communes. *Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule no 15, 3e sess., 34e lég., 3 octobre 1991, 15:15.

Canada. Comité consultatif en matière de faillite et d'insolvabilité. *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*. Ottawa : Ministre des Approvisionnements et Services Canada, 1986.

Canada. Comité d'étude sur la législation en matière de faillite et d'insolvabilité. *Faillite et Insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité*. Ottawa : Information Canada, 1970.

Canada. Industrie Canada. Direction générale des politiques-cadres du marché. *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*. Ottawa : Direction des politiques du droit corporatif et de l'insolvabilité, 2002.

Canada. Sénat. Comité sénatorial permanent des banques et du commerce. *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrange-*

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the Study Committee on Bankruptcy and Insolvency Legislation. Ottawa: Information Canada, 1970.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal: Thémis, 2009.

Edwards, Stanley E. "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587.

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Joint Task Force on Business Insolvency Law Reform. *Report* (2002) (online: http://www.cairp.ca/publications/submissions-to-government/law-reform/index.php).

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55* (2005).

Jackson, Georgina R. and Janis Sarra. "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto: Thomson Carswell, 2008, 41.

Jones, Richard B. "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005*. Toronto: Thomson Carswell, 2006, 481.

Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto: Carswell, 1996 (loose-leaf updated 2010, release 1).

Morgan, Barbara K. "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461.

Sarra, Janis. *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations*. Toronto: University of Toronto Press, 2003.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto: Thomson Carswell, 2007.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto: Thomson Carswell, 2005.

Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto: Irwin Law, 2009.

ments avec les créanciers des compagnies. Ottawa : 2003.

Canada. Sénat. *Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont. : Carswell, 2000.

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal : Thémis, 2009.

Edwards, Stanley E. « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587.

Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation. Joint Task Force on Business Insolvency Law Reform. *Report* (2002) (en ligne : http://www.cairp.ca/publications/submissions-to-government/law-reform/index.php).

Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55* (2005).

Jackson, Georgina R. and Janis Sarra. « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto : Thomson Carswell, 2008, 41.

Jones, Richard B. « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005*. Toronto : Thomson Carswell, 2006, 481.

Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto : Carswell, 1996 (loose-leaf updated 2010, release 1).

Morgan, Barbara K. « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461.

Sarra, Janis. *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations*. Toronto : University of Toronto Press, 2003.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto : Thomson Carswell, 2007.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont. : LexisNexis, 2008.

Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto : Thomson Carswell, 2005.

Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto : Irwin Law, 2009.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

[1] Deschamps J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, *Owen J. James* et *Matthew J. G. Curtis*, pour l'appelante.

Gordon Bourgard, *David Jacyk* et *Michael J. Lema*, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] La juge Deschamps — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la *LACC* et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la *LACC*, et non la *LTA*, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la *LACC* et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

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Act, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

[2] Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d'avis d'accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L'entreprise a vendu certains éléments d'actif excédentaires, comme l'y autorisait l'ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s'applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s'applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s'appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l'époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l'emportait sur la *LACC*, la Couronne jouissant ainsi d'un droit prioritaire à l'égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu'elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l'objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu'il sera utile de le faire.

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[4] On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[7] First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la *LACC*, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 $ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la *LFI*. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la *LFI* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la *LACC* n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

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that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

[9] This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la *LACC*, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la *LACC*.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Questions en litige

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

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3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l'insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l'égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l'époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d'imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c'est souvent le cas, le conflit apparent peut être résolu au moyen des principes d'interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l'historique de la *LACC*, la fonction de cette loi parmi l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d'insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l'objectif de cette loi et l'interprétation qu'en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l'espèce, j'aborderai la conclusion du juge Tysoe selon laquelle l'ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l'insolvabilité*

[12] L'insolvabilité est la situation de fait qui se présente quand un débiteur n'est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d'insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

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a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvables — personnes physiques ou personnes morales — qui doivent 1 000 $ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

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the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

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Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la *LACC*, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la *LACC*. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La *LACC* est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

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the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la *LACC*. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la *LACC*.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la *LACC* dans la pratique contemporaine,

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flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

ni des avantages qu'offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la LACC [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d'un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d'insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

[22] Si les instances en matière d'insolvabilité peuvent être régies par des régimes législatifs différents, elles n'en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l'objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

> [TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d'éviter l'anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l'absence d'un processus collectif, chaque créancier sait que faute d'agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

Le modèle de la procédure unique vise à faire échec à l'inefficacité et au chaos qui résulteraient de l'insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d'un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

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rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

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3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

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largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d'une priorité en cas d'insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l'insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l'objet d'aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu'elle l'était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l'État en cas d'insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l'État ne bénéficie d'aucune priorité, alors qu'aux États-Unis et en France il jouit au contraire d'une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d'une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l'impôt sur le revenu et des cotisations à l'assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s'applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n'a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

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held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

également les biens détenus par un créancier garanti qui, si ce n'était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l'égard des retenues à la source relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC (voir par. 227(4) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J'emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l'impôt sur le revenu et aux cotisations à l'AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d'un litige portant sur la priorité de rang entre, d'une part, une fiducie réputée établie en vertu de la *LIR* à l'égard des retenues à la source, et, d'autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l'Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D'après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l'égard des biens du débiteur pour une valeur égale à la somme due au titre de l'impôt sur le revenu — commençait à s'appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l'emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n'existait pas de biens susceptibles d'être visés par la fiducie réputée de la *LIR* lorsqu'elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu'elle est réputée s'appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l'arrêt *Sparrow Electric* »).

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[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. . . .

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed . . . .

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

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subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

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[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** . . .
>
> . . .
>
> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution . . . .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

> **18.4** . . .
>
> . . .
>
> (3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :
>
> *a*) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;
>
> *b*) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

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conflicts, apparent or real, and resolve them when possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

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the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

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in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

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[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

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[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

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contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

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the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

[56] My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

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3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

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staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

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[62] Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

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purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[66] Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procédèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

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matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

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stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

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[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

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the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

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lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

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to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

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[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

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that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

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And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

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II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

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apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . .

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC que* sous celui de la *LFI.*

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[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit

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security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

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provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

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be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

[115] Section 11[1] of the *CCAA* stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

1 Section 11 was amended, effective September 18, 2009, and now states:

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.

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] L'article 11[1] de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

11. Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

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(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) . . . [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) . . . [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

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interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* . . . . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

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various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

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[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

[123] Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

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[125] The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> . . . the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, . . . at p. 239 . . . :
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> > On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

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legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as

2 The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

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"new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

. . .

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

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Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

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for payment of the GST funds during the *CCAA* proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

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(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

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(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou

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as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

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and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou

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effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

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18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii),

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in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] 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.

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

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(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

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Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

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collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

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3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

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37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la

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creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

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(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

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(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

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(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Appeal allowed with costs, ABELLA J. *dissenting.*

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

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TAB 5

See paras. 49, 79-86, 95, 96

Ford et al. v. F. Hoffmann-La Roche Ltd. et al.

Ford et al. v. F. Hoffman,-La Roche Ltd. et al.

Fleming Feed Mill Ltd. et al. v. BASF Aktiengesellschaft et al.

Ford et al. v. Rhne-Poulenc S.A. et al.

Vitapharm Canada Ltd. et al. v. Degussa-Hls AG et al.

Fleming Feed Mill Ltd. et al. v. UCB S.A. et al.

Ford v. Novus International (Canada) Ltd.

[Indexed as: Ford v. F. Hoffmann-La Roche Ltd.]

74 O.R. (3d) 758
[2005] O.J. No. 1118
Court File Nos. 00-CV-202080CP, 00-CV-200045CP, 00-CV-198647CP, 00-CV-201723CP, 00-CV-200044CP 40610 and 42267CP

Ontario Superior Court of Justice,
Cumming J.
March 23, 2005

Civil procedure -- Class proceedings -- Settlement -- Plaintiffs commencing proposed class actions alleging price fixing in relation to sale of vitamins in Canada -- Plaintiffs pursuing litigation using two-stage model -- Plaintiffs first seeking aggregate damages and then developing distribution model for aggregate damages to be paid to or for benefit of direct purchasers, intermediate purchasers and consumers -- Benefits available to intermediate purchasers and consumers were to be paid cy-prs to consumer and industry organizations

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-- Plaintiffs and defendants entering into settlement agreements for total of approximately $140 million, to be allocated in accordance with distribution model -- Court certifying actions as class proceedings and approving settlement agreements -- Court granting order barring any future claim for contribution or indemnity against settling defendants.

The plaintiffs commenced a number of proposed class actions alleging price fixing in relation to the sale of vitamins in Canada. They claimed that the defendants contravened s. 45(1) of Part VI of the Competition Act, R.S.C. 1985, c. C-34, giving rise to a right to damages under ss. 36(1) and 45(1); that the defendants were liable for tortious conspiracy and intentional interference with economic interests; and that the defendants were liable for punitive damages. The proposed class was comprised of direct purchasers of vitamins during the relevant period, intermediate purchasers and ultimate consumers. The plaintiffs pursued the litigation using a two-stage model. At stage one, on behalf of all purchasers of vitamins, they sought to hold the alleged conspirators accountable for the aggregate overcharge on all sales of vitamins in Canada by recovering aggregate damages. Then, at stage two, class counsel developed a distribution model for the aggregate damages to be paid to or for the benefit of di rect purchasers, intermediate purchasers and consumers. The plaintiffs and the defendants entered into settlement agreements based on a total damage assessment of approximately $140 million. Direct purchasers would receive up to 12 per cent of the value of their vitamin purchases. The benefits available to intermediate purchasers and consumers would be paid cy-prs to carefully selected and well-recognized consumer and industry organizations. Motions were brought for certification of the actions as class proceedings and approval of the settlement.

Held, the motions should be granted. [page759]

The criteria for certification were met. The class actions were the preferable procedure because they presented a fair and manageable process. For class members, there were no alternative avenues of redress apart from individual actions,

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which would be less practical and less efficient than a class proceeding. Class proceedings provided a fair, efficient and manageable method of determining the common issues and would advance the actions in accordance with the goals of judicial economy, access to justice and behaviour modification.

There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arms length by counsel for the class, is presented for court approval. To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes. When these class actions were commenced, this type of litigation was novel in Canada and the approach taken by class counsel was significantly different from that which had been seen in the United States Federal Court. The plaintiffs faced litigation risks. The novel nature of the actions and the theory pursued by class counsel created the risk that the actions, or some of them, would not be certified, and the risk that if certified, the court would not assess damages in the aggregate. If the defendants, or some of them, were successful in establishing any of the general defences, such as pass through, or the product-specific defences, such as no sales in Canada or no conspiracy, then the plaintiffs would not succeed, at least in the entirety, at a trial of the common issues and there would be limited recovery. While these defences were largely problematical, at the very least their number and complexity would lengthen a trial of the common issues.

Section 24 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 permits damages to be assessed in the aggregate. Section 26 permits the court to direct the distribution of settlement moneys by any means it considers appropriate whether or not such a distribution would benefit persons who are not class members or persons who otherwise might receive monetary compensation as a result of the proceeding. In order words, the Act permits cy-prs distributions of the type contemplated here.

Class counsel were seeking an order barring any future claim for contribution or indemnity against the settling defendants.

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Once it became clear in the course of negotiations that some defendants would not participate in a global settlement, a bar order was critical in the negotiation of the agreements. Bar orders have their origin in the United States and are frequently used to achieve settlement in complex tort and securities litigation, including class proceedings. Ontario courts favour settlement wherever possible and have found that the underlying principles of American bar orders may be applied in Canada. The requested bar order was fair and reasonable.

The proposed settlement achieved the legislative goals of the Class Proceedings Act and afforded significant judicial efficiency and economy, while allowing access to justice through an efficient and cost-effective distribution mechanism. All of the settlement negotiations were at arms' length and were adversarial in nature. The settlements were fair and reasonable.

Cases referred to

A & M Sod Supply Ltd. v. Akzo Nobel Chemicals B.V., unreported, December 22, 2003, Doc. 02-CT-40300CP (Toronto); Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co., [2001] O.J. No. 6028 (S.C.J.); Alfresh Beverages Canada Corp. v. Hoechst AG, [2002] O.J. No. 79, 16 C.P.C. (5th) 301 (S.C.J.); Amoco Canada Petroleum Co. v. Propak Systems Ltd., [2001] A.J. No. 600, 200 D.L.R. (4th) 667, [2001] 6 W.W.R. 628, 2001 ABCA 110; [page760] Anderson v. Wilson (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494, 175 D.L.R. (4th) 409, 36 C.P.C. (4th) 17 (C.A.) [Leave to appeal to S.C.C. refused (2000), 258 N.R. 194n], revg in part (1998), 37 O.R. (3d) 235, [1998] O.J. No. 671, 156 D.L.R. (4th) 735, 18 C.P.C. (4th) 208 (Div. Ct.), revg in part (1997), 32 O.R. (3d) 400, [1997] O.J. No. 548 (Gen. Div.); Bendall v. McGhan Medical Corp. (1993), 14 O.R. (3d) 734, [1993] O.J. No. 1948, 106 D.L.R. (4th) 339, 16 C.P.C. (3d) 156 (Gen. Div.); Bona Food s Ltd. v. Ajinomoto U.S.A., Inc., [2004] O.J. No. 908, 2 C.P.C. (6th) 15 (S.C.J.); Bona Foods Ltd. v. Pfizer Inc., [2002] O.J. No. 5553 (S.C.J.); California v. ARC America Corp., 109 S. Ct. 1661, 490 U.S. 93 (1989); Caputo v. Imperial Tobacco Ltd.,

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[2004] O.J. No. 299, 236 D.L.R. (4th) 348, 42 B.L.R. (3d) 276, 22 C.C.L.T. (3d) 261, 44 C.P.C. (5th) 350 (S.C.J.), supp. reasons, [2005] O.J. No. 842, 250 D.L.R. (4th) 756 (S.C.J.); Carom v. Bre-X Minerals Ltd. (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014, 196 D.L.R. (4th) 344, 1 C.P.C. (4th) 62, 11 B.L.R. (3d) 1 (C.A.) (sub nom. 3218520 Canada Inc. v. Bre-X Minerals Ltd.); Catfish Antitrust Litigation (Re), 826 F. Supp. 1019, 1993-2 Trade Cas. (CCH) P70, 395 (N.D. Miss. 1993); Chadha v. Bayer Inc. (2003), 63 O.R. (3d) 22, [2003] O.J. No. 27, 31 B.L.R. (3d) 214, 23 C.L.R. (3d) 1, 31 C.P.C. (5th) 40 (C.A.) [Leave to appeal to S.C.C. denied, [2003] S.C.C.A. No. 106], supp. reasons (2003), 22 s 3 D.L.R. (4th) 158, [2003] O.J. No. 1162, 31 B.L.R. (3d) 214 (C.A.), affg (2001), 54 O.R. (3d) 520, [2001] O.J. No. 1844, 200 D.L.R. (4th) 309, 15 B.L.R. (3d) 177, 8 C.P.C. (5th) 138 (Div. Ct.), revg (1999) 45 O.R. (3d) 29, [1999] O.J. No. 2497 (S.C.J.); Cotton v. Hinton, 559 F.2d 1326, 15 Fair Empl. Prac. Cas. (BNA) 1342 (5th Cir. 1977); Currie v. McDonald's Restaurants of Canada Ltd., [2005] O.J. No. 506, 250 D.L.R. (4th) 224, 7 C.P.C. (6th) 60 (C.A.); Dabbs v. Sun Life Assurance Co. of Canada (1998), 41 O.R. (3d) 97, [1998] O.J. No. 3622, 165 D.L.R. (4th) 482, [1999] I.L.R. para. I-3629, 27 C.P.C. (4th) 243 (C.A.) [Leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372, 235 N.R. 390n], quashing (1998), 40 O.R. (3d) 429, [1998] O.J. No. 2811, [1998] I.L.R. para. I-3575, 22 C.P.C. (4th) 381 (Gen. Div.); Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 (Gen. Div.); Gariepy v. Shell Oil Co., unreported, April 16, 2004, Doc. 30781/99 (Toronto, Ont. S.C.J.); Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224 (1968); Hollick v. Toronto (City), [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105 (sub nom. Hunt v. T & N plc); Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 431 U.S. 720 (1977); Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 1481, 2001 BCSC 1060, 91 B.C.L.R. (3d) 309 (S.C.); M. (J.) v. B. (W.) (2004), 71 O.R. (3d) 171, [2004] O.J. No. 2312, 187 O.A.C. 201, 240 D.L.R. (4th) 435, 47 C.P.C. (5th) 234 (C.A.); M.C.C. v. Canada (Attorney General), [2004] O.J. No. 4924, 247 D.L.R. (4th) 667 (C.A.); McCarthy v. Canadian Red Cross Society, [2001] O.J. No.

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2474, [2001] O.T.C. 470, 8 C.P.C. (5th) 349 (S.C.J.); Millard v. North George Capital Manag ement Ltd., [2000] O.J. No. 1535, 47 C.P.C. (4th) 365 (S.C.J.); Minnema v. Archer Daniels Midland Co., unreported, February 28, 2003, Doc. G23495-99CP (Barrie, Ont. Sup. Ct.); NASDAQ Market-Makers Antitrust Litigation (Re), 169 F.R.D. 493, 1996-2 Trade Cas. (CCH) P71, 643 (S.D.N.Y. 1996); Nelson v. Bennett, 662 F. Supp. 1324 (E.D. Cal. 1987); Newly Weds Foods Co. v. Pfizer Inc., unreported, April 7, 2003, Doc. 39495 (Toronto); Nucorp Energy Securities Litigation (Re), 661 F. Supp. 1403, Fed. Sec. L. Rep. (CCH) P93, 224 (S.D. Cal. 1987); Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245, 37 C.P.C. (4th) 175 (S.C.J.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572, 40 C.P.C. (4th) 151 (S.C.J.); Price v. Panasonic Canada Inc., [2002] O.J. No. 2362, [2002] O.T.C. 426, 22 C.P.C. (5th) 382 (S.C.J.); Rumley v. British Columbia, [2001] 3 S.C.R. 184, [2001] emS.C.J. No. 39, 95 B.C.L.R. (3d) 1, 205 D.L.R. (4th) 39, 275 N.R. 342, [2001] 11 W.W.R. 207, 2001 SCC 69, 10 C.C.L.T. (3d) 1, 9 C.P.C. (5th) 1; Sawatzky v. Societe Chirurgicale Instrumentarium Inc., [1999] B.C.J. No. 1814, 37 C.P.C. (4th) 163 (S.C.); [page761] Silicone Gel Breast Implant Products Liability Litigation (Re), 1994 WL 578353 (N.D. Ala.); Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, [1988] O.J. No. 1745, 66 O.R. (2d) 225, 41 B.L.R. 22 (H.C.J.); Sugar Industry Antitrust Litigation (In Re), 73 F.R.D. 322, 22 Fed. R. Serv. 2d (Callaghan) 634 (E.D. Pa. 1976); Sutherland v. Boots Pharmaceutical PLC, [2002] O.J. No. 1361, 21 C.P.C. (5th) 196 (S.C.J.); Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2002] O.J. No. 298, 20 C.P.C. (5th) 351 (S.C.J.); Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2001] S.C.J. No. 63, 94 Alta. L.R. (2d) 1, 201 D.L.R. (4th) 385, 272 N.R. 135, [2002] 1 W.W.R. 1, 2001 SCC 46, 8 C.P.C. (5th) 1 (sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere); Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392, 49 C.P.C. (4th) 233, 24 C.P.C. (5th) 175 (S.C.J.) [Leave to appeal denied (2000), 52 O.R. (3d) 20, [2000] O.J. No. 4735 (S.C.J.), leave to appeal to S.C.C. denied, [2001] S.C.C.A. No. 88]

Statutes referred to

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Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 1, 5, 12, 13, 24, 26, 29, 32, 33

Clayton Act, 38 Stat. 731, 15 U.S.C. 15

Competition Act, R.S.C. 1985, c. C-34, ss. 36, 45

Interpretation Act, R.S.O. 1990, c. I.11, s. 10

Sherman Act, 26 Stat. 209, 15 U.S.C. 1

Authorities referred to

Manual for Complex Litigation, 3rd ed. (St. Paul, MN: West Publishing, 1995)

Newberg, H.B., and A. Conte, Newberg on Class Actions, 3rd ed. (Colorado: Sheppards/McGraw-Hill, 1992)

Ontario Law Reform Commission, Report on Class Actions, vol. 1 (Toronto: Ministry of Attorney General, 1982)

MOTIONS for certification of class proceedings and for an approval of settlements.

Court File No.: 00-CV-202080CP

Harvey T. Strosberg, Q.C., C. Scott Ritchie, Q.C., J.J. Camp, Q.C., and Joe Fiorante, for plaintiffs in all actions.

Glenn M. Zakaib, for defendant Merck KgaA.

John Callaghan, for Sumitomo Chemical Co. Ltd.

William Vanveen and Franois Baril, for defendants Hoffmann-La Roche Limited, F. Hoffmann-La Roche Ltd.

Ariane Farrell, for Sumitomo Canada Ltd.

2005 CanLII 8751 (ON SC)

Donald Houston, for Lonza AG.

Court File No.: 00-CV-200045CP

William Vanveen and Fraois Baril, for defendants F. Hoffmann-La Roche Ltd. and Hoffmann-La Roche Limited/Limitee.

Glenn M. Zakaib, for defendant Merck KGaA.

Katherine L. Kay and Eliot N. Kolers, for defendant Eisai Co., Ltd.

Evangelia Kriaris, for Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries, Ltd.); Takeda Canada Vitamin and Food Inc. [page762]

Sandra A. Forbes, for Aventis Animal Nutrition SA, the Rhne-Poulenc defendants and Daiichi Pharmaceutical Company, Ltd.

David W. Kent, for BASF Aktiengesellschaft, BASF Corporation and BASF Canada Inc.

Court File No.: 00-CV-198647CP

David W. Kent, for BASF Aktiengesellschaft, BASF Corporation and BASF Canada Inc.

Andrew J. Roman, for Akzo Nobel N.V. and Akzo Nobel Chemicals B.V.

George D. Hunter, for DCV Inc. and Ducoa L.P.

James Doris, for Bioproducts, Inc.

Tycho Manson, for Chinook Group, Ltd.

Court File No.: 00-CV-201723CP

Sandra A. Forbes, for Aventis Animal Nutrition S.A. and the Rhne-Poulenc defendants.

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F. Paul Morrison and J.P. Brown, for Degussa Corporation, Degussa Canada Inc. and Degussa-Huls A.G.

S.A. Dawson, for Novus International, Inc.

Court File No.: 00-CV-200044CP

Donald Houston, for Lonza AG and Alusuisse-Lonza Canada Inc.

Jennifer Badley (per D. Kent) for Reilly Industries Inc. and Reilly Chemicals S.A.

F. Paul Morrison and J.P. Brown, for Degussa Corporation, Degussa Canada Inc. and Degussa-Huls AG.

S. Vlahakis, for Nepera Inc., Roger Noack and David Purpi.

Court File No.: 40610

Donald Houston, for UCB S.A. and UCB Chemicals Corporation.

Court File No.: 42267CP

Donald Houston, for Wippon Soda Co. Ltd.

Pauline W. Wong, for defendant, Mitsui & Co., Ltd.

S.A. Dawson, for Novus International (Canada) Inc. [page763]

CUMMING J.:--

The Motions

[1] These are motions for certification, and for approval of the settlements, of a group of class actions in respect of certain defendants in the proceedings under ss. 32 and 33 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA").

[2] In 1999, multiple putative class actions were commenced in Ontario, British Columbia and Quebec alleging a complex,

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global, multi-party, price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. Ultimately, five separate class actions were reconstituted and pursued in Ontario, dealing with discrete vitamins and with separate representative plaintiffs. Two additional, so-called "supplemental", class actions have also been initiated. Certain "Settling Defendants" have now entered into a proposed settlement with certain "Settling Plaintiffs" in these class actions in Ontario, culminating in what is called the "Amended Canadian Vitamins Class Actions National Settlement Agreement" ("Agreement") made as of November 1, 2004, and amended as of January 6, 2005. The proposed settlement is for the national classes contemplated in the class actions at hand, together with separate class proceedings in British Columbia and Quebec. Separate settlement approval hearings will take place bef ore the courts in those provinces. (The status of the several class actions, upon successful motions for certification and settlement approval, is set forth in para. 106 of these Reasons.)

[3] The materials filed in support of the motion at hand are voluminous, filling three bankers' boxes. The Agreement is lengthy and complex with several schedules (see Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of the Motion Record). These materials can be found (together with additional information), online <http://www.vitaminsclassaction.com>.

[4] There are also very recent, trailing, additional, separate Settlement Agreements for three defendants (Akso Nobel Chemicals BV ("Akso"), UCB S.A. ("UCB"), and Reilly Industries Inc. ("Reilly") which, for the purposes of the motion at hand, can be notionally treated as though they are part of a single overall settlement.

[5] Capitalized terms used herein are as defined in the Agreement. However, the term "Class Counsel" means the law firms known as Siskinds, Cromarty, Ivey & Dowler ("Siskinds"), Sutts Strosberg ("Strosberg"), Camp Fiorante Matthews ("Camp"), Desmeules, and Allen Cooper. This definition of "Class Counsel" is different from the definition of "Class Counsel" found in the Agreement. The term "Quebec Counsel" means the two Montreal

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firms, Sylvestre, Charbonneau, Fafard and Unterberg, Labelle, Lebeau. [page764]

[6] As well, "Class Counsel Fees", as this term is used herein, means the total fees payable to both Class Counsel and Quebec Counsel.

[7] The motion for certification and court approval of the proposed settlement was heard on March 8, 2005, with the motion for the approval of "Class Counsel Fees" being heard separately March 9, 2005. Reasons for Decision in respect of certification and settlement approval have been given separately. The Reasons for Decision at hand deal with the discrete issue of certification and the approval of the Settlement Agreement.

[8] The plaintiffs assert that:

(a) the defendants entered into conspiracies to fix prices with respect to the distribution and sale of vitamins and related products in the period January 1, 1986 to February 28, 1999; and

(b) the worldwide vitamin industry was dominated by certain groupings of the defendants who controlled a significant percentage of the world vitamin market for many of the main types of vitamins.

[9] Some of the defendants pled guilty in the United States and Canada to price-fixing charges concerning vitamins. The class actions at hand are based upon the impact of the alleged global conspiracies upon residents of Canada.

[10] Generally, vitamins are manufactured and marketed for four primary uses: animal and fish feed supplements; direct human consumption; food and beverage additive for human consumption; and cosmetics, as more fully particularized in the chart below:

Product	Uses
Biotin (Vitamin B8, Vitamin H)	Human consumption

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	Animal and fish feed supplement
Bulk vitamins (Vitamin A, Vitamin B1, Vitamin B2, Vitamin B5, Vitamin B6, Vitamin B9, Vitamin B12, Vitamin C, Vitamin E, Beta Carotene, Canthaxanthin, Premix)	Human Consumption Food and Beverage additive for human consumption Cosmetics Animal and fish feed Supplement
Choline Chloride (Vitamin B4)	Food and beverage additive for human consumption Animal and fish feed supplement
Methionine	Human consumption Animal and fish feed supplement
Niacin, Niacinamide (Vitamin B3)	Human Consumption Food and beverage additive for human consumption Animal and fish feed supplement

[page765]

[11] There is a broad spectrum of plaintiffs because of the different users, namely, Direct Purchasers, Intermediate Purchasers and Consumers.

[12] The plaintiffs pursued this litigation, using a two-stage model. At stage one, on behalf of all purchasers of vitamins, the plaintiffs sought to hold the alleged conspirators accountable for the aggregate overcharge on all sales of vitamins in Canada by recovering aggregate damages. Then, at stage two, Class Counsel developed a distribution model for the aggregate damages to be paid to or for the benefit of Direct Purchasers, Intermediate Purchasers and Consumers, all of whom comprise the distribution chain.

[13] Class Counsel submits this two-stage approach is novel

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in that it avoids the fragmented approach in the United States to price-fixing conspiracy claims. Under U.S. federal anti-trust laws, only direct purchasers are entitled to claim damages, notwithstanding that some of the overcharge may have been passed through the distribution chain: Sherman Act, 26 Stat. 209, 15 U.S.C. 1. Over 20 states have responded to this federal law by passing state laws that permit indirect purchasers, harmed by a conspiracy, to claim damages in state courts.

The Motions for Certification

[14] The CPA is a procedural statute. Section 5 of the CPA sets out the test for certification. The word "shall" in s. 5(1) is mandatory: the court must certify an action as a class proceeding if all of the five criteria of s. 5(1) of the CPA are met and if there is no other reason to refuse to make the order: Bendall v. McGhan Medical Corp. (1993), 14 O.R. (3d) 734, [1993] O.J. No. 1948 (Gen. Div.), at p. 744 O.R.; Caputo v. Imperial Tobacco Ltd., [2004] O.J. No. 299, 236 D.L.R. (4th) 348 (S.C.J.), at para. 13.

[15] To certify an action as a class proceeding under s. 5, the plaintiff requires a "minimum evidentia[ry] basis for a certification order". It is necessary that the plaintiff "show some basis in fact for each of the certification requirements", other than the requirement in s. 5(1)(a). The "adequacy of the record will vary in the circumstances of each case": Hollick v. Toronto (City), [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, at para. 25.

[16] On these certification motions, there is before the court a substantial evidentiary base touching on all the requirements of s. 5(1). While the motions for certification vary in terms of the parties and vitamins involved, the motions can conveniently be discussed as a single motion.

[17] The following principles apply to the issue as to whether the pleadings disclose a cause of action under s. 5(1)

(a) of the CPA: [page766]

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(a) no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion;

(b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;

(c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;

(d) the novelty of the cause of action will not militate against the plaintiff;

(e) matters of law not fully settled in the jurisprudence must be permitted to proceed; and

(f) the statement of claim must be read generously to allow for inadequacies due to drafting frailties and the plaintiff'ss lack of access to key documents and discovery information: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, at pp. 990-91 S.C.R.; Anderson v. Wilson (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494 (C.A.), at p. 679 O.R.; Hollick, supra, at para. 25; M.C.C. v. Canada (Attorney General), [2004] O.J. No. 4924, 247 D.L.R. (4th) 667 (C.A.), at para. 41.

[18] The plaintiffs allege the following causes of action:

(a) the defendants contravened s. 45(1) of Part VI of the Competition Act, R.S.C. 1985, c. C-34, giving rise to a right of damages under ss. 36(1) and 45(1);

(b) the defendants are liable for tortious conspiracy and intentional interference with economic interests; and

(c) the defendants are liable for punitive damages.

[19] The plaintiffs submit that it is not "plain and obvious"

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and beyond doubt that they could not succeed in the causes of action pleaded.

[20] Class definition is critical because it identifies the persons who are entitled to notice, entitled to relief, if relief is awarded, and bound by the judgment. A class definition must be "defined ... by reference to objective criteria". A class definition dependent upon a determination of an issue in the action is unacceptable because the merits are not to be decided at the certification [page767] stage: Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2001] S.C.J. No. 63, at para. 38.

[21] A class definition must bear a rational relationship to the common issues: Canadian Shopping Centres, supra, at para. 38; Hollick, supra, at para. 17; M.C.C. v. Canada, supra, at para. 45.

[22] The proposed class definition for each of the Ontario actions can be stated as follows:

> All persons in Canada who purchased the relevant Class Vitamin(s) in Canada in the relevant Purchase Period(s) except the Excluded Persons and persons who are included in the corresponding British Columbia and Quebec Actions.

[23] The proposed class definitions embody all levels of purchasers, including those who purchased vitamins in raw form and those who purchased a product of which vitamins were a component part. As the court recognized in Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 431 U.S. 720 (1977), at paras. 737-38, in the absence of a bar respecting the use of the passing-on defence, the class necessarily has to include all levels of plaintiffs, from direct purchasers to intermediate purchasers to ultimate consumers. All groups of class members must be present to ensure that the wrongdoers do not retain any of the fruits of their wrongdoing and to protect the rights of the class members to make a claim against a common fund to address their losses.

[24] The case of Hanover Shoe v. United Shoe Machinery Corp.,

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392 U.S. 481, 88 S. Ct. 2224 (1968) serves as a starting point for the background of American price-fixing case law. Heard by the U.S. Supreme court in 1968, Hanover Shoe involved allegations by the plaintiffs that the defendants had monopolized the shoe machinery industry in violation of the Sherman Act, supra, resulting in an overcharge. The defendants argued that the plaintiff class had passed on some or all of the overcharge and therefore, was not entitled to recover such damages. The court rejected this defence, holding that the passing-on defence was not available to the defendants. In making its decision, the court determined that if the passing-on defence was permitted treble-damages actions would become too complicated, and the alleged co-conspirators "would retain the fruits of their illegality" because indirect purchasers, having only modest claims, would be unlikely to sue.

[25] The above decision was affirmed in 1977 in Illinois Brick, supra, another U.S. Supreme Court decision. The State of Illinois brought an action against manufacturers and distributors of concrete block in the Greater Chicago area. The state alleged that the defendants's illegal overcharges had been passed on through various levels of contractors to the plaintiff consumers, [page768] or indirect purchasers, causing them to suffer a loss. The court held that the passing-on theory must be applied uniformly for plaintiffs and defendants alike. Therefore, the plaintiffs could not use the passing-on theory offensively in light of the court'ss prior ruling that it could not be used defensively. The court further stated that only overcharged direct purchasers, and not others in the chain of manufacture or distributors, are considered parties "injured in his business or property" within the meaning of the Clayton Act, 38 Stat. 731, 15 U.S.C. 15: Illinois Brick.

[26] The result of Illinois Brick is arguably to create a windfall for a direct purchaser that passes on an overcharge in whole or in part to an indirect purchaser. The indirect purchaser, who suffers a loss as a result of the conspiracy, would be barred from any recovery.

[27] The decision of the U.S. Supreme Court in Illinois Brick was criticized in many quarters. The reasoning of its critics

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is largely contained within the dissent written by Mr. Justice Brennan, at p. 749, joined by Mr. Justice Marshall and Mr. Justice Blackmun:

> Today'ss decision flouts Congress's purpose and undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the court'ss decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers.

[28] Since the Supreme Court'ss decision in Illinois Brick, more than 20 states have enacted statutes which authorize indirect purchaser lawsuits. These statutes serve to ensure that the Illinois Brick decision does not bar state residents from potential recoveries against alleged conspirators. The United States Supreme Court has ruled that such statutes are not pre-empted by the court'ss decision in Illinois Brick. See California v. ARC America Corp., 109 S. Ct. 1661, 490 U.S. 93 (1989), at para. 1665.

[29] A national class which includes class members in all provinces and territories except Quebec (Consumers only) and British Columbia is appropriate. The subject matter of the class actions has a real and substantial connection to the Province of Ontario. As stated by this court in its decision dismissing the defendants jurisdictional challenge:

> [i]n my view, if the alleged conspiracy in each of the class actions is proven, there is a real and substantial connection with Ontario in respect of the subject matter of the actions in tort. [page769]

[30] I continued on to say:

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> [t]he centre of gravity for each of the class actions, initially on behalf of putative plaintiff aenational classes's, is Ontario. Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd., [2002] O.J. No. 298, 20 C.P.C. (5th) 351 (S.C.J.), at paras. 100-01.

[31] National classes have been certified by the Ontario court in many class actions: Wilson v. Servier Canada Inc. (2000), 50 O.R. (3d) 219, [2000] O.J. No. 3392 (S.C.J.), at p. 228 O.R., leave to appeal denied (2000), 52 O.R. (3d) 20, [2000] O.J. No. 4735 (S.C.J.), leave to appeal to S.C.C. denied, [2001] S.C.C.A. No. 88. Recently, Sharpe J.A. said that "there are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation": Currie v. McDonald'ss Restaurants of Canada Ltd., [2005] O.J. No. 506, 7 C.P.C. (6th) 60 (C.A.), at para. 15; Alfresh Beverages Canada Corp. v. Hoechst AG, [2002] O.J. No. 79, 16 C.P.C. (5th) 301 (S.C.J.), at para. 2.

[32] The plaintiffs propose the following common issue for each of the Ontario actions:

> Did the Settling Defendant(s) and its/their Affiliated Defendants(s) in the relevant Ontario Action agree to fix, raise, maintain or stabilize the prices of, or allocate markets and customers for, the relevant vitamins(s) in Canada in the relevant Purchase Period?

[33] The definition of "common issues" in s. 1 of the CPA "represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high". The common issues need only to "advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of a particular legal claim ... is not required." This requirement has been described by the Court of Appeal "as a low bar". The Supreme Court of Canada has held that in framing the common issues, the guiding question should be "whether allowing the suit to proceed as a representative one would avoid duplication of fact finding or legal analysis". The common issues question should be approached purposively: Carom v. Bre-

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X Minerals Ltd. (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.), at pp. 248-49 O.R.; M.C.C. v. Canada, supra, at para. 52; Western Canadian Shopping Centres, supra, at para. 39; Rumley v. British Columbia, [200

1] 3 S.C.R. 184, [2001] S.C.J. No. 39, at para. 29.

[34] Price-fixing conspiracy cases by their nature, deal with common legal and factual questions about the existence, scope and effect of an alleged conspiracy. Putative class members have a common interest in any proof of a concerted action, conspiracy and of agreement with the aim and result of restricting trade: [page770] In Re Sugar Industry Antitrust Litigation, 73 F.R.D. 322, 22 Fed. R. Serv. 2d (Callaghan) 634 (E.D. Pa. 1976), at p. 335.

[35] In the United States, it is widely accepted that:

> [An] allegation of price-fixing . . . will be viewed as a central or single overriding issue or a common nucleus of operative fact and will establish a common question.

Herbert B. Newberg & Alba Conte, Newberg on Class Actions, 3rd ed. (Colorado: Sheppards/McGraw-Hill, 1992), at pp. 18-15 to 18-21.

[36] If each class member in the subject class actions proceeded individually against the defendants, each would have to prove the existence and impact of the identical conspiracy to fix prices and allocate markets. Therefore, in each of these actions the common issue satisfies the test of advancing the proceeding and avoiding duplication of the fact-finding and legal analysis: Rumley, supra, at para. 29.

[37] "[T]he preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members." The only litigation alternatives to these class actions are a plethora of individual actions or no individual actions. These are not realistic alternatives to a class

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action: M.C.C. v. Canada, supra, at para. 73.

[38] One goal of the CPA is "litigation efficiency" or "judicial economy ... to enable the court system to deal efficiently with a large number of claims [arising] from the same event". Another goal is to encourage access by victims to the court system. Thus, it is said, the CPA is "anchored in the principles of access to justice and judicial economy". The assessment of the s. 5(1)(d) requirement of the CPA "should be conducted through the lens of the three principles of advantages of class actions -- judicial economy, access to justice, and behavioural modification": Carom, supra, at pp. 238-39 O.R.; Hollick, supra, at para. 27.

[39] It is necessary "to assess the litigation as a whole" and "to adopt a practical cost-benefit approach to" the s. 5(1)(d) requirement. It is "essential to assess the importance of the common issues in relation to the claim as a whole": Hollick, supra, at para. 29; M.C.C. v. Canada, supra, at para. 76.

[40] These class actions are the preferable procedure because they present a fair and manageable process. Moreover, for class members there are no "alternative avenues of redress apart from individual actions". Further, "individual actions would be less practical and less efficient than a class proceeding". Thus, [page771] certification would increase access to justice: Hollick, supra, at para. 31; Rumley, supra, at paras. 37-38.

[41] A class proceeding is the preferable procedure because it provides a fair, efficient and manageable method of determining the common issues and because it will advance the actions in accordance with the goals of judicial economy, access to justice and behaviour modification. In the absence of these class actions, it is unlikely that the majority of claims would be advanced at all. This accords with the preferability test as enunciated by the Supreme Court of Canada in Rumley and in Hollick, namely, whether or not the class proceeding would be a fair, efficient and manageable method of advancing the claim, and whether a class proceeding is preferable, in the sense of preferable to other procedures: Rumley, supra, at

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para. 35; Hollick, supra, at paras. 28-31.

[42] Any notion of judicial economy would be destroyed if each class member was required to proceed individually against the defendants and to prove the existence and impact of the identical conspiracy to fix prices: Re Catfish Antitrust Litigation, 826 F. Supp. 1019, 1993-2 Trade Cas. (CCH) P70, 395 (N.D. Miss. 1993), at p. 1034.

[43] Each of the proposed representative plaintiffs is a Direct Purchaser, Intermediate Purchaser or Consumer, and each is a class member within the proposed relevant Settlement Class definition. Each of the plaintiffs would fairly and adequately represent the interests of the Settlement Classes.

[44] The plaintiffs do not have on the common issue any interest in conflict with the interests of other class members. In conspiracy claims, every buyer and seller in the class has a common interest in proving the existence of the conspiracy and in maximizing the aggregate amount of class-wide damages: Re NASDAQ Market-Makers Antitrust Litigation, 169 F.R.D. 493, 1996-2 Trade Cas. (CCH) P71, 643 (S.D.N.Y. 1996), at p. 513.

[45] The plaintiffs have produced a plan through the Agreement which sets out a workable method of resolving the litigation on behalf of the Settlement Classes and of notifying class members.

[46] The motion for certification is, of course, a necessary prerequisite to obtaining approval of the proposed settlement. The Settling Defendants will only settle if the plaintiff class members are to be bound by the settlement, subject to the right to opt out. The consent of the Settling Defendants is only for the purpose of giving effect to the settlement and is conditional upon the court'ss approval of the settlement.

[47] In my view, and I so find, the prerequisite criteria required by the CPA for certification are met. Subject to the [page772] issue of the motions for settlement approval being determined favourably, orders shall issue certifying the Ontario class actions under consideration as requested in the

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motion records in respect of the Settling Defendants. (See para. 106 of these Reasons for a summary.) I turn now to a consideration of the proposed settlements.

The Proposed Settlements

[48] The proposed class action settlements at hand total, by far, the largest amount recovered in a class action relating to price-fixing in Canada. The settlements are based on a total damage assessment of about $140 million, including interest, expenses and costs and would result in an anticipated recovery of about $100 million after the deduction of Settlement Credits.

[49] Direct Purchasers will receive up to 12 per cent of the value of their vitamin purchases. The benefits available to Intermediate Purchasers and Consumers will be paid cy-prs to carefully selected and well-recognized consumer and industry organizations. Each cy-prs recipient has prepared a detailed proposal for the expenditure of its share of the settlement moneys. Each recipient will be held accountable for the moneys it receives through compliance with strict governing rules.

[50] During the settlement negotiations, Class Counsel sought damages for the class as a whole. As a result of these negotiations, the Settlement Amount reflected in the Agreement was $132,450,000 plus Pre-Deposit Interest. Since then:

(a) Akzo, a defendant in the Ontario Choline Chloride Action, has agreed to pay $250,000 to settle the claims against it (Akzo did not sell choline chloride in Canada);

(b) UCB, a defendant in the Supplemental Ontario Choline Chloride Action, has agreed to pay $250,000 to settle the claims against it (UCB did not sell choline chloride in Canada); and

(c) Reilly, a defendant in the Ontario Niacin Action, has agreed to settle the claims against it for $32,728.80, based on 16.5 per cent of its sales of $184,154.50, plus interest of $2,323.30 from March 1, 2003.

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[51] In April 2002, the plaintiffs reached an agreement in principle with three of the Settling Defendants to resolve all of the actions for the amount of $144 million plus post-agreement interest, assuming that all other defendants agreed to participate. [page773]

[52] In November 2002, after the first mediation before Mr. Justice Winkler, a memorandum of understanding was signed with some of the defendants reflecting a Settlement Amount of $148,500,000, being $144,000,000 plus capitalized interest of $4,500,000.

[53] By February 2003, some of the defendants who sold methionine advised that they would not participate in the proposed settlement. Thus, an adjustment was required. After negotiations and as a result of a second mediation, the amount of $148,500,000 was reduced to $133,200,000.

[54] In the fall of 2004 and January 2005, there [were] further adjustments to the Settlement Amount to bring it to $132,450,000.

[55] The $132,450,000 includes some capitalized interest (in an amount less than $4,500,000) and is treated as damages.

[56] The proposed settlements are based on a total of $140,676,928, as of the Deposit Date, calculated as follows:

Item	Amount
Aggregate damages per Amended Settlement Agreement (Settlement Amount $132,450,000 less expenses of $10,000,000)	$122,450,000
Plus: Akzo, UCB, Reilly settlement amounts totalling	$532,728
Subtotal of aggregate damages	$122,982,728
Plus: expenses per Amended Settlement Agreement	$10,000,000

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Subtotal including expenses	$132,982,728
Plus: Pre-Deposit Interest per Amended Settlement Agreement	$7,694,200
Total	$140,676,928

[57] Sales of vitamins in Canada which were subject to the alleged conspiracies totalled about $950 million. This amount includes about $43 million of methionine sales by a Settling Defendant and estimated methionine sales of about $80 million by the defendants who have not settled. Therefore, the settlements are based upon vitamins sales in Canada totalling about $870 million ($950 million minus $80 million).

[58] Dr. Thomas Ross, the plaintiffs's expert, concludes in his affidavit that the "best aepoint's estimate corresponds to overcharges on the order of 16 per cent". He also states, "absent the conspiracy, the quantity of vitamins purchased would have cost buyers only $749 million rather than $870 million, implying an aggregate damage number (overcharge) of $121 million". [page774]

[59] Dr. Ross also states:

> In summary, I suggest that a range of $103 million to $138 million provides a very good estimate of the damage arising from the price-fixing conspiracy considered in this affidavit. The "best estimate" or "point estimate" is approximately $121 million and the associated price overcharge is 16.2 per cent. This percentage price overcharge is similar to that estimated by Beyer for the United States.

[60] The settlements contemplate aggregate damages of $122,982,728, which compares favourably with Dr. Ross's "estimate of the damage arising" in the "range of $103 million to $138 million".

[61] In his affidavit on settlement approval in the U.S. direct purchaser vitamins class action, economist Dr. John

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Beyer opined that the weighted average overcharge based on his regression analysis (using U.S. data) was 13.5 per cent. This estimate can be compared to Dr. Ross's regression analysis of a 16.2 per cent overcharge (using Canadian data). The settlement in the U.S. Federal Court was in the range of 18 per cent to 20 per cent of gross sales in an environment of treble damages and large jury verdicts.

Direct Purchasers

[62] The aggregate damages of $122,982,728 includes the sales to the Direct Purchasers who commenced actions or made claims against some Settling Defendants and who have settled their claims directly with them.

[63] Prior to the first mediation on October 7, 2002, and in the context of claims and/or ongoing litigation and at arm'ss length, three Settling Defendants paid, in total, $24,100,000 to settle individual claims of Direct Purchasers who had purchased a total of $200,500,000 of vitamins from them. This equates to an average overcharge of 12 per cent of sales.

[64] Each Direct Purchaser who settled with a Settling Defendant is excluded from the settlements as an "Excluded Customer" because it has already been paid and no longer has a claim. The Settling Defendants are entitled to a deduction from the aggregate damages, reflecting the payments they made to such Excluded Customers who are not class members because they no longer have a claim.

[65] Each Settling Defendant who settled with a Direct Purchaser is entitled to a Settlement Credit calculated as 12 per cent of the Purchase Price. The Settlement Credits particularized in the Agreement total $42,436,670. These Settlement Credits represent settlements made by the Settling Defendants with Direct [page775] Purchasers who purchased approximately $353,639,000 of vitamins, calculated as:

$$\frac{\$42,436,670}{12 \text{ per cent}} \times 100 \text{ per cent}$$

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[66] By the time of the signing of the Agreement, the aforementioned three Settling Defendants had paid, on average, 11.5 per cent of the Purchase Price to the Direct Purchasers with whom they settled.

[67] After taking into account Settlement Credits, the Settling Defendants have agreed to pay to the Administrator approximately $98,240,258 as calculated in the following chart:

Item	Amount
Aggregate damages as per Amended Settlement Agreement	$122,450,000
Plus: Akzo Settlement Amount	250,000
Plus: UCB Settlement Amount	250,000
Plus: Reilly Settlement Amount	32,728
Subtotal of aggregate damages	122,982,728
Plus: expenses as per Amended Settlement Agreement	10 million
Subtotal of aggregate damages plus expenses	132,982,728
Plus: Pre-Deposit Interest as per Amended Settlement Agreement	7,694,200
Subtotal of aggregate damages, expenses and Pre-Deposit Interest	140,676,928
Less: Settlement Credits per the Amended Settlement Agreement	(42,436,670)
Total payable to Administrator	$98,240,258

[68] The moneys paid to the Administrator will earn interest in the Administrator'ss hands before being paid out. The additional interest to be earned will total about $2 million.

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Thus, the total recovered through the settlement of the class actions is estimated to be in excess of $100 million ($98,240,258 + $2 million).

[69] Five Funds are established by s. 6.1(1) of the Agreement. The estimated amount allocated to each Fund is set forth in the following chart: [page776]

Fund	Allocation Amended Settlement Agreement	Settlement Credits	Interest % allocation	Pre-deposit Interest	Akzo, UCB and Reilly Settlements	Amount Allocated to Each Fund
Direct Purchaser	94,450,000	(42,436,670)	.578	4,447,247	250,000	56,710,577
Intermediate Purchaser	11 million	n/a	.122	938,693	141,364	12,080,057
Consumer	11 million	n/a	.122	938,693	141,364	12,080,057
Methionine	6 million	n/a	.067	515,511	n/a	6,515,511
Expense	10 million	n/a	.111	854,056	n/a	10,854,056
Total	132,450,000	(42,436,670)				

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	7,694,200	532,728	98,240,258
Total			

[70] The recognition of Settlement Credits at 12 per cent and the entitlement of each Direct Purchaser to receive up to 12 per cent of the Purchase Price are inter-related and flow from the same relevant statistical information obtained by Class Counsel from some of the defendants during the course of settlement negotiations.

[71] As a result of the first mediation, Class Counsel agreed that it was reasonable for each Direct Purchaser to be paid up to 12 per cent of its Purchase Price.

[72] Together, the Direct Purchaser Fund and the Methionine Fund are allocated $105,662,758 with Pre-Deposit Interest (but before Settlement Credits), calculated as follows:

Item	Amount
Direct Purchaser Fund:	
Amended Settlement Agreement	94,450,000
Methionine Fund:	
Amended Settlement Agreement	6,000.000
Subtotal	100,450,000
Pre-Deposit Interest on Purchaser Fund	4,447,247
Pre-Deposit Interest on Methionine Fund	515,511
Akzo Settlement Agreement contribution to the Direct Purchaser fund	250,000
Total	105,662,758

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[73] The allocation of $105,662,758 to the Direct Purchaser Fund and the Methionine Fund was made in contemplation of payments to Direct Purchasers of $104,400,000, being 12 per cent of the total vitamin sales of $870 million. Class counsel submits that this allocation to the Direct Purchaser Fund gives Direct Purchasers added assurance that they will be paid 12 per cent of the Purchase Price and will motivate them to participate in the settlements rather than opt out. [page777]

[74] Direct Purchasers must decide whether or not to participate before the precise percentage payout of the Purchase Price to each Direct Purchaser is known. It is critical to the implementation of the settlements that Direct Purchasers do not opt out of the settlements. If Direct Purchasers with sales in excess of the Opt Out Threshold opt out, then the Settling Defendants, at their option, may declare the Agreement null and void pursuant to s. 14.4 thereof.

[75] The Methionine Fund will not be distributed to Direct Purchasers of methionine at this time. It will be held pending a further order of the court.

[76] However, if the requested $18,075,000 for Administration Expenses and Class Counsel Fees were to become payable, approximately $300,000 would be paid out of the Methionine Fund towards these costs.

[77] The proposed method of payments by the Administrator is user friendly for Direct Purchasers. The Administrator will write to virtually all Direct Purchasers to advise of their right to claim and, for many, will provide the precise amount due to the Direct Purchaser based on 12 per cent of their Purchase Price as disclosed by the Settling Defendants to the Administrator.

[78] If the Direct Purchaser agrees with the amount calculated by the Administrator, the Direct Purchaser need not produce any Purchase Price information. If the Direct Purchaser disagrees with the Administrator'ss calculation or the Administrator has no Purchase Price data for a particular Direct Purchaser, then the Direct Purchaser must prove the

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Purchase Price to the satisfaction of the Administrator by producing invoices or other records.

[79] There are tens of thousands of Intermediate Purchasers and millions of Consumers in the classes.

[80] There are substantial difficulties associated with the determination of the actual damage (taking into account pass through) suffered by each Intermediate Purchaser and Consumer. Moreover, the complexity and administrative costs associated with any direct distribution to each Intermediate Purchaser and Consumer would be prohibitive. Thus, the settlements contemplate cy-prs distributions to these two groups of class members.

[81] After the allocation to Direct Purchasers and to expenses, the balance of the settlement moneys is to be divided equally between the Intermediate Purchasers and Consumers so that each Fund initially would receive $11 million plus Pre-Deposit Interest. Class Counsel submit this to be reasonable given the complexities associated with a precise calculation of the damages of these class members. [page778]

Intermediate Purchasers

[82] The Intermediate Purchaser Fund will be distributed cy-prs to industry organizations for the benefit of Intermediate Purchasers.

[83] Intermediate Purchasers can generally be classified into one of three categories: agricultural producers, grocer/wholesalers and drugstores/pharmacies. The Intermediate Purchaser Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule F. It allocates 70 per cent of the fund to agricultural producers, 15 per cent to grocer/wholesalers and 15 per cent to drugstores/pharmacies.

[84] The Intermediate Purchaser Fund Distribution Protocol is intended to provide benefits to Intermediate Purchasers by funding industry organizations. Class Counsel identified potential recipient organizations by Internet research and

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discussions with various industry organizations. Each potential recipient was evaluated against the following criteria:

(a) the organization'ss membership base;

(b) whether the organization was national in scope;

(c) the organization'ss ability to deliver benefits to a particular group of Intermediate Purchasers; and

(d) the organization'ss financial stability.

[85] Proposed recipients have agreed to comply with the rules governing cy-prs distributions which were developed with the assistance of the Administrator, Deloitte & Touche LLP, and are found at s. 1.3 of Schedule F. These rules seek to ensure that all recipient organizations account to the courts for the settlement funds they receive.

[86] Each proposed recipient:

(a) prepared a detailed proposal which is before the court;

(b) delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirmed it would comply with the procedures governing distribution; and

(c) has agreed to use the funds in a manner that will deliver an identifiable benefit to its respective membership.

[87] The Canadian Cervid Council was to receive 0.112 per cent of the money available to Intermediate Purchasers. However, it is now defunct. Thus, funds otherwise to have been allocated to the [page779] Canadian Cervid Counsel will be distributed to the remaining participating organizations as provided in Schedule F.

[88] The Canadian Goat Society is to receive 0.098 per cent of the Intermediate Purchaser Fund. The Canadian Goat Society seeks approval to share its portion of the settlement funds

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with the Canadian Boer Goat Association, a group that also represents Canadian goat producers. This is accepted as a request. Therefore, upon court approval, each of these two organizations will receive 50 per cent of the funds earmarked for the Canadian Goat Society.

[89] Schedule F provides that two industry organizations representing grocers and grocer/wholesalers in Canada, the Federation of Independent Grocers and the Canadian Council of Grocery Distributors, are to receive 4.5 per cent and 10.5 per cent respectively of the available moneys. Combined, the membership in these two organizations accounts for virtually all grocer/wholesalers in Canada.

[90] Schedule F also provides that the Canadian Association of Chain Drugstores, an industry organization that represents the interests of over 70 per cent of all retail drugstores and pharmacies in Canada, is to receive 15 per cent of the available moneys on behalf of drugstore/pharmacies.

[91] Assuming a distribution of $11,400,000, the following chart lists the proposed cy-prs recipients on behalf of Intermediate Purchasers, the initial percentage they were to receive, their percentage taking into account the adjustment because of the demise of the Canadian Cervid Council, and the amount each is actually to receive:

Proposed Recipients	Initial %	Adjusted %	Adjusted Allocation
Agricultural Producers - 70%			
Canadian Pork Council	22.12	22.123	2,522,022
Canadian Cattlemen's Association	18.795	18.799	2,143,086
Dairy Farmers of Canada	10.927	10.934	1,246,476
Chicken Farmers of Canada	7.469	7.476	852,264

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Canadian Egg Marketing Agency	3.22	3.227	367,878
Canadian Aquaculture Industry Alliance	2.884	2.891	329,574
Canadian Turkey Marketing Agency	1.463	1.47	167,580
Equine Canada	1.162	1.169	133,266
Poultry Research Council	0.784	0.791	90,174
Canadian Broiler Hatching Egg Marketing Agency	0.525	0.532	60,648
Canadian Sheep Federation	0.266	0.273	31,122
Canadian Bison Association	0.175	0.182	20,748
Canadian Cervid Council (now defunct)	0.112	0	0
Canadian Goat Society	0.098	0.056	6,384
Canadian Boer Goat Association	0	0.056	6,384

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Grocer Wholesalers - 15%

Canadian Council of Grocery Distributors	10.5	10.507	1,197,798
Canadian Federation of Independent Grocers	4.5	4.507	513,798

Drugstores/Pharmacies - 15%

Canadian Association of Chain Drugstores	15.0	15.007	1,710,798

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Total	100.0	100.0	11,400,000

Consumers

[92] The initial corpus of the Consumer Fund will be distributed to consumer organizations for activities related to vitamin products, such as food and nutritional research, education and food programs, consumer services, or consumer protection activities for the indirect benefit of consumers of all ages.

[93] The Consumer Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule G. It allocates 30 per cent of the initial moneys in the Consumer Fund to research/advocacy groups for the benefit of all consumers across Canada. The remaining 70 per cent will be divided, based on population, between Quebec (16.5 per cent) and the rest of Canada (53.5 per cent) and allocated to service delivery groups. (Quebec Counsel independently have assumed responsibility for allocating the portion of the Consumer Fund earmarked for Quebec Consumers. This distribution is set out in s. 1.2(4) of Schedule G.) (The Quebec Court is to receive full particulars of these organizations and their plans.)

[94] Proposed recipients were identified through Internet research, discussions with various consumer organizations and through consultation among Class Counsel. Additionally, Class Counsel consulted with Mr. Gordon Wolfe, a person employed in the non-profit sector with knowledge of charitable and non-profit organizations.

[95] Class Counsel recognized that selecting regional or provincial organizations would make equal treatment across Canada difficult, so they concentrated on selecting Canadian-wide organizations that had a presence in most, if not all, provinces and territories.

[96] Each potential recipient was evaluated against the following criteria:

(a) the organization'ss ability to deliver benefits in each

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province and territory; [page781]

(b) the organization'ss ability to reach one or more of the target age groups, being children, youth, adults or the elderly;

(c) whether the organization was non-denominational;

(d) whether the organization had a charitable or non-profit designation;

(e) the organization'ss financial stability and budget; and

(f) the organization'ss history of advocacy, service delivery, research or education relevant to vitamin products.

[97] Financial information was obtained from each potential recipient. The size of an organization'ss budget was a consideration in determining what proportion of the Consumer Fund, if any, a particular organization should receive.

[98] Each proposed recipient prepared a detailed proposal which is before the court. Each proposed recipient also delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirming that it will comply with the rules governing cy-prs distributions found at Schedule G. Class Counsel have reviewed all of the proposals and state their belief that, if the distribution is made as proposed, the funds will provide a tangible benefit to consumers.

[99] Assuming an initial distribution of $11,400,000, the following chart lists the proposed cy-prs recipients on behalf of Consumers and the amount each is to receive:

Proposed Recipients	%	Allocation
Allocation to National Organizations -- 30%		
Food Safety Network	29.0	991,800

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Option Consommateurs (Canada)	29.0	991,800
Canadian Foundation for Dietetic Research	12.5	427,500
The Centre for Research in Women's Health	10.5	359,100
The Centre for Science in the Public Interest	10.5	359,100
Canadian Institute of Food and Nutrition	8.5	290,700
Allocation to all provinces and territories except Qubec -- 53.5%		
Victoria Order of Nurses	35.0	2,134,650
Canadian Association of Food Banks	25.0	1,524,750
Boys and Girls Clubs of Canada	20.0	1,219,800
Breakfast for Learning	15.0	914,850
Canadian Feed the Children	5.0	304,950

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Allocation to Qubec -- 16.5%		
Centraide pour tout le Qubec	46.0	865,260
Fonds d'aide au recours collectif	19.0	357,390
Campagne de prvention l'endettement des 40 associations de consommateurs du Qubec	10.0	188,100
Projet Petits prts (en collaboration avec la Fiducie Desjardins et la Coalition des associations des consommateurs du Qubec)	9.0	169,290
Fondation Claude Masse	8.0	150,480

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Option Consommateurs	8.0	150,480
Total		$11,400,000

[100] The Agreement also provides in s. 6.2(7) that any remaining "balance in the Direct Purchaser Fund ... shall be transferred to and become part of the Consumer Fund". Based on experience and the statistics from other price-fixing class actions, class counsel are of the view that it is probable that the "take-up rate" by Direct Purchasers will be less than 100 per cent and that substantial moneys will trickle down to the Consumer Fund.

[101] Section 1.3 of the Consumer Fund Distribution Protocol creates an alternative method to distribute moneys which are subsequently allocated to the Consumer Fund as a result of trickle down from the Direct Purchaser Fund.

[102] Although within the Consumer Fund Distribution Protocol, the intent of this alternative method of distribution is to benefit both consumers and Intermediate Purchasers. This is accomplished by paying the vast majority of the trickle down moneys to universities and colleges.

[103] For example, the allocation to the Ontario Veterinary College at the University of Guelph seeks in part to benefit Intermediate Purchasers, many of whom are in the agricultural business.

[104] The following chart lists the proposed recipients of the moneys which could subsequently be allocated to the Consumer Fund and the amounts each would receive, assuming an amount of $10 million trickles down:

	%	Allocation
Northwestern Region - 30.3%		
University of British Columbia	45	1,363,500

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University of Alberta	133	999,900
University of Manitoba	12	363,600
Western College of Veterinary Medicine, University of Saskatchewan	10	303,000

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Eastern Region - 7.6%		
Memorial University	50	380,000
Dalhousie University	50	380,000
Ontario -- 38.4%		
University of Toronto	25	960,000
University of Guelph	25	960,000
Ontario Veterinary College, University of Guelph	25	960,000
Ontario Agri-Food Education	25	960,000
Qubec - 23.7%		
Universit Laval	27	639,900
McGill University	26	616,200
Facult de mdecine vtrinaire, Universit of Montral	27	639,900
Option Consommateurs [to a maximum of $1 million]	20	474,000
Total	100	$10,000,000

[105] Option Consommateurs is to receive $1,142,280 of the initial Consumer cy-prs distribution and 20 per cent, to a

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maximum of $1 million, of the trickle down distribution. Option Consommateurs is not only a cy-prs recipient but also a representative plaintiff in Quebec. In Quebec, Option Consommateurs has a unique status and has the capacity to sue on behalf of Consumers. As representative plaintiff, Option Consommateurs has been the recipient on behalf of Quebec Consumers of a portion of settlement funds in eight settled actions.

The Status of the Ontario Class Actions upon Settlement Approval

[106] The following chart lists the outstanding class actions in Ontario and the status of each action if the court approves the proposed settlements and they become effective.

Proceeding	
	Ontario Biotin Action Glen Ford v. F. Hoffmann-La Roche Ltd.
Settling Defendants	
	F. Hoffmann-La Roche Ltd., Merck KGaA, Lonza AG, Sumitomo Chemical Co., Ltd., Tanabe Seiyaku Co., Ltd.
Non-Settling Defendants	
	None [page784]
Proceeding	
	Ontario Bulk Vitamins Action Glen Ford v. F. Hoffmann-La Roche Ltd.
Settling Defendants	
	F. Hoffmann-La Roche Ltd., Aventis Animal Nutrition S.A., Eisai Co., Ltd., Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries, Ltd.), Merck KGaA, Daiichi Pharmaceutical Company, Ltd.

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Non-Settling Defendants

none

Proceeding

Ontario Choline Chloride Action Fleming Feed Mill Ltd. v. BASF Atkiengesellschaft

Settling Defendants

Chinook Group Limited (incorrectly named Chinook Group, Ltd.) BASF Aktiengesellschaft Bioproducts, Incorporated (incorrectly named Bioproducts, Inc.) Akzo Nobel Chemicals BV

Non-Settling Defendants

DCV, Inc.
DuCoa, L.P.

Proceeding

Supplemental Ontario Choline Chloride Action Fleming Feed Mill Ltd. v. UCB S.A.

Settling Defendants

UCB S.A.
UCB Chemicals Corporation
UCB, Inc.

Non-Settling Defendants

none

Proceeding

Ontario Niacin Action VitaPharm Canada Ltd. v. Degussa-Hls

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AG

Settling Defendants

Degussa Canada Inc.
Lonza AG Nepera, Inc. (incorrectly named Nepera, Incorporated)
Reilly Industries Inc.

Non-Settling Defendants

None

Proceeding

Ontario Methionine Action Glen Ford v. Rhne-Poulenc S.A.

Settling Defendants

Aventis Animal Nutrition S.A.

Non-Settling Defendants

Degussa-Hls AG
Degussa Corporation
Degussa Canada Inc.
Novus International, Inc.

Proceeding

Supplemental Ontario Methionine Action Glen Ford v. Novus International (Canada) Inc.

Settling Defendants

None

Non-Settling Defendants

Novus International (Canada) Inc.
Nippon Soda Co. Ltd.

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Mitsui & Co. Ltd.

[107] If the proposed settlements are approved, Class Counsel will continue to prosecute the Ontario Methionine Action and the Supplemental Ontario Methionine Action.

[108] The only other outstanding action will be the Ontario Choline Chloride Action against DCV Inc. and DuCoa L.P. These companies represent that they are insolvent. Class Counsel will seek the court'ss direction about whether or not to continue this action against these defendants.

[109] The following chart sets out an estimate of the timeline for the implementation of the settlement if the courts in the three provinces give their approval: [page785]

Ontario approval hearing	March 8, 9, 2005
Decision -- Ontario	By March 24, 2005
British Columbia and Quebec approval hearings	April 6 and 21, 2005
Ontario judgment final	By April 24, 2005
British Columbia and Quebec judgments final	By May 6, 2005
IMPLEMENTATION OF NOTICE PROGRAM	By June 5, 2005
Opt Out period expires and claim period for Direct Purchasers begins	By August 5, 2005
Assume Opt Out Threshold is not exceeded, Administrator will report to the Courts and the Courts declare that settlements are operative and binding (s.16.1 Amended Settlement Agreement)	By September 9, 2005
Payout of Intermediate cy-prs and initial Consumer cy-prs no earlier than	September 9, 2005

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Claim period expires	By November 5, 2005
Payout to Direct Purchasers no earlier than	December 1, 2005
Calculation of trickle down and payout no earlier than	January 6, 2006
Final reports to Courts no earlier than	February 1, 2006

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The Law

[110] A settlement of a class proceeding is not binding unless approved by the court. To approve a settlement, the court must find that it is fair, reasonable and in the best interests of the class: CPA, s. 29(2); Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, [1998] O.J. No. 2811 (Gen. Div.), at p. 444 O.R., quashing (1998), 41 O.R. (3d) 97, [1998] O.J. No. 3622 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372.

[111] The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy. As observed in Amoco Canada Petroleum Co. v. Propak Systems Ltd., [2001] A.J. No. 600, 200 D.L.R. (4th) 667 (C.A.), at p. 677 D.L.R.:

> In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice.

[112] Similar sentiments have been expressed by Cronk J.A. in M. (J.) v. B. (W.) (2004), 71 O.R. (3d) 171, [2004] O.J. No. 2312 (C.A.), at para. 65:

> Finally, there is an additional, and powerful, reason to support the implementation of the Agreements in this case: the overriding public interest in encouraging the pre-trial settlement of civil cases. This laudatory objective [page786] has long been recognized by Canadian courts as fundamental to

> the proper administration of civil justice . . . Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation.

[113] There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm'ss length by counsel for the class, is presented for court approval: Manual for Complex Litigation, Third 30.42 (1995). See Cotton v. Hinton, 559 F.2d 1326, 15 Fair Empl. Prac. Cas. (BNA) 1342 (5th Cir. 1977), at p. 1330; Dabbs (Gen. Div.), supra, at p. 440 O.R.

[114] To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes: Dabbs (Gen. Div.), supra, at p. 440 O.R.

[115] In general terms, a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a "zone or range of reasonableness":

> ... all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

Dabbs (Gen. Div.), supra, p. 440 O.R.; Newberg, supra, at p. 11-104.

[116] A similar standard has been applied in non-class action proceedings in Ontario. The courts recognize that settlements are by their very nature compromises, which need not, and usually do not, satisfy every single concern of every stakeholder. Acceptable settlements may fall within a broad

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range of upper and lower limits:

> In cases such as this, it is not the court'ss function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court'ss function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal.

Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, [1988] O.J. No. 1745 (H.C.J.), at p. 230 O.R.

[117] In determining whether to approve a settlement, a court takes into account factors such as:

(a) the likelihood of recovery or likelihood of success;

(b) the amount and nature of discovery, evidence or investigation; [page787]

(c) the proposed settlement terms and conditions;

(d) the recommendation and experience of counsel;

(e) the future expense and likely duration of litigation;

(f) the recommendation of neutral parties, if any;

(g) the number of objectors and nature of objections;

(h) the presence of arms-length bargaining and the absence of collusion;

(i) the information conveying to the court the dynamics of, and the positions taken by

(j) the parties during the negotiations; and

(k) the degree and nature of communications by counsel and the representative

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(l) plaintiff with class members during the litigation.

Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 (Gen. Div.), at para. 13; Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572, 40 C.P.C. (4th) 151 (S.C.J.), at paras. 71-72.

[118] These factors constitute a guide in the process. It is not necessary that all factors receive the same consideration. In any particular case, certain of the listed factors will have greater significance than others, and weight should be attributed accordingly: Parsons, supra, at para. 73.

[119] When the subject class actions were commenced, this type of litigation was novel in Canada and the approach taken by Class Counsel was significantly different from that which had been seen in the United States Federal Court. Class Counsel advanced the actions on the theory that:

(1) the defendants should pay the total overcharge for vitamins sold in Canada; and

(2) the actions would be pursued in a two-phased approach: first, damages for the entire Canadian vitamins marketplace would be measured by the total overcharge for vitamins sold in Canada during the Purchase Periods; and second, an appropriate distribution protocol would be determined or negotiated. [page788]

[120] The plaintiffs faced litigation risks. The novel nature of the actions and the theory pursued by Class Counsel created the risk that the actions, or some of them, would not be certified, and the risk that if certified, the court would not assess damages in the aggregate. Quite probably, the defendants would have argued that the decision of the Ontario Court of Appeal in Chadha v. Bayer Inc. (2003), 63 O.R. (3d) 22, [2003] O.J. No. 27 (C.A.), affg (2001), 54 O.R. (3d) 520, [2001] O.J. No. 1844 (Div. Ct.) (certification denied), revg (1999), 45 O.R. (3d) 29, [1999] O.J. No. 2497 (S.C.J.) (certification granted), leave to appeal to S.C.C. denied, [2003] S.C.C.A. No. 106, ought as precedent to preclude certification in the

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actions at hand.

[121] The plaintiffs also faced risks specific to some of the defendants and actions. For example, until October 2002, there were no guilty pleas relating to Niacin. Certain bulk vitamins were not the subject of criminal convictions. Moreover, certain pleas refer to conspiracy periods which are considerably shorter than those pleaded in the actions. Therefore, Class Counsel faced the significant hurdle of having much less information to work with to prove overcharge rates for these bulk vitamins.

[122] If the defendants, or some of them, were successful in establishing any of the general defences, such as pass through, or the product specific defences, such as no sales in Canada or no conspiracy, then the plaintiffs would not succeed, at least in the entirety, at a trial of the common issues and there would be limited recovery. While these defences were arguably problematical, at the very least their number and complexity would lengthen a trial of the common issues.

[123] A court "need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. At minimum, a court must possess sufficient information to raise its decision above mere conjecture." The parties proposing the settlement have an obligation to provide sufficient information to permit the court to exercise its function of independent approval: Newberg, supra, at pp. 11-100 and 11-101; Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598, at para. 15.

[124] While the court requires sufficient evidence to be able to exercise an objective, impartial and independent assessment of the fairness of the settlement in all of the circumstances, it is not necessary that formal discovery have occurred at the time of settlement. It is clear that settlements reached at an early stage of proceedings are appropriate: Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598 at paras. 15 and 24. [page789]

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[125] Class Counsel had significant information about the case and a good understanding of liability and damages issues before embarking on the negotiation process. Class Counsel'ss grasp of these issues continued to increase throughout the negotiation process as a result of, among other things:

(a) interaction with U.S. counsel who had been litigating extensively against these defendants and were able to assist in devising strategy and highlighting some of the strengths and weaknesses of the case;

(b) independent analysis of class member records including transaction data from Agro-Pacific, Statistics Canada data and industry data;

(c) affidavit evidence and cross-examinations on affidavits conducted in the context of the motions by some defendants challenging the jurisdiction of the Ontario Court;

(d) information obtained through, and as the result of, settlements with Lindel Hilling and Merck KGaA;

(e) the Agreed Statements of Fact that supported the guilty pleas; and

(f) the input from expert economists, Dr. Thomas Ross and Dr. John Beyer.

[126] There is sufficient evidence before the court to allow it to exercise an objective and independent assessment of the fairness of the proposed settlement agreements.

[127] The function of a court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of possibly improving the terms of the settlement. It is within the power of the court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the court'ss power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement: Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598 at para. 10; Manual

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for Complex Litigation, supra, at 30.42.

[128] In reviewing the terms of a settlement, a court must be assured that the settlement secures an adequate advantage for the class in return for the compromise of litigation rights: Newberg, supra, at p. 11-46.

[129] The proposed settlement under consideration contemplates aggregate damages of $122,982,728, or $132,982,728 [page790] including expenses and costs of $10 million, or a total of $140,676,928 with Pre-Deposit Interest. The $122,982,728 compares favourably with Dr. Ross's estimate of the actual damages being in the "range of $103 million to $138 million".

[130] The settlement reasonably allocates $56,710,577 of the settlement moneys to the Direct Purchaser Fund. Any unclaimed portion will flow down to the Consumer Fund to be predominately used by universities for the benefit of Intermediate Purchasers and Consumers. Class Counsel expect that substantial amounts will flow down because the take-up rate by Direct Purchasers will not be 100 per cent.

[131] The distribution to Intermediate Purchasers and Consumers is through two cy-prs distribution plans, the Intermediate Purchaser Fund Distribution Protocol and the Consumer Fund Distribution Protocol, to recognized industry and consumer organizations and universities. Class Counsel identified the recipient organizations through diligent research and consultation. All recipient organizations will be accountable for settlement moneys received by them.

[132] Section 24 of the CPA permits damages to be assessed in the aggregate. Section 26 permits the court to direct the distribution of settlement moneys by any means it considers appropriate whether or not such a distribution would benefit persons who are not class members or persons who otherwise might receive monetary compensation as a result of the proceeding. In other words, the CPA permits cy-prs distributions of the type contemplated in Schedules F and G of the Agreement.

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[133] Cy-prs distributions of the type outlined in Schedules F and G have been accepted by the Ontario Court. In Hoechst, supra, at paras. 15-16, a price-fixing case involving food additives, this court held:

> There are significant problems in identifying possible claimants below the manufacturer level. Hence, the moneys allocated to intermediaries such as wholesalers and consumers are to be paid by a cy-prs distribution to specified not-for-profit entities, in effect as surrogates for these categories of claimants, for the general, indirect benefit of such class members. The CPA provides flexibility for this approach: see ss. 24 and 26.
>
> Such a settlement and payments largely serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing. That is, the private class action litigation bar functions as a regulator in the public interest for public policy objectives.

[134] This reasoning was adopted by the court in Sutherland v. Boots Pharmaceutical PLC, [2002] O.J. No. 1361, 21 C.P.C. (5th) 196 (S.C.J.). The court approved a settlement which distributed all of the settlement benefits cy-prs to various consumer [page791] groups for the indirect benefit of class members. The court held [at para. 16]:

> [w]here in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a cy-prs distribution to recognized organizations or institutions which will benefit class members.

[135] Class Counsel are seeking an order barring any future claim for contribution or indemnity against the Settling Defendants (and UCB in the additional, trailer settlement achieved with it). Once it became clear in the course of negotiations some defendants would not participate in a global settlement, a bar order was critical in the negotiation of the Agreement. Class Counsel submits that the form of the bar order

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is fair and properly balances the competing interests of the classes, the Settling Defendants, UCB and the Non-Settling Defendants. No bar order is sought by Akzo or Reilly.

[136] Bar orders have their origin in the United States and are frequently used to achieve settlement in complex tort and securities litigation, including class proceedings. In the California case of Nelson v. Bennett, 662 F. Supp. 1324 (E.D. Cal. 1987), at p. 1335, District Court Judge Ramirez traced the history of the development of such orders and commented that they arose to counteract the inhibiting effect of claims for contribution on settlement. From a policy perspective, Ramirez J. concluded that ruling in favour of a bar order would "accommodate both the interests of settlement and of fairness and deterrence". He further stated that a "no bar" rule would give "exclusive weight to fairness and deterrence at the complete expense of settlement".

[137] In the case Re Nucorp Energy Securities Litigation, 661 F. Supp. 1403, Fed. Sec. L. Rep. (CCH) P93, 224 (S.D. Cal. 1987), at p. 1408, District Court Judge Irving went so far as to say that without some sort of settlement bar, partial settlement of any federal securities case before trial is, "as a practical matter, impossible". Any single defendant who refuses to settle, would force all other defendants to trial.

[138] Ontario courts favour settlement wherever possible and have found that the underlying principles of American bar orders may be applied in Canada. For example, in Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245 (S.C.J.), at p. 141 O.R., a settlement agreement preventing non-settling defendants from making claims for contribution or indemnity was approved. Winkler J. considered many American authorities in support of the proposed [page792] bar order and concluded that while the U.S. cases were not dispositive of the issue, the underlying principles were applicable and, in the Ontario context, ss. 12 and 13 of the CPA provided a mechanism for supporting these principles:

I do, however, find that the underlying principles on which

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"bar orders" are granted in the American cases have some application to these proceedings. Moreover, the Class Proceedings Act provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 a court may "stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate". This broad discretion is buttressed by s. 12 which permits the court, on a motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

[139] Following the Ontario New Home Warranty decision, bar orders have been approved in the class actions context in order to facilitate partial settlements in mass tort claims that benefit the plaintiffs and achieve the goals of the class proceeding legislation. See Millard v. North George Capital Management Ltd., [2000] O.J. No. 1535, 47 C.P.C. (4th) 365 (S.C.J.); Sawatzky v. Societe Chirurgicale Instrumentarium Inc., [1999] B.C.J. No. 1814, 37 C.P.C. (4th) 163 (S.C.); Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 1481, 91 B.C.L.R. (3d) 309 (S.C.); McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474, 8 C.P.C. (5th) 349 (S.C.J.); and Gariepy v. Shell Oil Co., unreported, April 16, 2004, Doc. 30781/99 (Toronto, Ont. S.C.J.), at para. 16. Most recently, in a price-fixing case, the court approved a bar order: Bona Foods Ltd. v. Ajinomoto U.S.A., Inc., [2004] O.J. No. 908, 2 C.P.C. (6th) 15 (S.C.J.).

[140] In my view, the requested bar order is fair and reasonable.

[141] The burden of proving that a settlement ought to be approved rests with the proponents, however, the recommendation of capable counsel is significant. The recommendation of class counsel is clearly not dispositive as class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputations for integrity and diligent effort on behalf of their clients is also at stake: Dabbs (Gen. Div.),

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supra, at p. 440 O.R.

[142] In the absence of evidence to the contrary, the recommendation of experienced counsel should be accorded considerable weight, as stated in Manual for Complex Litigation, supra, at 30.42:

> [T]he judge should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy, and reasonableness may attach to a class settlement [page793] reached in arms length negotiations between experienced, capable counsel after meaningful discovery.

[143] In the normal course, once a court is satisfied that a settlement is the product of arm'ss length bargaining by experienced counsel, the settlement will be approved:

> As a practical matter, the overwhelming majority of proposed settlements are approved when the court is satisfied that arms- length bargaining took place during settlement negotiations and experienced class counsel has recommended approval of the settlement.

Newberg, supra, at p. 11-42.

[144] Class Counsel and defence counsel have a unique ability to assess the potential risks and rewards of litigation. Class Counsel recommend approval of the proposed settlement. They have extensive experience in class action litigation and price-fixing litigation. In the absence of evidence to the contrary, the recommendation of these experienced counsel should be given considerable weight.

[145] The proposed settlement achieves the legislative goals of the CPA and affords significant judicial efficiency and economy, while allowing access to justice through an efficient and cost effective distribution mechanism. To the extent that civil damages are paid to or for the benefit of the class over and above the criminal fines and penalties which have been paid by some Settling Defendants, there will be an incentive for

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these Settling Defendants, and others, to refrain from engaging in the type of behaviour complained of in the future.

[146] Class members will receive fair and reasonable benefits in return for the compromise of their litigation rights against the Settling Defendants, and Akzo, UCB and Reilly.

[147] If there were to be a trial of the common issues, the litigation process to determine liability would be complicated and protracted, and no class member would be paid until the litigation process ended. The practical value of an expedited recovery is a significant factor for consideration. In addition to the legal and factual risks, a practical concern favouring settlement includes the potential that a case such as this one would take considerable expense and many more years to reach trial and exhaust all appeals: Dabbs (Gen. Div.), supra, at p. 441 O.R.

[148] The court acknowledges a range of acceptable settlements, thereby recognizing, "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion". Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598 at para. 12. [page794]

[149] The settlements at hand were, in part, as a result of two mediations conducted by Winkler J. Also, the Children'ss Lawyer and the Public Trustee were aware of the ongoing negotiations and having been given notice of this approval hearing have indicated they do not wish to make submissions.

[150] In appropriate circumstances, objectors to a class action settlement may be granted leave to participate in the settlement approval hearing. Objectors who are granted leave are not parties to the proceeding, and accordingly do not have the rights of a party: Dabbs (C.A.), supra, at p. 100 O.R.

[151] Even in the presence of objectors, the settlement approval process is non-adversarial in nature:

It is important that the court itself remain firmly in

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> control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other.

Dabbs v. Sun Life Assurance Co. of Canada, supra,[1998] O.J. No. 1598 at para. 21.

[152] An objector who suggests that Class Counsel ought to have structured the settlement differently essentially seeks to substitute the personal judgment of such objector for the judgment of Class Counsel.

[153] It is not within the jurisdiction of the court to consider an objection based upon extra-legal concerns. The approval process does not include an assessment of the proposed settlement from a social or political context:

> The parties have chosen to settle the issue on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the class as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra legal and outside the ambit of the court'ss review of the settlement.

Parsons, supra, at para. 77.

[154] The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member. Further, when a settlement is reached prior to the expiry of the opt out period, class members have a further element of control:

> The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The CPA mandates that class members retain for a certain time, the right to opt out of a class

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> proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual'ss circumstances. In this case, there is the [page795] added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the class.

Parsons, supra, at para. 79; Dabbs v. Sun Life Assurance Co. of Canada, supra, [1998] O.J. No. 1598 at para. 11.

The Objections

[155] As of February 15, 2005, the original deadline for written objections, Mr. William Dermody, the appointed friend of the Ontario Court in this settlement approval process, had received only three written objections in respect of the proposed settlement.

[156] These were on behalf of two organizations, the International Society for Orthomolecular Medicine and the Health Action Network Society.

[157] The third objection is by Dr. A. Hoffer, a retired psychiatrist and former Director of Psychiatric Research, Department of Public Health, for the province of Saskatchewan and a founder of the developing branch of medicine known as "orthomolecular medicine and psychiatry". His letter seeks consideration for patients who receive treatment of "optimum doses of vitamins for . . . forms of mental and physical illness". Dr. Hoffer could not appear, so he did not make an oral submission.

[158] It is necessary and appropriate that only well-recognized entities be the recipients of the cy-prs distributions. Such entities have an established record of providing not-for-profit services, with transparency in respect of their activities and accounting. They provide the greatest level of confidence and assurance to the general consuming public that the moneys distributed will be responsibly used.

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There are a multitude of charitable organizations in Canada who can use the limited moneys available through the contemplated cy-prs distribution. It is readily apparent that the organizations listed in Schedule G of the Agreement meet this criteria. It is also clear that there are other organizations who could arguably meet the criteria.

[159] The process to determine recipients, and the reasons for the choices made, in respect of the listed organizations which are to receive the distributions in accordance with the Consumer Fund Distribution Protocol (Schedule G to the Agreement), including the proposals received from the successful intended recipients, are set forth in the Affidavit of Ms. Andrea DeKay dated February 16, 2005 (Vols. 3 and 4 of the Motion Record).

[160] The first step in creating the Consumer Fund Distribution Protocol was to identify the primary objective, being the delivery of vitamin related benefits to Canadian Consumers of all ages and [page796] across Canada. The second step was to identify potential recipient organizations which would meet the primary objective.

[161] Class Counsel took into consideration the extent to which a proposed organization could deliver benefits in each province and territory, could reach one or more of the target age groups, whether the organization was non-denominational, whether there was a registered charitable designation, the organization'ss financial stability and budget and the organization'ss history of advocacy, service delivery, research or education relevant to vitamin products. Consultation was also made with an expert in the non-profit sector as to the tentative list of possible recipients for review and comment.

[162] The third step in the process was to develop a draft plan of distribution and the allocation of the limited resources. Ultimately, money was not allocated simply on a provincial or regional population basis but also on the basis of research/advocacy or service delivery. For example, 30 per cent of the Fund is allocated to research/ advocacy focused organizations.

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[163] Finally, stringent guidelines were developed and reviewed by the accounting firm Deloitte & Touche LLP (the proposed Administrator) to ensure accountability. A binding commitment was obtained from each organization to use the moneys solely for activities related to vitamin products, to maintain a separate account for the moneys received, to provide reports, and to consent to an independent audit and to reimburse moneys in the event a court should so order.

[164] For example, The Food Safety Network is to receive 29 per cent, The Centre for Research in Women'ss Health 10.5 per cent, Breakfast for Learning 15 per cent and Canadian Feed the Children 5 per cent.

[165] The distribution of any moneys subsequently allocated to the Consumer Fund because of a less than 100 per cent take-up in respect of the Direct Purchasers Fund (anticipated by Class Counsel) will go to listed universities.

[166] Each objection was in respect of the list of proposed recipients of the Consumer Fund cy-prs distribution. The objectors are persons or supporters of organizations or groups who wish to be recipients of the cy-prs distribution.

[167] A further objection was received by fax from the Consumer Health Organization of Canada March 4, 2005. A fifth objection was received by fax from Mr. Lars Soderstrom March 6, 2005.

[168] The written submissions received were filed as part of the record of this proceeding. Each of the individual objectors who appeared at the hearing March 8, 2005, was allowed to make an oral submission and to file such further materials as desired. [page797]

[169] Mr. Soderstrom'ss submission is unique in that he seems to argue against the merits of the proposed settlement on the basis that it does not result in payments directly to consumers. Mr. Borden has recently commenced an application on behalf of Mr. Soderstrom on the asserted basis that Mr.

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Stroderstrom'ss rights under the Canadian Charter of Rights and Freedoms are violated by the proposed settlement. The short answer to Mr. Soderstrom'ss objection is that he can, of course, opt out of the settlement and pursue his individual application, as he apparently intends to do. As I have stated above, in my view, a cy-prs mechanism for the distribution of benefits through the recovery in respect of the damages to Consumers is the only viable, cost efficient and fair approach.

[170] I turn now to the other four objections. Class Counsel properly objected to any organization or corporate entity which filed an objection being heard itself as an objector for the reason that it is not a class member. Hence, individuals, each being within the Consumer class in respect of the class actions at hand, made submissions, arguing that some parts of the moneys available should go to certain organizations.

[171] The only objector without an individual present who could speak in its interest was the International Society for Orthomolecular Medicine. Dr. Hoffer'ss letter objecting, discussed above, was also addressed to a like interest and concern as expressed by this organization. The responding affidavit of Ms. Andrea Dekay suggests that this organization represents a group of orthomolecular societies throughout the world, with its president being in the Netherlands.

[172] Mr. Milt Bowling, Mr. Trueman Tuck, "a legal and political rights advocate", Dr. David Rowland and Mr. Paul Anderson, each made oral submissions. Mr. Tuck filed an extensive written submission.

[173] Mr. Bowling argues for the inclusion of the Health Action Network Society ("HANS") as a recipient of funds. This organization is an educational, non-profit and charitable organization which has reportedly worked for some 22 years in educating consumers on the benefits of nutritional therapies, including the use of vitamins and minerals.

[174] Mr. Anderson argued for the inclusion of the Consumer Health Organization of Canada in the list of recipients from the Consumer Fund.

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[175] Mr. Tuck proposes that funds from the settlement be given to the Live Longer Foundation. However, this entity was incorporated only in November 2004. Mr. Tuck is also active on behalf of "Friends of Freedom", not a registered charity, which [page798] reportedly actively supports several court actions by alternative health organizations against Health Canada. This group also supports HANS. Mr. Tuck is an advocate on behalf of a number of organizations which promote food based medicines as a health measure. Mr. Tuck is a passionate advocate in favour of vitamins for health purposes. He states he is opposed to doctors and prescription drugs.

[176] Ms. DeKay states in her responding affidavit of March 3, 2005, to the objections, after completing her research into the organizations favoured by the objectors, that Class Counsel "are satisfied that none of the organizations which objected to the settlement satisfy the criteria" determined by the process employed for the selection of recipient organizations, as outlined in her affidavit of February 16, 2005 (and discussed above). She concludes that she "would not have recommended that any of these organizations receive settlement moneys from the Consumer Fund".

[177] The court concurs with the view of Class Counsel that the organizations favoured by the objections do not meet the selection criteria. This is not to imply any condemnation or criticism of these organizations. It is simply to say that none are sufficiently substantial to meet the extensive, demanding criteria for selection. As discussed above, the selection criteria is quite reasonable and responsible in all the circumstances. To repeat, there is a very limited supply of moneys for distribution, with potentially many worthy claimant organizations. Not nearly all can be selected. The stringent criteria for selection is both appropriate and necessary for selection and maximizes the confidence of the broad, vitamin consuming public that the objectives of the settlement are being realized, and will be easily seen to be realized, by the proposed recipient organizations.

[178] Given the substantial size of the class (millions in

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this case) and the relatively small number of objections, the court must also take account of the relative paucity of objections and conclude that the vast majority of the class is supportive of the settlement. Finally, the selection put forward by Class Counsel is certainly reasonable, worthy and appropriate from every objective viewpoint.

[179] "While approval of a proposed class settlement is not a matter to be determined by a plebiscite, the views of putative class members are certainly relevant and entitled to great weight": Re Silicone Gel Breast Implant Products Liability Litigation, 1994 WL 578353 (N.D. Ala.), at p. 5. [page799]

Disposition

[180] All of the negotiations in this case, including those with Lindel Hilling, Merck KGaA, Nepera, Inc., Lonza, Akzo, UCB and Reilly were at arms's length and adversarial in nature. Each clause of each settlement agreement was achieved through extensive, adversarial and protracted negotiations.

[181] The drafting and negotiation of the Agreement was adversarial and hard fought over 18 months. Reportedly, over 60 drafts of the agreements were circulated.

[182] During the litigation process, before the announcement of the proposed settlement, Class Counsel did not attempt to directly communicate with or register individual class members because the large number (in the millions) made it impractical to do so. However, Class Counsel did maintain vitamins websites and received numerous telephone and electronic contacts initiated by class members.

[183] The proposed representative plaintiffs support and recommend approval of the settlement.

[184] The inclusive model adopted by Class Counsel assesses aggregate damages for the entire marketplace, and provides benefits, directly and indirectly, to all purchasers in an efficient and manageable way.

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[185] Numerous price-fixing class actions have been commenced in Ontario. Two of these cases, Chadha v. Bayer, supra, and Price v. Panasonic Canada Inc., [2002] O.J. No. 2362, 22 C.P.C. (5th) 382 (S.C.J.), were commenced on behalf of consumers only. In each of these consumer-only cases, the court refused to grant certification. Conversely, seven price-fixing class actions have been certified in Ontario in the context of negotiated settlements. In each of the settled cases, all purchasers of the price-fixed product, including Direct Purchasers, Intermediate Purchasers and Consumers, were included in the class. See Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co., [2001] O.J. No. 6028 (S.C.J.); Hoechst, supra; Bona Foods Ltd. v. Pfizer Inc., [2002] O.J. No. 5553 (S.C.J.); Newly Weds Foods Co. v. Pfizer Inc., unreported, April 7, 2003, Doc. 39495 (Toronto); Minnema v. Archer Daniels Midland Co., unreported, February 28, 2003, Doc. G23495-99CP (Barrie, Ont. Sup. Ct.); A & M Sod Supply Ltd. v. Akzo Nobel Chemicals B.V., unreported, December 22, 2003, Doc. 02-CT-40300CP (Toronto); Bona Foods Ltd. v. Ajinomoto U.S.A., Inc., supra.

[186] In approving the settlement in Hoechst, this court recognized that such settlements and payments "serve the important policy objective of general and specific deterrence of [page800] wrongful conduct through price-fixing": Hoechst, supra, at para. 16.

[187] The CPA is remedial and is to be given a generous, broad, liberal and purposive interpretation. The three goals of a class action regime, as recognized by the 1982 Ontario Law Reform Commission'ss Report on Class Actions, vol. 1 (Toronto: Ministry of the Attorney General, 1982), by the Attorney General'ss Advisory Committee on Class Action Reform and by the Supreme Court of Canada, are judicial efficiency, improved access to the courts and behaviour modification: Interpretation Act, R.S.O. 1990, c. I.11, s. 10; Hollick, supra, at para. 15; Western Canadian Shopping Centres, supra, at paras. 27-29.

[188] The settlements are the product of lengthy, adversarial negotiations which understandably have involved compromise. Given the number of parties, the complexities of the issues and

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the litigation risks involved in proceeding to trial, in my view, and I so find, the settlements are fair and reasonable and in the best interests of the classes as a whole and should be approved.

[189] For the reasons given, the overall settlement of the subject class actions is found to be fair and reasonable and in the best interests of all class members. Approval is given to the proposed settlement as set forth in the Agreement, subject to a determination and findings in respect of the regime set forth in s. 18.1 thereof, to be dealt with in separate Reasons for Decision, relating to the motion for approval of Class Counsel Fees.

[190] Counsel can prepare the necessary implementing orders and judgments for my signature consistent with these Reasons for Decision and the separate Reasons for Decision relating to Class Counsel Fees.

Motions granted.

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TAB 6

See paras. 8, 1282

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COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

Nos.: 500-09-025385-154, 500-09-025386-152 and 500-09-025387-150
(500-06-000070-983 and 500-06-000076-980)

DATE: March 1, 2019

CORAM: THE HONOURABLE YVES-MARIE MORISSETTE, J.A.
ALLAN R. HILTON, J.A.
MARIE-FRANCE BICH, J.A.
NICHOLAS KASIRER, J.A.
ÉTIENNE PARENT, J.A.

No.: 500-09-025385-154

IMPERIAL TOBACCO CANADA LIMITED
APELLANT / CROSS-RESPONDENT - defendant
v.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
RESPONDENTS / CROSS-APPELLANTS - plaintiffs And
JTI-MACDONALD CORP.

ROTHMANS, BENSON & HEDGES INC.
IMPLEADED PARTIES - defendants

No.: 500-09-025386-152

JTI-MACDONALD CORP.
APPELLANT / CROSS-RESPONDENT - defendant

v.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
RESPONDENTS / CROSS-APPELLANTS - plaintiffs And
IMPERIAL TOBACCO CANADA LIMITED
ROTHMANS, BENSON & HEDGES INC.
IMPLEADED PARTIES – defendants

No.: 500-09-025387-150

ROTHMANS, BENSON & HEDGES INC.
APPELLANT / CROSS-RESPONDENT - defendant

v.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS CÉCILIA LÉTOURNEAU
RESPONDENTS / CROSS-APPELLANTS - plaintiffs And
JTI-MACDONALD CORP.
IMPERIAL TOBACCO CANADA LIMITED
IMPLEADED PARTIES - defendants

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JUDGMENT

2019 QCCA 358 (CanLII)

[1] The Court is asked to determine the outcome of three appeals and one cross-appeal contesting a judgment rendered on May 27, 2015,[1] and corrected on June 9, 2015, by the Superior Court, District of Montreal (the Honourable Brian Riordan), in the context of two class actions[2] whose origins date back to 1998. The judgment ordered the collective recovery of $6,858,864,000 in compensatory damages for the injury caused to the members in one of the class actions and the collective recovery of a total of $131,090,000 in punitive damages in both files.

[2] In that judgment, the Honourable Brian Riordan condemned the appellants, three cigarette manufacturers, to pay moral and punitive damages due to the multiple faults they committed over the course of the second half of the twentieth century. The appellants' liability is invoked on several fronts, involving the regimes of extracontractual liability under the general law, the provisions of the *Charter of human rights and freedoms*[3] (the "***Charter***"), those of the *Consumer Protection Act*[4] (the "**C.P.A.**") and the regime of manufacturer's liability. Added to that are the provisions that derogate from the general law in the *Tobacco-related Damages and Health Care Costs Recovery Act*[5] (the "**T.R.D.A.**"), enacted by the National Assembly in 2009. The appellants are alleged to have conspired, for close to five decades, to silence or minimize the risks inherent to smoking and to have, if not created, at least maintained a controversy surrounding the state of scientific knowledge to encourage smoking. It is alleged that this policy of silence and this scientific controversy, *inter alia*, are faults that caused the members' smoking and, consequently, the development of certain diseases among some and tobacco addiction among others.

[3] In the Blais file, which groups together tens of thousands of persons who developed certain types of cancer and emphysema, the appellants were condemned to indemnify the victims of these diseases by paying moral damages ($6,858,864,000) and a symbolic amount of punitive damages ($90,000). In the Létourneau file, which groups together hundreds of thousands of persons who have developed an addiction to tobacco, the judge found the appellants liable but refused to award compensation to the members. He nevertheless condemned the appellants to pay substantial punitive damages totalling $131,000,000. Collective recovery was ordered in both files.

[4] In these appeals, the appellants allege that the trial judge made numerous errors. In addition to his conclusions on fault, causation and the assessment of damages, the appellants challenge a series of contingent conclusions, including the application of the general principles governing class actions, collective recovery, the prescription of certain claims, the applicability of

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1 *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382 [judgment *a quo*].

2 In the original French version of the judgment, the expression "*recours collectif*" is used to refer to the actions in these files, rather than the expression "*action collective*" set out in the new *Code of Civil Procedure*. The English translation of both these expressions is "class action."

3 *Charter of human rights and freedoms*, CQLR, c. C-12.

4 *Consumer Protection Act,* CQLR c P-40.1.

5 *Tobacco-related Damages and Health Care Costs Recovery Act*, CQLR c. R-2.2.0.0.1.

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the *Charter* and the C.P.A., the calculation of the quantum of punitive damages, the starting point for the calculation of interest and the additional indemnity, as well as various findings of fact concerning certain actions of the appellants and the admissibility or use of certain exhibits.

[5] After carefully reviewing the reasons of the trial judge and the French translation accompanying them, the Court has concluded that only the English version should be considered authoritative. When analyzing reasons of this magnitude, which make abundant reference to legal, technical and scientific terminology that is often highly specialized or uncommon, it is advisable to follow the example of the Supreme Court of Canada and defer to the language used by their author in drafting them. As the judge noted in paragraph 1205 of his reasons, that language is English. The Court will therefore cite herein only the reasons filed in English, and the same will apply for the excerpt from the conclusions of the trial judgment reproduced in the conclusions of this judgment. In the footnotes that appear in support of these reasons, references to the case law (except for the judgment *a quo*) and to certain statutes systematically reproduce the complete reference to the original source. Due to the length of the judgment, it seemed preferable to proceed in this way for the reader's convenience, rather than by *supra* and *infra* references in the footnotes. An exception to this rule, however, is made for the footnotes referring to commentary. In general, the page references refer to the page numbers of the exhibit referred to; if the exhibit does not have page numbers, the references refer to the page numbers of the joint schedules ("J.S."). The titles of exhibits are indicated only when relevant to the understanding of the reasons.

I. BACKGROUND

1. CLASS ACTIONS

[6] The two class actions that were before the Superior Court concern the period from 1950 to 1998 ("**the relevant period**"). Within the framework of each of the actions, the respondents alleged that the appellants committed numerous faults that caused injury to hundreds of thousands of Quebec residents. These faults originate in four principal sets of circumstances. They result from (i) a failure to fulfil the general duty not to cause injury to another (art. 1053 C.C.L.C*.* and art. 1457 C.C.Q.); (ii) the failure to comply with the manufacturer's obligation to inform (duty to warn) (arts. 1468 and 1473 C.C.Q.); (iii) violations of the fundamental rights of the members set forth in the *Charter*; and (iv) violations of the merchant's or manufacturer' duties imposed by the *C.P.A.* The respondents furthermore allege that the Appellants intentionally took concerted action and cooperated in order to delay public awareness of the dangers of tobacco.

[7] We reiterate that these cases concern tobacco sold in the form of cigarettes. Consequently, where dealing with the issues of cigarettes, tobacco or smoking, it is agreed that these terms refer solely to cigarettes or the consumption of cigarettes by inhalation.

1.1. Blais file

[8] The Blais claim was filed in the Superior Court in November 1998 and was authorized on February 21, 2005. The class whose members are represented by Mr. Jean-Yves Blais ("**the**

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Blais Class") is comprised of smokers who developed cancer of the lung, larynx, oropharynx or the hypopharynx or contracted emphysema ("**the diseases at issue**") prior to March 12, 2012, after having smoked a stipulated quantity of cigarettes manufactured by the appellants ("**the critical dose**" of smoking). The threshold for this dose was established as being 12 pack years by the trial judge. A pack-year is equivalent to the consumption of one pack of 20 cigarettes per day for one year or any equivalent consumption. In other words, this measurement corresponds to 7,300 cigarettes *per annum* for a total of 87,600 cigarettes.

[9] At trial, the judge found the appellants liable and ordered them to pay moral damages to the members who had received a diagnosis of any of the diseases at issue, i.e., $100,000 for cancer of the lung, larynx, oropharynx or hypopharynx and $30,000 for emphysema. He concluded, however, that the members who were not yet addicted to nicotine as of January 1, 1980, i.e., the moment when the public became aware that tobacco caused the diseases at issue ("**the date of public knowledge**") were entitled to only 80% of the moral damages on the ground of their contributory negligence. He also established the period for becoming addicted to tobacco as being four years. The Judge ordered the collective recovery of the sums for an aggregate amount of $6,858,864,000. He also ordered the appellants to pay punitive damages which, due to the significant amount of moral damages awarded, were limited to the amount of $30,000 per appellant.

1.2. Létourneau file

[10] The Létourneau claim was filed in the Superior Court in September 1998 and authorized on February 21, 2005. The class, whose members are represented by Ms. Cécilia Létourneau ("**the Létourneau Class**"), is estimated to include nearly one million smokers who developed an addiction to nicotine contained in cigarettes manufactured by the appellants. The judge defined addiction to nicotine as resulting (i) from the consumption of cigarettes over a minimum period of four years and (ii) consumption at the time of assessment of this addiction of a minimum daily average of 15 cigarettes.

[11] At trial, the judge found that the appellants had caused the addiction of the members of the Létourneau Class. He nevertheless refused to award them moral damages due to a lack of sufficiently precise evidence of the aggregate total of claims and due to the indeterminate number of members. However, he ordered the appellants to pay punitive damages totalling $131,000,000, a sum providing for collective recovery in accordance with terms to be established at a later time.

1.3. Description of the appellants

[12] The appellants are three cigarette manufacturers who carried on trade in Quebec and in Canada under various corporate forms throughout the period governed by the two class actions. They underwent major changes in their corporate structure and their shareholdings. Although it is not necessary for the purposes of this Appeal to relate this in every detail, a brief description of each of them is necessary for a proper comprehension of these reasons.

[13] Furthermore, to facilitate this comprehension, the appellants will be referred to using their current name and not their prior corporate identity, save and except where necessary in order to make the necessary distinctions.

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A. ITL

[14] Imperial Tobacco Canada Ltd. ("**ITL**") is, in terms of market share, the largest of the appellants, having held on average 50.38% of the market share of the appellants during the relevant period.[6] Today, and since a considerable period of time, it has been owned, either in whole or in part, depending on the time, by British American Tobacco ("**BAT**"), a company based in London.

B. JTM

[15] JTI-Macdonald Corp. ("**JTM**") is the smallest of the appellants in terms of market share, having held on average 19.59% of the market share of the appellants during the relevant period.[7] At the time of trial, it was indirectly owned by the company Japan Tobacco.

[16] Originally, this was a Montreal company founded by the McDonald brothers – their name would eventually be changed to MacDonald – towards the mid-19th century. From 1917 to 1974, the company was owned by the Stewart family. In 1974, the company, which at that time was called Macdonald Tobacco Inc. ("**MTI**"), was acquired by the American conglomerate R.J. Reynolds Tobacco Company. Initially, MTI continued operating under the same name, but its activities were eventually merged into a new corporate entity, RJR-Macdonald Inc. ("**RJRM**"), which is directly or indirectly owned by R.J. Reynolds Tobacco Company. MTI was eventually dissolved. Finally, in 1999, R.J. Reynolds Tobacco Company split from RJRM and, in the wake of a succession of agreements among the various corporate structures of the companies, RJRM became the indirect owner of Japan Tobacco and henceforth was known under the current name of the appellant, JTI-Macdonald Corp.[8]

C. RBH

[17] Rothmans, Benson and Hedges Inc. ("**RBH**") is the second largest entity among the appellants with respect to market share, having held on average 30.03% of the market share of the Appellants during the relevant period.[9]

[18] The appellant RBH is the result of a merger of two companies in 1986: Rothmans of Pall Mall Canada ("**RPMC**") and Benson & Hedges ("**B&H"**). Whereas B&H were present in Canada prior to the commencement of the relevant period, RPMC commenced carrying on business in Canada in 1958. After their merger in 1986, the RBH shareholding was comprised of the Philip Morris and Rothmans groups. Since 2008, Philip Morris International Inc. is the sole shareholder of the appellant RBH.[10]

2. GENERAL CHRONOLOGY

[19] Due to its abundance, the evidence filed in the trial record creates certain constraints and

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6 Judgment *a quo* at para. 1007.
7 Judgment *a quo* at para. 1007.
8 See exhibit 40000.
9 Judgment *a quo* at para. 1007.
10 Judgment *a quo* at paras. 591–592 and note 289.

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calls for a preliminary remark. It is certain that, at least viewed from the angle of the size of the body of evidence, the matter exceeds the complexity of most cases previously heard before the Quebec Superior Court. Thus, it is not desirable to attempt at this time to present a summary of all the facts read into the court record as the reader would risk becoming lost in a maze of details. In the following pages, the numerous complaints formulated by the appellants against the judgment *a quo* will be dealt with in order, and each of them will be accompanied by a summary of the evidence most relevant to it.

[20] It is nevertheless appropriate to offer as a reference point a general chronology of the legal framework within which the consumption of cigarettes has evolved since the commencement of the period defined by the trial judge, running from 1950 to 1998.

[21] One can draw a portrait of the relevant period in three phases. From 1950 to 1972, the public debate on tobacco and health existed, but no significant government measures resulted therefrom. From 1972 to 1998, the Canadian tobacco industry was self-regulating – under the threat of legislative intervention – and as a result, public awareness increased. It was during this period that the initial warnings began to appear on cigarette packages. Finally, from 1988 to 1998, governments intervened in order to oversee the industry both with respect to advertising and warnings. In what follows, solely the salient facts of these three periods will be discussed, as will be the case for the specific matters of Mr. Blais and Ms. Létourneau.

2.1. Evolution of perceptions (1950–1972)

[22] Although we can retrace the origins of the legislative framework for tobacco use (for example to the *Tobacco Restraint Act*,[11] enacted in 1908), it has long since been reduced to its most simple expression.

A. Early confrontations

[23] During the 1950s, certain initiatives intensified, which led governments to increasingly direct their attention to the issue.

[24] Thus, in 1953, the American industry created a common strategy for the half century to come during a meeting that will remain known as the *Plaza Hotel Meeting*.[12] The Tobacco Industry Research Committee, an American association of cigarette manufacturers, issued a release titled *Frank Statement to the Public by the Makers of Cigarettes*[13] on December 28, 1953. It acknowledged the existence of certain studies that linked lung cancer with cigarette smoking, but pointed out that several other causes of lung cancer had been identified, that there existed no scientific consensus, that there was no proof that tobacco use was a cause of lung cancer, and finally that the statistics related to smoking could apply "to any one of many other aspects of modern life."[14] As the founding act of the Tobacco Industry Research Committee, the

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11 *Tobacco Restraint Act*, S.C. 7-8 Ed VII (1908), c. 73.
12 Testimony of Robert Proctor, November 28, 2012, at 30.
13 Exhibit 1409.
14 Exhibit 1409.

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Frank Statement united several American cigarette manufacturers.[15] It contained a promise to cooperate with public health authorities and to lend assistance to research into tobacco and health. This document illustrates the tone that would be adopted by cigarette manufacturers during the years to come.

[25] In 1957, the United States Surgeon General published a notice on tobacco and health further to which it affirmed that excessive smoking was *one* of the underlying factors contributing to lung cancer.[16]

[26] On June 21, 1958, Rothmans International published in the *Globe and Mail* a release, which it qualified in the following manner: "*AN ANNOUNCEMENT OF MAJOR IMPORTANCE*."[17] It stated therein that the Canadian Medical Association disclosed, during its annual congress, that there existed a link between smoking and lung cancer. Rothmans International declared that it wished to seek a solution in cooperation with medical authorities, or alone if necessary. It considered various proposals, including improving cigarette filters, using only tobacco containing lower tar and nicotine levels (the Virginia), and promoting King Size cigarettes, i.e., longer cigarettes where the combustion generates less warmth and thus less tar. The company concluded by noting that with moderation, "smoking can still remain one of life's simple and safe pleasures."[18] Furthermore, it added, "Rothmans would like it known that the problem of the relationship between cancer and smoking has for many years engaged the attention of the Research Division of its worldwide organization."[19] Several weeks later, Rothmans International issued a release[20] during a meeting of the *International Cancer Congress* held in London. At that meeting, it clarified its position: it accepted the statistical evidence of a link between cancer and heavy tobacco use. It reiterated that the biological cause of cancer remained unknown, and it committed to remaining transparent in the future. These announcements of Rothmans International were very poorly received by the tobacco industry and forced Mr. Patrick O'Neil-Dunne, Rothmans' executive and principal instigator behind the announcements in question to explain himself before the Tobacco Industry Research Committee.[21]

[27] In 1962, the Royal College of Physicians and Surgeons of the United Kingdom published a report titled *A Report of The Royal College of Physicians of London on Smoking in relation to Cancer of the Lung and Other Diseases*,[22] which noted a substantial increase in the number of lung cancers in the United Kingdom from 1910 to 1950 (also credited, it should be added, to the improvement in diagnostic techniques). However, by indexing several retrospective and prospective studies, the body concluded that there existed a "strong statistical association" between tobacco use and lung cancer, even going so far as to speak of a relation of cause and effect. It underlined that the laboratory experiments did not establish a causal link but did reveal

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15 The signatories included the American Tobacco Company, Benson & Hedges, Brown & Williamson Tobacco Corporation, P. Lorillard Company, Philip Morris & Co., R. J. Reynold Tobacco Company, Tobacco Associates Inc., and the U.S. Tobacco Company.

16 Exhibit 21363-AUTH.

17 Exhibit 536.

18 Exhibit 536.

19 Exhibit 536 [emphasis added].

20 Exhibit 536A; see also Exhibit 536B.

21 Exhibit 922; see also Exhibits 918 to 921 and 923 to 924; and Exhibits 536 to 536H.

22 Exhibit 545.

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several compatible elements pointing to a form of causation. On addiction, the report was less explicit: it disclosed popular beliefs – shared by doctors – further to which tobacco created a *"*addictive habit" but expressed the view that there existed no decisive evidence in this regard. The report used the expression "habit*"* and concluded that tobacco use is generally "much more habit-forming than drinking."[23] It recommended that preventive measures be taken, including the removal of hazardous products transported by the smoke, the implementation of educational and tax measures against smoking, the reduction of advertising and a ban against smoking in certain public places.

B. The 1962 Statement of Principle

[28] On October 12, 1962, the appellants or their successor companies,[24] as applicable, signed the *Policy Statement by Canadian Tobacco Manufacturers on the question of tar, nicotine and other smoke constituents that may have similar connotations* ("**Statement of Principle**").[25] At the instigation of Mr. Edward C. Wood, President of Imperial Tobacco Company of Canada Ltd. (the forerunner of ITL) a letter was sent to the other companies encouraging them to sign the Statement of Principle.[26] This document required the companies to refrain from using the words "tar," "nicotine" or other terms that could have a similar connotation in advertising or public communications. The companies were of the view that they were acting in the public interest because such labelling, in their minds, would only serve to confuse consumers. This document also contains guidelines concerning media interventions by cigarette manufacturers, in a schedule.[27] The guidelines state that voluntary comments by companies on health and tobacco should be avoided, that the companies would not attribute special advantages to cigarette brands and that the components of smoke would not be disclosed.

C. Ad Hoc Committee of the Canadian Tobacco Industry, Canadian Tobacco Manufacturers Council and the LaMarsh Conference

[29] It is also necessary to mention the Ad Hoc Committee of the Canadian Tobacco Industry ("**Ad Hoc Committee***"*), formed in 1963, whose actions would intermittently mark the remainder of the relevant period.

[30] During the summer of 1963, correspondence[28] between ITL and the Ministry of National Health and Welfare of Canada and the Minister at that time, Ms. Judy LaMarsh, suggested that the industry was getting organized with a view to a conference devoted to public health issues related to tobacco use scheduled to take place in November 1963 in Ottawa (the LaMarsh Conference). In August 1963, the cigarette manufacturers established the Ad Hoc Committee at Royal Montreal Golf Club, in all likelihood to prepare for that. This Ad Hoc Committee changed its name in 1971 and became the Canadian Tobacco Manufacturers Council ("**CTMC**").[29]

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23 Exhibit 545 at 42.
24 Imperial Tobacco Company of Canada Limited, Rothmans of Pall Mall Canada and MTI.
25 Exhibit 154; this Exhibit is also identified as 40005A-1962.
26 Exhibit 154A.
27 Exhibit 154B-2m.
28 See Exhibits 20321 to 20343.
29 Exhibit 544E.

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[31] The Conference, chaired by Minister LaMarsh, was held on November 25 and 26, 1963.[30] On behalf of the cigarette manufacturers, Messrs. John Keith, L.C. Laporte, L.P. Chesney and N.A. Dann (ITL), Messrs. J.H. Devlin and G.J. McDonald (RPMC), Robert Leahy and Jos. Secter (B&H) and Mr. René Fortier (MTI) attended, in addition to associations of tobacco farmers, the Canadian Medical Association, the Canadian Cancer Society and various other Intervenors.[31]

D. Report of the United States Surgeon General (1964) and its aftermath

[32] January 11, 1964, was a milestone date. On this date, the Surgeon General published a key report titled *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*.[32]. Among other findings, it stated as follows: (i) tobacco use increases the specific mortality rates of men and to a lesser extent women; (ii) there is a causal link between smoking and lung cancer among men, which increases the risk of contracting lung cancer by a factor of 10 (average smoker) to 20 times (heavy smoker); (iii) smoking increases the risk of contracting emphysema but no causal link is established; (iv) smoking "appears" to be linked with other types of cancer (larynx, bowel), but causation is not established; and (v) smoking ("habitual use") is principally related to psychological and social impulses that are reinforced by the pharmacological effect of nicotine. The report advised remedial action: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[33] This report received significant coverage by Quebec media outlets[34] and was characterized as being "seminal"[35] or a "bombshell"[36] by an expert witness.

[33] Several years later, in 1969, in the wake of the work of the Surgeon General, the Standing Committee on Health, Welfare and Social Affairs of the House of Commons of Canada published in turn its report. The Committee, chaired by Dr. Gaston Isabelle, titled its 1969 report, *Report of the Standing Committee on Health, Welfare and Social Affairs on Tobacco and Cigarette Smoking*.[37] It contained several recommendations following consultations with various Intervenors: (i) restrict and reduce the promotion of cigarette sales; (ii) affix warnings on packages and promotional materials and, ultimately, (iii) eliminate advertising related to cigarettes. The experts concluded that "there is no longer any scientific controversy regarding the risk created by cigarette smoking. The original statistical observations have been validated by clinical observation and the evidence is now accepted as fact by Canadian medicine."[38]

[34] On June 10, 1971, bill C-248, introduced by the Minister of Health and Welfare, John Munro, the *Cigarette Products Bill*, underwent its initial reading before the House of Commons. There would not be a second or third reading.[39] Subparagraph 3(1) of the bill prohibited virtually

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30 Exhibit 40118.
31 Exhibit 20341.
32 Exhibit 601-1964.
33 Exhibit 601-1964 at 33.
34 Testimony of Prof. David Flaherty, May 21, 2013, at 78.
35 Testimony of Prof. David Flaherty, May 21, 2013, at 78.
36 Testimony of Prof. David Flaherty, May 21, 2013, at 225.
37 Exhibit 1554.4.
38 Exhibit 1554.4 at 10.
39 Exhibit 20073. The bill was abandoned by the House due to the general elections, according to the testimony of Mr. Marc Lalonde (see testimony of Marc Lalonde, June 17, 2012, at 38).

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any form of tobacco advertising. Several exhibits on the record[40] retraced the debates that were held between the powers within the Trudeau government of that time.

[35] Four months earlier, on February 19, 1971, the Surgeon General had published "a major reworking"[41] of its 1964 report titled "*The Health Consequences of Smoking*."[42] Among its findings, the report stated that smoking is the principal cause of lung cancer among men and one of the causes among women, that it is a significant risk factor in the development of cancer of the larynx and of the mouth and that it is associated with cancer of the oesophagus. Smoking was also the most significant cause of chronic obstructive pulmonary disease ("**COPD**"[43]).

[36] At that time, no warning appeared on cigarette packs sold in Canada and advertising, as it appears in samples filed with the Court record, flourished. It is within this context, and particularly that of bill C-248, that the industry would henceforth practice a form of "voluntary" submission, but which was not unrelated to government pressure.

[37] Thus, on September 8, 1971, the CTMC held a meeting.[44] The participants[45] discussed the scientific controversy and estimated that it was preferable to reduce to a minimum any public interventions. According to Mr. Paul Paré (president of ITL and the CTMC), the CTMC had a responsibility towards (i) its member companies, (ii) the Canadian tobacco industry, and (iii) the worldwide tobacco industry. In his view, notwithstanding the divergent interests, it was necessary to fully assume these three responsibilities. Conscious of the bills that were reviewed in the House of Commons,[46] the CTMC decided to establish a line of conduct inspired by the voluntary actions taken in the United Kingdom and the American legislation.

2.2. Voluntary Adherence (1972–1988)

A. Voluntary codes

[38] With the approval of representatives of the Canadian Government with whom the appellants had jointly consulted, the latter adopted several Voluntary Codes as of 1972. It is true that these Codes had been preceded in 1964 by a *Cigarette Advertising Code*,[47] which had been published by the appellants. The trial judge saw in this a precursor to the Codes of the 1970s but added that, as opposed to these latter codes, the evidence did not allow for a determination as to

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40 Exhibits 20068 to 20074.1.

41 Testimony of Prof. David Flaherty, May 21, 2013, at 96.

42 Exhibit 601-1971.

43 Which may be defined as [TRANSLATION] "A pathological condition characterized by a decrease in the airways (bronchial obstruction), incompletely reversible, usually progressive and associated with an abnormal inflammatory response in the lungs to toxic gases and particles" (Exhibit 1382 at 12).

44 Exhibit 542.

45 Imperial Tobacco Products Ltd. (ITL), RPMC, MTI, B&H Tobacco Co., a lawyer of the Tobacco Institute Inc., a certain L.C. Laporte for the CTMC and N. J. McDonald of the public relations firm Public & Industrial Relations.

46 Exhibit 542.

47 Exhibit 40005B-1964.

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whether the *Cigarette Advertising Code* of 1964 had been adopted after consultation with the government.[48]

[39] On January 1, 1972, the first Voluntary Code[49] endorsed by the appellants was adopted. This Code provided for (i) the television and radio advertising ban,[50] (ii) the affixing of warnings (which will be analysed in the next section of this chronology) and (iii) a ban against advertising to minors.

[40] In 1975, two new versions of the Voluntary Code were adopted and replaced that of 1972.[51] The attendant regulations were also adopted.[52] Subsequent versions succeeded in 1976, 1984, 1985, 1995 and 1996.[53]. In this regard, the trial judge concluded that the rules limiting advertising that were included in the voluntary codes scarcely changed from 1972 to 1988.[54]

B. Warnings

[41] Also in 1972, the first warnings appeared on cigarette packages. The trial judge noted that the industry reacted "under threat of legislation."[55] The 1972 Voluntary Code[56] provided at rule 2, that any package produced after April 1, 1972, would bear the following statements:

WARNING: THE DEPARTMENT OF NATIONAL HEALTH AND WELFARE ADVICES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED.	AVIS: LE MINISTÈRE DE LA SANTÉ NATIONALE ET DU BIEN- ÊTRE SOCIAL CONSIDÈRE QUE LE DANGER POUR LA SANTÉ CROÎT AVEC L'USAGE.

[42] These warnings were also reproduced in small font letters on cigarette packages, presumably on the lateral sides of the packages,[57] or as footers to advertising posters.[58]

[43] In 1975, once again "under threat of legislation,"[59] the following warnings appeared

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48 Judgment *a quo* at para. 394, note 206.

49 Exhibit 40005C-1972; Exhibit 40005D-1972.

50 The first rule of the Code provided: "After December 31, 1971, there will be no cigarette or cigarette tobacco advertising on radio or television."

51 The first rule of the 1975 Code provided: "There will be no cigarette or cigarette tobacco advertising on radio or television, nor will such media be used for the promotion of sponsorship of sports or other popular events whether through the use of brand of corporate name or logo" (Exhibit 40005G-1975 at 2).

52 Exhibits 40005G-1975 to 40005K-1975; see also Exhibit 20002.

53 See exhibits 40005B-1964 to 40005S-1996.

54 Judgment *a quo* at para. 394.

55 Judgment *a quo* at para. 110, note 57.

56 Exhibit 40005D-1972.

57 Exhibit 40005E-1972.

58 Exhibit 40005F-1973.

59 Judgment *a quo* at para. 110, note 57. Mr. Marc Lalonde, Minister of National Health and Welfare from 1972 to 1977, testified as follows: [TRANSLATION] "This was subject to numerous discussions,

henceforth on packages. They were stipulated in rule 12 of the new Voluntary Code:[60]

WARNING: Health and Welfare Canada advises that danger to health increases with amount smoked - avoid inhaling.	AVIS: Santé et Bien-être social Canada considère que le danger pour la santé croit [sic] avec l'usage - éviter d'inhaler.

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exchanges of letters and communications between myself and representatives of the industry throughout the time that I was Minister. It was ... they took a certain number of steps, we asked for more, they resisted, we exerted pressure from time to time. It was necessary to use the threat of introduction of the legislative bill and gradually the industry adopted different amendments to their Code concerning various aspects of advertising, sale nature, content of ... in terms of nicotine and tar in cigarettes and so forth" (testimony of Marc Lalonde, June 17, 2013, at 53).

60 Exhibit 40005G-1975.

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[44] The regulation accompanying the 1975 Voluntary Code decreed that the warnings had to appear in 10 point or 7 point font according to certain specific terms.[61] These warnings would appear until 1988 on the packages and would have for the most part the same appearance and take up the same space as their previous 1972 version.[62]

[45] A second version of the 1975 Voluntary Code, that of October, provided for the same warnings.[63] The 1976 Code maintained these warnings and added the content in tar and nicotine in milligrams in addition to modifying the font size of characters.[64] The Voluntary Codes of 1984[65] and 1985[66] provided the same warnings.

C. Advertising

[46] The trial judge considered that "[t]he Companies certainly viewed the Codes as a means to avoid legislation in this area."[67] This statement is solidly supported by the evidence. He also concluded, relying upon the evidence offered by the Defence that the appellants "scrupulously complied with the codes."[68] It is necessary, however, to realize that the restrictions to advertising imposed by these codes, although they evolved further to a gradual reinforcement of constraints that the appellants imposed upon themselves, still left room for several other forms of advertising and promotion of their products. The 1972 Code prohibited cigarette advertising on radio and television. The 1975 Code added certain prohibitions that can be found in the 1984 Code[6969] and that remained in effect thereafter.

[47] The prohibitions in the 1984 Code prohibited (i) the promotion of sports and other sponsorships by the same media, i.e., radio and television (rule 1), (ii) any advertising stating that a particular brand improved physical health (rule 8) and (iii) any advertising relying upon "the testimony of athletes or celebrities from the world of entertainment" (rule 9). We note, however, that the authors of the Code reserved the possibility of interpreting this so as to allow for the use of other advertising techniques. Thus, in reference to the three prohibitions just mentioned, a regulation supplements the Code (*Regulations Re Cigarette and Cigarette Tobacco Advertising and Promotion*). In force since January 1, 1976, it states as follows in the January 1, 1985, version:[70]

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[61] Exhibit 40005H-1975.
[62] Exhibit 40005I-1975.
[63] Exhibit 40005K-1975.
[64] Exhibit 40005L-1976, p. at II.3.
[65] Exhibit 40005M-1984, rule 12.
[66] Exhibit 40005N-1985, rule 12.
[67] Judgment *a quo* at para. 400.
[68] Judgment *a quo* at para. 398.
[69] For the French version, see Exhibit 40005M-1984 at 173924.
[70] Exhibit 40005N-1985 at III.1.

> Rule 1 of the Code shall be interpreted to permit broadcast media to use film, video or radio tapes of sports or other popular events sponsored by Member Companies and for which production charges are borne by a manufacturer provided no time or other charges are paid directly or indirectly to the station or network and provide [sic] such films, video, or radio tapes do not infringe on Rules 8 and 9 of the Code.

[48] We are far from the regime that would be implemented by the Canadian Parliament in 1997 and that the Supreme Court of Canada would rule constitutionally valid in 2007. These issues are addressed further on.

D. Internal newsletters

[49] During the relevant period, certain appellants, the Smokers Freedom Society ("**SFS**") and the CTMC published newsletters addressed to their employees, both active and retired. An overview follows.

[50] For a certain period of time, ITL published *The Leaflet / Le Feuillet*, a newsletter addressed to its employees and their families.[71] Generally, it contained a varied range of articles, for example, on employee retirement conditions and on the harmlessness of secondary smoke, etc. According to the issues, volumes and the years of editions filed in evidence, this newsletter was published commencing in 1964 and up until at least 1994. The judge concluded that this publication drew a favourable portrait of smoking and cultivated scientific controversy in that regard.[72]

[51] The SFS was initially directed by Mr. Michel Bédard, but the effective management of the group, in addition to its financing, appears to have derived in good part from the CTMC,[73] - thus the appellants. The SFS published the first issue of its newsletter *Calumet* during the winter of 1986–1987.[74] Other newsletters would follow. It presented a visual portrait of famous smokers (such as Winston Churchill, John Steinbeck and Simone de Beauvoir). It encouraged letters to the editor. Among other things, the newsletter disclosed that the ban of cigarettes in the workplace would have no impact on the quality of air and that according to a study, secondary smoke did not cause lung cancer. It argued for the accuracy of facts on tobacco and health. In the Autumn 1987 edition, an editorial recalled that the SFS "recognises and accepts that non-smokers are what they are" but that they took issue with those who, as affirmed by the author of the editorial, refused to allow smokers access to health services.[75] It also stated that, according to a Dutch study, keeping birds in cages at home was responsible for half of all lung cancers and that a kilogram of meat cooked on a barbecue contains the same number of carcinogens as 600 cigarettes.[76] Finally, the Spring 1989 edition referred to an epidemiologist named Siemiatycki (one of the expert witnesses cited by the respondents at trial), who concluded that bus drivers

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71 See Exhibit 2A; all the annual versions of Exhibit 105-AAAA-2m; Exhibit 126A; Exhibits 244G to 244M.
72 Judgment *a quo* at paras. 247 and 265.
73 See for example Exhibit 208 at 1; Exhibit 208.1 at 2; Exhibit 433H at 5; Exhibit 441 at 2, point 2.
74 Exhibits 215 to 215H.
75 Exhibit 215A at 1.
76 Exhibit 215A at 2.

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had 50% more chances of suffering lung cancer due to gas exhaust.[77] The publication of *Calumet* continued until 1989. Some copies of the newsletter are found under the English title *Today's Smoker* in 1993.[78]

[52] The CTMC published the *Revue du Tabac / The Tobacco Review*, from at least f1978 to 1980.[79] Then, in as of autumn 1988, the CTMC published the quarterly *Tabacum* "[a] liaison bulletin for the tobacco industry."[80] The first issue reported on the constitutional challenge to the *Tobacco Products Control Act*[81] and voices joining with those of the tobacco industry. The issue concerned the ban against tobacco sales to children under the age of 16. It provided an overview of the 1988 tobacco harvest. In short, the information disclosed was still varied in nature. In the summer of 1989, *Tabacum* published the "*Charter of Rights and Freedoms of Smokers*" formulated by the SFS. One reads therein that an adult smoker is entitled, *inter alia*, "to scientific honesty in the addressing of questions related to tobacco."[82] During the winter of 1990, it strenuously criticized the report of the Royal Society of Canada of August 31, 1989, sponsored by Health and Welfare Canada. The *Tobacco Revue* criticized the Royal Society for coming to the preliminary conclusion that tobacco was addictive and that the definition of dependence (or the definition of addiction therein) was vague, arbitrary and based on vacillating scientific foundations.[83]

[53] For a certain time, RJRM published the journal *Contact*, of which only one example of which appears to have been filed as evidence. That issue (1979) sets out RJRM's position: "We were unable to establish any scientific relationship of cause and effect between tobacco and certain diseases."[84]

2.3. Government Interventions (1988–1998)

A. Legislative framework

[54] On January 1, 1987, the *Act respecting the Protection of non-smokers in certain public places*[85] was adopted in Quebec. It prohibited smoking in various locations including certain zones in public bodies, public transportation (metro, ambulance, etc.) and certain other locations (judicial institutions, childcare centres and the waiting rooms of health professionals).

[55] In 1988, the Surgeon General published a report titled *The Health Consequences of*

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77 Exhibit 215E at 6.
78 Exhibit 215I.
79 Exhibits 951-197809-2m to 951-198012-2m.
80 Exhibit 975.1 at 1.
81 *Tobacco Products Control Act*, S.C. 1988, c. 20.
82 Exhibit 975.3 at 2.
83 Exhibit 975.6 at 52771.
84 Exhibit 959-197909 at 2.
85 *Act respecting the Protection of non-smokers in certain public places*, S.Q. 1986, c. 13, s. 38; R.S.Q., c. P-38.01, ss. 8–17, repealed by S.Q. 1998, c. 33, s. 76.

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Smoking: Nicotine Addiction.[86] According to the findings of this report, cigarettes and other forms of tobacco are addictive and nicotine is the component of tobacco which causes addiction. The pharmacological and behavioural processes that determine tobacco addiction are similar to those of heroin or cocaine. This was the 20th report of the Surgeon General on tobacco.

[56] In 1988, the *Tobacco Products Control Act*[87] was adopted, banning most types of tobacco advertising and imposing new warnings. The same year, the *Nonsmokers Health Act*[88] was adopted, banning smoking in certain types of public transportation including trains and planes. One year later, the *Ordre des pharmaciens du Québec* encouraged its members to cease selling cigarettes.[89]

[57] On August 31, 1989, the Royal Society of Canada published a report titled *Tobacco, Nicotine, and Addiction*[90] at the request of the Ministry of Health and Welfare of Canada, who had asked which term ("addiction", "dependence" or "habit formation") was appropriate to characterize the risk of addiction to nicotine and tobacco products. The Royal Society[91] concluded that smoking induced for the most part an "addiction" and that this term was preferable to the terms "dependence," "habituation" and "habit". The Society wrote in its conclusion:[92]

> Drug addiction is a strongly established pattern of behaviour characterized by (1) the repeated self-administration of a drug in amounts which reliably produce reinforcing psychoactive effects; and (2) great difficulty in achieving voluntary
>
> long-term cessation of such use, even when the user is strongly motivated to stop.
>
> [Emphasis added.]

B. Constitutional challenge

[58] Subparagraph 4(1) of the *Tobacco Products Control Act*[93] provides as follows: "No person shall advertise any tobacco product offered for sale in Canada." Several other provisions of that Act determine the scope of this general prohibition. appellants ITL and JTM (RJRM at the relevant time) challenged the constitutionality of the Act from two standpoints, i.e., that of the separation of federal / provincial legislative powers and that of the protection of freedom of expression. This challenge went as far as the Supreme Court of Canada, where the appellants were partially successful.[94] A majority of the judges of the Supreme Court came to the conclusion that the considerations related to the separation of legislative powers was no impediment to the adoption of this law by the Canadian Parliament. On the other hand, the Court deemed that the

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86 Exhibit 601-1988.
87 *Tobacco Products Control Act*, S.C. 1988, c. 20.
88 *Non-Smokers Health Act*, S.C. 1988, c. 21.
89 Exhibit 20065.6233; testimony of Prof. David Flaherty, May 22, 2013, at 226.
90 Exhibit 212.
91 The members of which had backgrounds in the following areas: pharmacology, clinical and experimental psychology, epidemiology, law and neuropsychology.
92 Exhibit 212 at 22-23.
93 *Tobacco Products Control Act*, S.C. 1988, c. 20.
94 *RJR – MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199.

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impugned provisions (concerning advertising and promotion of tobacco products) infringed the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*[95] (the "***Canadian Charter***"). Furthermore, for a majority of the judges of the Court, the same provisions did not constitute "reasonable ... limits" as contemplated by section 1 of the *Canadian Charter* and were therefore invalid.

[59] In the wake of this decision, the Canadian Parliament adopted a new law, the *Tobacco Act*[96] of 1997, which was less restrictive than the *Tobacco Products Control Act*,[97] but nevertheless contained numerous prohibitions and requirements in relation to promotion and advertising (*inter alia* "lifestyle" or "attractive for young people") and tobacco product sponsorships, as well warnings on packages. Chief Justice McLachlin described this new broadly drafted scheme at paragraphs 18 to 31 of *Canada (Attorney General) v. JTI-Macdonald Corp*.[98] Once again challenged on constitutional grounds, but this time by the three appellants currently before this Court, the law was upheld by a unanimous Supreme Court: sections 18, 19, 20, 22, 24 and 25 of the Act, and of the *Tobacco Products Information Regulations*,[99] adopted pursuant to the enabling statute, constituted an infringement of freedom of expression, but the infringement was deemed to be a "reasonable ... limit" as contemplated by section 1 of the *Canadian Charter*.

[60] As we have already seen, the claims by the Blais and Létourneau Classes were filed several years prior to this 2007 Judgment and were authorized by the Superior Court in 2005.

2.4. Positions of the Representatives

[61] A few remarks are in order regarding the particular situation of each of the representatives of the two groups.

A. Jean-Yves Blais

[62] In 1997, at the age of 53, Mr. Jean-Yves Blais was diagnosed with lung cancer and underwent a lower right lobectomy. He was monitored thereafter by medical personnel. His total smoking consumption was assessed to be in the order of 100 packs per year by Dr. Desjardins during a 2006 consultation. At that time, his daily smoking was estimated to be 50 cigarettes, and Dr. Desjardins emphasized his heavy addiction to cigarettes. He observed in 2006 a decline in Mr. Blais's pulmonary function and a progression of COPD.[100]

[63] Dr. Desjardins concluded that Mr. Blais's smoking was the most probable cause of his lung cancer and his advanced COPD.[101] The trial judge retained the finding of Dr. Desjardins and

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95 *Canadian Charter of Rights and Freedoms,* part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
96 *Tobacco Act*, S.C. 1997, c. 13.
97 *Tobacco Products Control Act*, S.C. 1988, c. 20.
98 *Canada (Attorney General) v. JTI-Macdonald Corp*, 2007 SCC 30.
99 *Tobacco Products Information Regulations*, SOR/2000-272.
100 Exhibit 1382 at 77 *et seq*.
101 Exhibit 1382 at 88.

ruled that Mr. Blais's lung cancer was caused by his smoking.[102]

B. Cécilia Létourneau

[64] The judgment *a quo* mentions only scant details on the particular case of Ms. Cécilia Létourneau, which can probably be explained by the file as constituted, but particularly by the fact that the judge did not make an order for compensatory damages in this file and did not assess the situation of Ms. Létourneau in the same manner as he did for Mr. Blais.

[65] According to the allegations contained in the amended originating application of February 24, 2014, Ms. Létourneau started smoking cigarettes at the age of 19, in 1964, without knowing that nicotine was addictive. Over the years, she attempted to quit smoking on numerous occasions without success. The last attempt mentioned in the claim allegedly failed in January 1998, several months prior to service of the motion for authorization to institute a class action.

3. PROCEDURAL HISTORY

3.1. Superior Court

A. Motions for authorization to institute a class action

[66] On September 30, 1998,[103] Ms. Létourneau served a motion *for authorization to institute* a class action against the appellants[104] on behalf of [TRANSLATION] "all persons residing in Quebec who are or have been dependent on the nicotine contained in cigarettes manufactured by the [defendants] and the legal heirs of the deceased persons comprised within the class."

[67] On November 20, 1998, the *Centre québécois sur le tabac et la santé* and Mr. Blais served a motion *for authorization to institute* a class action against the appellants on behalf of:[105]

> [TRANSLATION]
>
> all persons residing in Quebec who are or have been victims of cancer of the lungs, larynx or throat or who suffer from emphysema, after having directly inhaled cigarette smoke for a prolonged period of time in Quebec, and the successors and heirs of deceased persons who otherwise would have been part of the class.

[68] On November 3, 2000, the Court of Appeal ordered the joinder of the two claims for the purpose of proof and hearing at the authorization stage.[106]

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102 Judgment *a quo* at para. 964.
103 Judgment *a quo* at para. 1, note 1.
104 Operating at the time under the following names: Imperial Tobacco Ltd., RJRM and RBH.
105 Judgment *a quo* at para. 1, note 1.
106 *Conseil québécois sur le tabac et la santé c. J.T.I.-MacDonald Corp.*, 2000 CanLII 28985, rev'g

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B. Authorization and filing of claim

[69] On February 21, 2005, the Superior Court (the Honourable Justice Pierre Jasmin presiding) authorized the class actions, defined the classes in each matter[107] and identified the questions of fact and law to be collectively addressed.[108]

[70] On September 30, 2005, the respondents filed originating applications in the Blais and Létourneau matters. These applications were amended several times.[109]

C. Hearing and composition of the evidence

[71] The hearing of the matter took place on March 12, 2012, and December 11, 2014, during 241 hearing days before the Honourable Mr. Justice Brian Riordan. At trial, the parties produced more than 20,000 exhibits and more than 70 witnesses, including more than 20 experts. The appeal record contains approximately 265,000 pages of evidence.

[72] During the hearing, the trial judge rendered numerous interlocutory judgments, including several that were appealed. For the purpose of facilitating comprehension of the process of the trial hearing, it is appropriate to address three interlocutory judgments of particular importance.

i. <u>May 2, 2012, judgment concerning the authenticity of certain exhibits</u>

[73] On May 12, 2012, the trial judge ruled on the respondents' application seeking the filing of certain documents into evidence and the imposition of sanctions on ITL due to its refusal to recognize the genuineness of exhibits pursuant to article 403 f.C.C.P.[110] By this application the respondents sought (i) a declaration that ITL's notices of denial were abusive, (ii) the striking of these notices, (iii) authorization to file the relevant exhibits into evidence and (iv) a statement that this principle could be used again at a later time.

[74] The judge allowed this application in part, declaring ITL's notices of denial an abuse of procedure pursuant to article 54.1 f.C.C.P., ordered that they be struck and authorized the filing into the court record of the exhibits concerned by such notices.

[75] During the hearing, the judge accepted the filing of several other exhibits pursuant to the principle established by the May 2, 2012, judgment. These exhibits are marked with the suffix "2m." This decision deserves mention because the appellants call into question the factual conclusions drawn from certain exhibits admitted pursuant to the principle established by this decision.

Conseil québécois sur le tabac et la santé c. Blais (2000), AZ-50900627 (Sup. Ct.).

107 The various definitions of the two groups over the course of the proceedings are reproduced as a schedule to this judgment. See *infra*, Schedule III.

108 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, J.E. 2005-589, 2005 CanLII 4070 (Sup. Ct.).

109 The most recent amended originating applications are dated March 28, 2014, (Blais file) and February 24, 2014, (Létourneau file).

110 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCSC 1870.

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ii. July 3, 2013, judgment on the amendment of the Class definitions

[76] On July 3, 2013, following the plaintiffs' evidence, the trial judge authorized certain amendments to the definitions of the Blais and Létourneau Classes.[111] In the definition of the Blais Class, the judge specified the exact name of the cancers previously qualified as "throat cancers," adopted the measure of pack years as a unit of calculation of smoking habits of members and added a closing date for membership in the class. In the course of defining the Létourneau Class, the judge clarified the notion of addiction and added a closing date for membership in the class.

iii. May 13, 2014, judgment on access to medical records

[77] On May 13, 2014,[112] in a judgment written by Justice Bich, the Court of Appeal reversed in part a decision of the trial judge.[113] The Court allowed, *inter alia*, the examination by ITL of the successors of Mr. Blais and the examination of Ms. Létourneau, while authorizing the production of medical records of the two representatives, but not those of other members of the class that ITL was authorized to cross-examine.

D. Judgment a quo

[78] In his May 27, 2015, judgment, subsequently corrected on June 9, 2015, the trial judge allowed in part the originating applications of the respondents, amended the class definitions and ordered the appellants to pay eight billion dollars in moral and punitive damages. He also ordered them to pay initial deposits representing a portion of the compensatory damages payable in the Blais file and the full amount of punitive damages in the two matters, for an aggregate sum of $1,131,090,000, within 60 days of the judgment. He ordered the provisional execution of this initial payment.

3.2. Court of Appeal

[79] On June 26, 2015, each of the appellants filed an appeal of the judgment *a quo*, alleging that it contained numerous errors of law and fact that justified the intervention of the Court. Leaving aside the management measures ordered by Justice Savard, the appeal proceedings can be summarized in the following manner.

A. Application to quash the order for provisional execution

[80] On July 23, 2015,[114] a panel of the Court of Appeal allowed the motions of the appellants

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111 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2013 QCSC 4904. The various definitions of the two groups over the course of the proceedings are reproduced as a schedule to this judgment. See *infra*, Schedule III.

112 *Imperial Tobacco Canada Ltd. c. Létourneau*, 2014 QCSC 944.

113 *Conseil québécois sur le tabac et la santé c. JTI-Macdonald Corp.*, 2013 QCSC 4863.

114 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCSC 1224.

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seeking to stay the order for partial provisional execution of the judgment *a quo*, ordering them to deposit sums within 60 days of the judgment. The Court specified that there was no extraordinary urgency or sufficient reason to justify the ordering of provisional execution pursuant to article 547 f.C.C.P. The Court dismissed the applications of ITL and RBH for the issuance of an order to place under seal certain documents filed in support of their application.

B. Application for an order to provide security

[81] On October 27, 2015,[115] Justice Schrager allowed in part the motions of the respondents seeking an order against the appellants ITL and RBH[116] to provide security to guarantee the payment of costs of the appeal and the amount of an order in the event that the judgment *a quo* were to be upheld. According to the judge, the respondents had demonstrated the existence of a "special reason" as contemplated by article 497 f.C.C.P. Without the order for security, their rights recognized by the judgment would be at risk: "Both appellants have structured 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."[117]

[82] Justice Schrager determined the amount of the security based on the sum of the initial security deposit ordered by the trial judge ($1,131,090,000). He divided the sum between ITL and RBH according to their share of liability, i.e., 67% for ITL ($758,000,000) and 20% for RBH ($226,000,000). In order to protect their right of appeal, he ordered them to deposit the sums by successive instalments based on a calendar to be staggered over the period from December 2015 to June 2017.

C. Motion to stay the trial proceedings

[83] After quashing the order for provisional execution of the order against the appellants, the trial judge wrote to the parties to ask them when and in what manner the respondents intended on complying with paragraph 1247 of the judgment *a quo*, which ordered them to file with the Court within 60 days of the judgment a detailed proposal with respect to distribution of the amounts of compensatory and punitive damages. At the same time, the judge also initiated correspondence with the parties concerning holding a case management conference to rule upon (i) the notice required by article 1043 f.C.C.P., (ii) the powers of the judge with respect to issues not governed by the appeal and (iii) the issue of abuse of procedure.

[84] In this context, the appellants ITL and RBH filed a motion to stay proceedings wherein they alleged that during an appeal, the judge cannot take any measures or render any decision whatsoever with respect to the execution of the judgment, abuse of procedure or the notice required by 1043 f.C.C.P.

[85] On November 13, 2015,[118] a panel of the Court of Appeal dismissed the motion of ITL and RBH on the ground that the issues raised were moot but reiterated [TRANSLATION] "the

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115 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCSC 1737.

116 The motion against JTM was withdrawn at the opening of the hearing before Schrager J.A.

117 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCSC 1737 at para. 44.

118 *Imperial Tobacco Canada Ltd. c. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1882.

unequivocal wording of the first paragraph of article 497" f.C.C.P., which suspends the provisional execution of the trial judgment.

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D. ITL's motion for particulars

[86] At the same time, ITL filed a "motion ... for directions on the schedule to furnish security," pursuant to which it sought the amendment of the schedule established by Justice Schrager on October 27, 2015, for payment of the security deposit. Notably, ITL sought to decrease the amount of the two initial instalments of the security deposit on the ground that the judge erred by failing to consider a loan of $100,000,000 contracted by the company and payable to a third party.

[87] On December 9, 2015,[119] Justice Schrager dismissed the motion on the ground that it was tantamount to a disguised appeal. He found that "the factual premise of Petitioner's motion is unfounded,"[120] and that the order for payment of the security deposit required no correction. Even supposing that the order was tainted by an error, he added, the doctrine of *functus officio* estopped the motion of ITL.

E. Hearing of the appeals

[88] On September 8, 2016, two months prior to the appeal hearing, the assistant coordinator of the Court wrote to the appellants by email on behalf of the Court in order to specify the terms of the hearing and to ask them to precisely identify the exhibits they were challenging and the arguments in support of their claims, adding that the Court would not consider their arguments in the absence of such particulars due to the hundreds of exhibits related to their arguments.[121] On October 3, 2016, Mr. François Grondin, on behalf of the appellants, responded, *inter alia*, that the appellants did not wish to challenge any exhibits other than those specifically referred to in their respective arguments.[122]

[89] The hearing before the Court of Appeal was held from November 21 to 25 and on November 30, 2016. During the hearing, the Court asked the parties to submit an example of the claim form to be filled by a member in the event that individual recovery of the claims were to be substituted for collective recovery by the Court of Appeal, which they did on November 30, 2016. Upon the conclusion of the last day of the hearing, the Court reserved judgment and granted the parties permission to submit observations in writing within 15 days, which they did on December 15, 2016.

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119 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCSC 2056.

120 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCSC 2056 at para. 27.

121 Letter from Ms. Julie Devroede to the parties, September 8, 2016.

122 Response of Mr. François Grondin to Mr. Bertrand Gervais, October 3, 2016, (consulted in the file of the Court of Appeal).

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II. JUDGMENT *A QUO*

[90] This summary of the judgment *a quo* has the objective of presenting a general overview of the reasons and findings of the trial judge. To avoid repetition, the contextual components mentioned previously, concerning class actions, the general chronology and procedural history related to the judgment *a quo*, are for the most part excluded.

[91] Did the appellants manufacture, market and sell a product[123] that was dangerous and harmful to the health of consumers? The judge responded in the affirmative.[124] He defined as "dangerous" a product causing diseases to members of the Blais Class (lung cancer, cancer (squamous cell carcinoma) of the throat, i.e., of the larynx, the oropharynx or the hypopharynx, or emphysema), or causing the addiction of members of the Létourneau Class.

[92] In the event of a safety defect in a thing, however, article 1473 C.C.Q. provides two grounds of defence for the manufacturer, distributor or supplier:[125] (i) the victim knew or could have known of the defect in the thing or could have foreseen the injury; (ii) this defect could not have been known at the time the thing was manufactured, distributed or supplied. The evidence discloses that the appellants knew the risks and dangers associated with the use of their products throughout the entire period covered by the two claims. Consequently, the appellants cannot rely on the latter ground of defence.[126] On the first ground, the judge concluded that the public knew or could have known the risks and dangers of suffering a disease caused by tobacco as of January 1, 1980, i.e., the date of public knowledge in the Blais file.[127] He came to this conclusion by analyzing the impact of the warnings on cigarette packages with respect to the public. The first appeared in 1972, which, furthermore, was not sufficiently explicit with respect to the hazards of tobacco use. It was only towards the end of the 1970s that the warnings became sufficiently clear. In relation to tobacco addiction, the first warnings appeared more precisely on September 12, 1994. The date of public knowledge in the Létourneau file should nevertheless be set as being March 1, 1996, in order to allow the warnings the necessary time to have their full impact on public awareness of addiction, which corresponds to a period of approximately 18 months.[128]

[93] In summary, as of the dates of notoriety set respectively in the Blais and Létourneau files, the responsibility of the appellants in relation to the safety defect of their products is no longer incurred. They may, however, be found liable in regard to other obligations with which they were not compliant for the entire period covered by the two matters.

[94] Firstly, the appellants knowingly marketed an addictive product, a fault likely to

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123 For the definition of "product", see the judgment *a quo* at 15, para. 8.
124 Judgment *a quo* at paras. 41–51.
125 See art. 1468 *et seq. C.C.Q.*
126 Judgment *a quo* at paras. 55–73.
127 Judgment *a quo* at paras. 74–133.
128 Judgment *a quo* at paras. 122–142.

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trigger their civil liability both pursuant to the *Charter* and the *C.P.A.*[129] On the other hand, it was not demonstrated that they chose to use tobacco containing a higher level of nicotine for the purpose of perpetuating this addiction.

[95] The appellants failed to sufficiently inform the public of the risks and dangers of their products, and this omission constitutes a failure to fulfil the general duty not to cause injury to another under article 1457 C.C.Q.[130] In other words, the duty to inform the public does not cease by virtue of the fact that, in accordance with the criterion set forth at article 1473 C.C.Q., the public knew (or could have known) the risks and dangers of cigarette smoking (such knowledge could nevertheless trigger the contributory negligence of the victim). Several factual elements demonstrate that the appellants failed in this duty. They made public statements that they knew to be false or incomplete in relation to the risks and dangers of tobacco use, they demonstrated negligence by deliberately exposing consumers to the dangers of their products during the 22 years when no warning was affixed to cigarette packages. The tobacco industry adhered to a policy of silence on these issues; and finally, by choosing to not inform the public health authorities or the public directly of what they knew, the appellants prioritized their profits to the detriment of the health of users of their products.

[96] The judge then dealt with the common question dealing with the marketing strategies of the appellants. Within the specific context of this question, he was of the view that it could not necessarily be concluded that there was a fault on their part due to the fact that such strategies did not aim to inform the public of issues related to health and tobacco (in the original version of the judgment *a quo*: “were not informative about smoking and health questions”).[131]

[97] On the other hand, the appellants conspired in order to maintain a common front, the objective of which was to prevent users of their products from becoming informed of the dangers inherent to smoking.[132] By engaging in this collusion for several decades in light of the Declaration of Principle and the activities of the Ad Hoc Committee and thereafter the CTMC, the appellants jointly participated in a wrongful act which caused injury, thus triggering their solidary (joint and several) liability pursuant to article 1480 C.C.Q.

[98] Further to the wrongful conduct of the appellants, punitive damages were also justified pursuant to the *Charter* and the *C.P.A.*[133] Firstly, pursuant to sections 1, 4 and 49 of the *Charter*, they intentionally violated the right to life, security and integrity of the members of the Blais and Létourneau Classes. Furthermore, the appellants infringed sections 219 and 228 *C.P.A.* by making, as contemplated by the Act, “false or misleading representations” with respect to the risks and dangers inherent to their products and failing to mention “important facts.” After analyzing *Richard v. Time Inc.*,[134] the judge

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[129] Judgment *a quo* at paras. 143–201.
[130] Judgment *a quo* at paras. 202–378.
[131] Judgment *a quo* at paras. 379–438.
[132] Judgment *a quo* at paras. 439–475.
[133] Judgment *a quo* at paras. 476–544.
[134] *Richard v. Time Inc.*, 2012 SCC 8.

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concluded that the irrebuttable presumption of injury arising out of section 272 *C.P.A.* could apply to any and all failures to fulfil the duties imposed by law, including those of an extracontractual nature.

[99] After having responded to three questions of analysis for each of the classes, the judge concluded that the causal link was proved between the faults committed by the appellants and the diseases or addiction suffered by the members of the Blais and Létourneau Classes, respectively.[135] Within the framework of the class actions undertaken, the evidence of this link is facilitated by section 15 T.R.D.A. This provision allows for the establishment of the causal link by relying solely on the epidemiological or statistical studies of medical and conduct causation. The proof of existence of this link in law is not as stringent as in the field of scientific research. It is sufficient to demonstrate it in accordance with the legal standard of proof on a balance of probabilities as set out in article 2804 C.C.Q.

[100] On the other hand, the members of the Blais Class who started smoking after 1976 and continued to do so after the date of public knowledge of January 1, 1980, must bear a share of responsibility with respect to damages incurred, in accordance with the principles of contributory negligence of the victim (art. 1478 C.C.Q.),. This share is set at 20%.[136] This is also true for members of the Létourneau Class who started smoking after 1992 and who pursued this activity after the March 1, 1996, date of public knowledge. The judge nevertheless concluded that these principles were inapplicable to punitive damages as they are not awarded based on the conduct of the victim.

[101] The trial judge then examined the issue of prescription.[137] Further to the application of the T.R.D.A., no claim for moral damages of the members of the Blais Class is prescribed, contrary to those related to punitive damages, which have been prescribed since November 20, 1995. In the event that this Act was declared unconstitutional,[138] any claim would be prescribed as of that date (art. 2925 *C.C.Q*), with respect to both moral and punitive damages. In the Létourneau matter, the motion for authorization to institute the class action was filed on September 30, 1998. Thus, all the causes of action of the members of this class originated after September 30, 1995. As the date of public knowledge in this matter was set as being March 1, 1996, no claim is prescribed under either the general scheme of the C.C.Q. or that of the T.R.D.A.

[102] On the issue of quantum, in the Blais matter, the appellants were ordered solidarily to pay $6,858,864,000 in moral damages, i.e., $15,500,000,000 with interest and the additional indemnity (arts. 1480 and 1526 C.C.Q. and ss. 22 and 23 T.R.D.A.).[139] An analysis of activities of the appellant ITL during the period covered by the claims, however, demonstrates that its wrongful conduct exceeds that of the other appellants. In

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135 Judgment *a quo* at paras. 647–817.

136 Judgment *a quo* at paras. 818–836.

137 Judgment *a quo* at paras. 837–910.

138 While waiting for the outcome of the appeal of the Declaratory Judgment of March 5, 2014, which was dismissed. For the subsequent developments, see *Imperial Tobacco Canada Ltd v. Québec (Procureure générale)*, 2015 QCCA 1554, leave to appeal to SCC refused, 36741 (5 May 2016).

139 Judgment *a quo* at paras. 911–1016.

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fact, the evidence discloses that ITL was the leader within the industry on several fronts, particularly where it concerns plans to conceal the truth and mislead the public. Taking into account the bad faith of ITL and the market shares of the appellants, their liability is apportioned as follows: 67% for ITL, 20% for RBH and 13% for JTM. In the Létourneau file, the judge refused to award such damages because the evidence did not establish in a sufficiently precise manner the aggregate sum of claims for all the members.[140]

[103] The judge then considered the principles applicable to the award of punitive damages (art. 1621 C.C.Q. and s. 272 C.P.A.).[141] Insofar as the claims under the *Charter* and the *C.P.A.* arise out of the same wrongful actions and attitudes of the appellants, they cannot be penalized twice. Consequently, the analysis is not undertaken separately for these statutes. These damages cannot be quantified on the basis of the market shares of the appellants as they must be assessed "in the light of all the appropriate circumstances" (art. 1621, para. 2 C.C.Q). They must be assessed on the basis of the annual pre-tax profits of each of them. Considering the particularly egregious conduct of ITL during the period covered by the claims, in addition to that of JTM to a lesser degree, it is appropriate to increase the sums for which these appellants are held liable above and beyond the base amount. Thus, the punitive damages set at 1.31 billion dollars are awarded in the following manner: 725 million for ITL, 460 million for RBH and 125 million for JTM. Since the gravity of the faults is more significant in the Blais file, the judge attributed 90% of the total of the sum to his Class and 10% to the Létourneau Class. However, due to the size of the moral damages awarded in the Blais file, the order for punitive damages cannot be as substantial. Further to this consideration, the judge ordered each of the appellants to pay a symbolic sum of $30,000, representing one dollar for the death of each Canadian caused by the tobacco industry each year. In the Létourneau file, the punitive damages were in the amount of $72,500,000 for ITL, $46,000,000 for RBH and $12,500,000 for JTM. Given that this Class includes more than one million persons, this sum represents only about $130 per member. Due to the fact that the judge did not award moral damages in this file, it is not appropriate to proceed with the distribution of a sum to each of the members on the ground that to do so would be impractical or too onerous.

[104] The judge ordered the provisional execution notwithstanding appeal of an initial deposit in the amount of $1,131,090,000,00. This sum includes a portion of moral damages in the Blais file and all of the punitive damages awarded in the two matters.[142]

[105] The judge also dismissed the applications for individual claims in the Blais and Létourneau files, which were discontinued by the respondents.[143]

[106] Finally, the judge ruled on objections taken under reserve and argued during the pleadings regarding the admissibility of exhibits bearing the entry "R" and orders of

[140] Judgment *a quo* at paras. 911–1016.
[141] Judgment *a quo* at paras. 1017–1112.
[142] Judgment *a quo* at paras. 1013–1123 and 1196–1204.
[143] Judgment *a quo* at paras. 1193–1195.

confidentiality with respect to certain documents.[144]

III. GROUNDS OF APPEAL

[107] The appellants have alleged a series of errors in support of their grounds of appeal. Some of their grounds overlap. Furthermore, certain arguments are raised in a dispersed manner within several grounds of appeal. This is notably the case with respect to criticisms concerning the general principles applicable to class actions.

[108] The respondents have replied to these arguments with their own classification of the grounds of appeal and have asked, within the framework of a cross-appeal, for an increase in the quantum of punitive damages in the event the order for compensatory damages is revised downward by the Court of Appeal.

[109] Moreover, prior to and during the hearing, the Court asked the parties to plead on various elements of the appeal including the contractual or extracontractual basis of the class actions, the exhibits, where their admissibility into evidence was called into question, and the terms of any potential individual recovery.

[110] It is thus appropriate to reorganize all these grounds of appeal, the responses given by the respondents, the ground of the cross-appeal and the other considerations that the Court has been called upon to decide based on the broadest possible conceptual schema. The Court will thus deal with the grounds of appeal in accordance with the following configuration:

1. Liability of the appellants under the general law and section 53 *C.P.A.*;
2. *Consumer Protection Act*;
3. *Charter of human rights and freedoms*;
4. Prescription;
5. Award and quantum of punitive damages;
6. Interest and additional indemnity;
7. Appropriate mode of recovery;
8. Interlocutory judgments and evidence;
9. Transfer of MTI obligations;
10. Destruction of documents by ITL.

[111] Due to their scope, the arguments of the parties on each of these subjects will be discussed directly within the analysis.

[144] Judgment *a quo* at paras. 1024–1192.

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IV. ANALYSIS

1. LIABILITY OF THE APPELANTS UNDER THE GENERAL LAW AND SECTION 53 C.P.A.

1.1. Preliminary remarks

A. Standard of review

[112] It is with deference − if not reluctance[145] − that appellate courts will reconsider the findings of fact of trial judges, for all the reasons we know and that have been repeated so often that it is no longer necessary to repeat them.[146] The intervention of an appellate court in this respect hinges on the demonstration of a palpable and overriding error, a strict and demanding standard (which, it bears repeating, [TRANSLATION] "is not in the nature of a needle in a haystack, but of a beam in the eye," to borrow an image from *J.G. c. Nadeau*.)[147]

[113] Nevertheless, the fact is that it is hard to ignore the following passage from *Berthiaume v. Réno-dépôt inc.*, on the appeal from the judgment of Superior Court,[148] following a long trial concerning urea-formaldehyde foam insulation(UFFI): [149]

> [TRANSLATION]
>
> The duty of restraint regarding the general appreciation of the evidence is of critical importance with respect to complex and lengthy trials. Even with exhaustive work, the trial judge cannot analyze every detail of the evidence, accurately explain every aspect of that analysis and provide justification for his or her overall conclusions regarding the quality, weight and effects of the evidence [reference omitted].
>
> …
>
> If there has ever been a long trial in Canadian judicial history, it was this one. However, despite its length and the variety of decisions that Hurtubise J. had to make, his work in assessing the evidence was so impressive that the appellants decided not to directly challenge his basic findings regarding the value of the evidence of the harmful nature of urea formaldehyde foam, its detrimental effects on the health of the occupants

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145 Term used by the Supreme Court, per Lamer, C.J. in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 78.

146 Those reasons were examined in detail in *Housen v. Nicholaisen*, 2002 SCC 33, and in several decisions of the Supreme Court and of this Court. For a recent example, see *Martel-Poliquin v. R.*, 2018 QCCA 1931 at para. 30.

147 2016 QCCA 167 at para. 77.

148 See *Berthiaume c. Val Royal Lasalle ltée*, J.E. 92-71, AZ-92021018 (published in part in [1992] R.J.Q. 76 (S.C.)).

149 *Berthiaume c. Réno-dépôt inc.*, [1995] R.J.Q. 2796 at 2807 and 2808 (C.A.).

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of the houses and the physical deterioration of those houses.

[114] These comments, which can be transposed in their entirety to this case, will form the basis for the following consideration of the trial judge's findings of fact.

B. Main findings of fact

[115] It is not possible to set out the details of each of the trial judge's findings, which run at over 200 pages[150] and are based on a careful analysis of over half a century of abundant and complex evidence that importantly, was contradictory, and that the parties fought over on an imposing factual battleground. Furthermore, it is not necessary, given that many of those findings are not, or not really, challenged on appeal, while other findings − it can be stated immediately − are not vitiated by any overriding error.

[116] The Court will therefore confine itself to the essentials and, specifically, to that which will establish the parameters of one or more liability regimes potentially relevant to the case. As required, in determining whether the parties have established the conditions allowing for a finding of liability or, on the contrary, exoneration, the trial judge's factual findings and the evidence itself will be examined more closely.

[117] However, before turning to the facts of the case, it may be worthwhile to review the underlying thesis of the respondents' class actions, which forms the framework of the proceedings:

> (1) Tobacco products, and specifically cigarettes, are harmful, and medically speaking, their consumption causes various diseases (including lung and throat cancer[151] and emphysema) as well as a strong addiction making quitting impossible or difficult;
>
> (2) The appellants, all manufacturers of cigarettes and other tobacco products, have been fully aware of the characteristics of this substance since the 1950s;
>
> (3) From 1950 to 1998, the appellants, individually and collectively, first failed to disclose the dangers of tobacco and cigarettes, then instituted and pursued a common policy of denying and trivializing the risks associated with those products, created and maintained an artificial scientific controversy on the subject, and, through their various marketing and communication strategies, crafted a misleading counter-discourse;

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[150] And 1,000 paragraphs, excluding everything relating to the distribution process, objections to the evidence, the confidentiality of certain information, individual claims and provisional execution.

[151] The term "throat cancer" is used here in the interests of brevity, but specifically, it means the squamous cell carcinomas of the larynx, oropharynx and hypopharynx covered by the Blais action *(Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.,* 2013 QCCS 4904 at paras. 9−16 and 83).

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> (4) Marketing a dangerous product with harmful effects that substantially exceed the benefits (benefits that are practically, if not totally, non-existent in this case), marketing that product without disclosing the risks associated with its consumption, systematically attempting to deny or minimize those risks, and deceptively misleading the user all amount to wrongful conduct of a nature resulting in the appellants' liability, as manufacturers;
>
> (5) As a result of these faults, the appellants are liable for the harm caused to both classes;[152]
>
> (6) In addition, there are grounds for awarding punitive damages.

[118] It should be noted that the first three statements made by the respondents coincide with the provisions of various statutes or with various judicial statements made in the case law prior to the judgment of first instance.

[119] Section 3 of the *Tobacco Products Control Act*,[153] assented to in June 1988, and the main provisions of which were declared unconstitutional in 1995 on the grounds of unjustified violation of the right to freedom of expression,[154] provided as follows:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,	**3.** La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement :
(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;	*a)* de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;
(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and	*b)* de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;
(c) to enhance public awareness of	*c)* de mieux sensibiliser les

[152] The Respondents made other allegations against the appellants, but they were rejected by the trial judge.

[153] *Tobacco Products Control Act*, S.C. 1988, c. 20.

[154] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199. See *supra* at para [58].

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the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.	Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

[Emphasis added.]

[120] Originally, section 4 of the *Tobacco Act* of 1997,[155] which replaced the 1988 statute, repeated the same theme and formulated the legislator's objective in equally urgent terms:

4. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,	**4.** La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave et d'envergure nationale et, plus particulièrement :
(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;	*a)* de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant, de façon indiscutable, un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;
(b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;	*b)* de préserver notamment les jeunes des incitations à la consommation du tabac et du tabagisme qui peut en résulter;
(c) to protect the health of young persons by restricting access to tobacco products; and	*c)* de protéger la santé des jeunes par la limitation de l'accès au tabac;
(d) to enhance public awareness of the health hazards of using tobacco products.	*d)* de mieux sensibiliser la population aux dangers que l'usage du tabac présente pour la santé.

[Emphasis added.]

[121] In the Supreme Court of Canada judgment rendered in 1995 concerning the 1988 legislation, La Forest J.,[156] who, on the basis of the evidence, held that tobacco was an

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[155] *Tobacco Act*, S.C. 1997, c. 13.

[156] Dissenting, but not on this specific point.

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inherently dangerous[157] and addictive[158] product, commented as follows[159]:

> 30 ... A copious body of evidence was introduced at trial demonstrating convincingly, and this was not disputed by the appellants, that tobacco consumption is widespread in Canadian society and that it poses serious risks to the health of a great number of Canadians. …
>
> 31 Apart from shedding light upon the government's intent in introducing this legislation, this speech also gives some indication of the nature and scope of the societal problem posed by tobacco consumption. Statistics show that approximately 6.7 million Canadians, or 28 percent of Canadians over the age of 15, consume tobacco products; see expert report prepared for Health and Welfare Canada by Dr. Roberta G. Ferrence, *Trends in Tobacco Consumption in Canada, 1900-1987* (1989). The harm tobacco consumption causes each year to individual Canadians, and to the community as a whole, is tragic. Indeed, it has been estimated that smoking causes the premature death of over 30,000 Canadians annually; see Neil E. Collinshaw, Walter Tostowaryk, Donald T. Wigle, "Mortality Attributable to Tobacco Use in Canada" (1988), 79 *Can. J. Pub. Health* 166; expert report prepared for Health and Welfare Canada by Dr. Donald T. Wigle, *Illness and Death in Canada by Smoking: An Epidemiological Perspective* (1989). Overwhelming evidence was introduced at trial that tobacco use is a principal cause of deadly cancers, heart disease and lung disease. In our day and age this conclusion has become almost a truism. Nonetheless, it is instructive to review a small sampling of some of the vast body of medical evidence adduced at trial attesting to the devastating health consequences that arise from tobacco consumption. ...
>
> 32 It appears, then, that the detrimental health effects of tobacco consumption are both dramatic and substantial. Put bluntly, tobacco kills. ...
>
> 34 ... Many scientists agree that the nicotine found in tobacco is a powerfully addictive drug. For example, the United States Surgeon General has concluded that "[c]igarettes and other forms of tobacco are addicting" and that "the processes that determine tobacco addiction are similar to those that determine addiction to other drugs, including illegal drugs"; see The *Health Consequences of Smoking — Nicotine Addiction — A report of the Surgeon General* (1988).
>
> [Emphasis added.]

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[157] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, specifically at para. 41.

[158] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 83.

[159] Later on in his decision, La Forest J. (at para. 66) made several findings pertaining to addiction caused by tobacco products, which he described as “a unique, and somewhat perplexing, phenomenon” and compared to “dangerous drugs” and “poisons” (para. 43).

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[122] In 2007, in the judgment dismissing the constitutional challenge of the 1997 *Tobacco Act*, the Supreme Court, this time per McLachlin C.J., added to those comments in light of new evidence:[160]

> 9 Parliament was assisted in its efforts to craft and justify appropriately tailored controls on tobacco advertising and promotion by increased understanding of the means by which tobacco manufacturers seek to advertise and promote their products and by new scientific insights into the nature of tobacco addiction and its consequences. On the findings of the trial judge in the present case, tobacco is now irrefutably accepted as highly addictive and as imposing huge personal and social costs. We now know that half of smokers will die of tobacco-related diseases and that the costs to the public health system are enormous. We also know that tobacco addiction is one of the hardest addictions to conquer and that many addicts try to quit time and time again, only to relapse.
>
> …
>
> 13 Some 45,000 Canadians die from tobacco-related illnesses every year. By this measure, smoking is the leading public health problem in Canada.
>
> 14 Most smokers begin as teenagers, between the ages of 13 and 16. Tobacco advertising serves to recruit new smokers, especially adolescents. It is completely unrealistic to claim that tobacco advertising does not target people under 19 years of age. Recent tobacco advertising has three objectives: reaching out to young people, reassuring smokers (to discourage quitting), and reaching out to women.
>
> 15 Tobacco contains nicotine, a highly addictive drug. Some 80 percent of smokers wish they could quit but cannot. However, new smokers, especially young people, are often unaware of (or tend to deceive themselves about) the possibility of addiction. Tobacco companies have designed cigarettes to deliver increased levels of nicotine.
>
> [Emphasis added.]

[123] She also stated:

> 61 The inquiry into the justification of the ban imposed by s. 20 of the Act must be set in the factual context of a long history of misleading and deceptive advertising by the tobacco industry. The creative ability of the manufacturers to send positive messages about a product widely known to be noxious is impressive. In recent years, for example, manufacturers have used labels such as “additive free” and “100% Canadian tobacco” to convey the impression that their product is wholesome and healthful. Technically, the labels may be true. But their intent and effect is to falsely

[160] *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30.

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lull consumers into believing, as they ask for the package behind the counter, that the product they will consume will not harm them, or at any rate will harm them less than would other tobacco products, despite evidence demonstrating that products bearing these labels are in fact no safer than other tobacco products. The wording chosen by Parliament in s. 20, and its justification must be evaluated with this context in mind. Parliament's concern was to combat misleading false inferences about product safety and to promote informed, enlightened consumer choice.

62 The specific objection is to the phrase "or that are likely to create an erroneous impression" in s. 20. The manufacturers argue that this phrase is overbroad and vague, and introduces subjective considerations. How, they ask, can they predict what is "likely to create an erroneous impression"? The words false, misleading or deceptive, used as legal terms, generally refer to objectively ascertainable facts. If "likely to create an erroneous impression" adds something to "false, misleading or deceptive", as presumably was Parliament's intent, what is it?

63 The answer is that the phrase "likely to create an erroneous impression" is directed at promotion that, while not literally false, misleading or deceptive in the traditional legal sense, conveys an erroneous impression about the effects of the tobacco product, in the sense of leading consumers to infer things that are not true. It represents an attempt to cover the grey area between demonstrable falsity and invitation to false inference that tobacco manufacturers have successfully exploited in the past.

64 The industry practice of promoting tobacco consumption by inducing consumers to draw false inferences about the safety of the products is widespread. This suggests that it is viewed by the industry as effective. Parliament has responded by banning promotion that is "likely to create an erroneous impression". This constitutes a limit on free expression. The only question is whether the limit is justified under s. 1 of the *Charter*.

…

68 Finally, the impugned phrase meets the requirement of proportionality of effects. On the one hand, the objective is of great importance, nothing less than a matter of life or death for millions of people who could be affected, and the evidence shows that banning advertising by half-truths and by Invitation to false inference may help reduce smoking. The reliance of tobacco manufacturers on this type of advertising attests to this. On the other hand, the expression at stake is of low value — the right to invite consumers to draw an erroneous inference as to the healthfulness of a product that, on the evidence, will almost certainly harm them. On balance, the effect of the ban is proportional

[Emphasis added.]

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[124] Of course, none of these observations were binding on the trial judge, whose findings differ on several points (for example, regarding the allegation that the appellants developed an advertising strategy targeting adolescents), which we will return to later. However, in this case, the evidence adduced by both sides demonstrates, beyond the requisite balance of probabilities, the accuracy of these legislative and judicial findings, with which the trial judge's findings are substantially consistent.

[125] Thus, on the basis of the evidence submitted, the trial judge held that tobacco, more precisely cigarettes, is carcinogenic (lungs and throat) and that its consumption is directly associated with various heart and respiratory diseases, including emphysema. The scientific evidence on file does not allow for any other conclusion. Admittedly, it does not establish that every smoker will develop cancer or emphysema at the end of a latency period, which can be quite long (20 years or more),[161] but it shows that almost all people with lung cancer, throat cancer or emphysema are or were smokers[162].

[126] The judge also held that tobacco is indeed addictive and that it quickly creates a strong addiction in its users,[163] although not insurmountable[164] (which some people are quick to compare to heroin and cocaine addiction).[165] Although the trial judge does not

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[161] Exhibit 30217 at 17. See also Exhibit 1426.1; testimony of Dr. Kenneth Mundt, March 17, 2014, at 59−60.

[162] In regard to lung cancer, this had been known since 1950, as appears (*inter alia*) from Exhibit 758-3: *Sales Lecture no. 3 - October 1957,* by M. Patrick O'Neill-Dunne, President of Rothmans of Pall Mall Canada Limited, specifically at 27, under the heading "Conclusion" (quoted in the judgment *a quo*, note *infra* at 296). The following remarks are also found in Exhibit 1398 (at 8−9), whose authors, after reviewing medical opinions and controversies on the subject and after expressing various reservations, conclude as follows (the first paragraph of this quotation is also found in paragraph 55 of the judgment *a quo*):

> 1. Although there remains some doubt about as to the proportion of the total lung cancer mortality which can fairly be attributed to smoking, scientific opinion in the U.S.A. does not seriously doubt that the statistical correlation is real and reflects a cause and effect relationship.
> 2. There remains an area for debate as to what is meant by "causation". Opinion differs as to whether or not cigarette smoke is likely to exert its effect by direct action on the lung. An indirect mechanism of causation is thought by some to be more likely.
> 3. The direct carcinogenicity of smoke condensate to animal tissue, which is consistent with direct causation, is now fully confirmed but the evidence so far obtained makes it unlikely that this activity is due to any single "super carcinogen" in smoke.

The evidence is replete with documents of this kind, which cannot all be quoted, confirming this knowledge. The risks of throat cancer or emphysema were known more or less concomitantly (see Exhibit 1426.1, *Expert report*, *Dr. Siemiatycki*). In that report, the expert relies on numerous scientific articles demonstrating awareness from the 1960s onwards of these risks (at 83). Knowing that the appellants kept abreast of the scientific research on the products they sold, it can be assumed that they had this knowledge.

[163] Physiological and pharmacological addiction, affecting the brain (see judgment *a quo*, specifically para. 175 *in fine* and para. 179).

[164] See judgment *a quo*, specifically paras. 177 to 182 and 830.

[165] 1988 Report of the Surgeon General of the United States, Exhibit 601-1988 at 37233 *et seq*. (J.S.); 2010 Report of the Surgeon General of the United States, Exhibit 601-2010 at *iii* and Exhibit 601-2010A at *iii* and 105; 2012 Report of the Surgeon General of the United States, Exhibit 601-2012 at 23; 2014 Report of the Surgeon General of the United States, Exhibit

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spell it out in full, it nevertheless appears from the judgment[166] − and the evidence − that the combination of toxicity and addiction increases the risk of developing carcinoma (lung, throat) or emphysema, a risk that increases with use, like the addiction itself.

[127] It is tempting to once again quote La Forest J., who was hardly exaggerating in describing tobacco as the "only legal product sold in Canada which, when used precisely as directed, harms and often kills those who use it."[167] The evidence on this point is clear: tobacco, in this case, that which is smoked, is a product with no real benefit other than to give the smoker the pleasure of satisfying and temporarily soothing the intense need − the drug addiction − that his or her consumption creates and to relieve the stress of (even temporary) abstinence. The appellants know this, and as Robert Bexon (of ITL) stated in a 1985 memo he sent to Wilmat Tennyson (President of ITL): "If our product was not addictive, we would not sell a cigarette next week in spite of these positive psychological attributes" (in other words, according to Mr. Bexon, reduced stress, improved concentration and alleviation of boredom).[168] This says a lot about the merits of cigarettes.

[128] It has been known for a long time that tobacco use causes a strong addiction, the product's primary commercial asset. Going gradually back in time, we note that in 1984 (and this is only one example among many), the same Robert Bexon wrote the following to Wayne Knox (then Director of Marketing at ITL):[169]

> However, we know quitting is not an easy process. For every 100 smokers who try, only five will make it past the first year. Less than two will make it
> permanently. ...

[129] In 1976, in a note to Anthony Kalhok (Vice President Marketing, ITL), Michel Descoteaux (ITL employee) suggested that the industry should encourage moderation among smokers, and added the following:[170]

> A word about addiction. For some reasons, tobacco adversaries have not, as yet, paid attention to the addictiveness of smoking. This could become a very serious issue if someone attacked us on this front. We all know how difficult it is to quit smoking and I think we could be very vulnerable to such criticism.
>
> I think we should study this subject in depth, with a view towards developing products that would provide the same satisfaction as today's

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601-2014B at 30.

166 Judgment *a quo*, specifically at para. 183.

167 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 97.

168 Exhibit 266 (transcribed in Exhibit 266A at 1) at 20603 (J.S.).

169 Exhibit 267 at 20623 (J.S.). A 1985 document entitled *Saving the Tobacco Industry* (Exhibit 1110) establishes the cumulative failure rate for smokers trying to quit at 98% over a 104-week period (at 14), noting that "[i]f starting on the first of January 1985, every attempt to quit was successful, the cigarette industry would end at 2:40 a.m. on March 22, 1988" (at 13).

170 Exhibit 11 at 4. Paragraph 135 of the judgment *a quo* refers to the same passage.

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cigarettes without “enslaving” customers.

[130] In 1961, Charles D. Ellis, scientific advisor at BAT (ITL’s parent company), stated as follows in interview notes:[171]

> Smoking demonstrably is a habit based on a combination of psychological and physiological pleasure, and it also has strong indications of being an addiction. It differs in important features from addiction to other alkaloid drugs, but yet there are sufficient similarities to justify stating that smokers are nicotine addicts.

[131] He even suggested that further research be conducted to discover “the causes of the pleasurable physiological effects and the cause of addiction.”[172]. Although at the time the appellants did not know the exact causes of the addiction, it is indisputable that they knew about the addiction.

[132] However, the evidence indicates that publicly, the appellants, like the entire tobacco industry, strongly opposed the use of words “addict” and “addiction” to describe what they present as the habit of someone who “lights up a cigarette only after dinner;”[173] more generally, they argued that one cannot seriously “suggest that to use tobacco is the same as to use crack”[174] or to assimilate smokers to drug addicts. They even resisted the idea of mentioning tobacco addiction on cigarette packages or in their advertisements. Their efforts were successful, and it was not until 1994 that the Canadian government imposed such a requirement, and a statement to that effect began being displayed on packaging.

[133] Nevertheless, internally, they clearly acknowledged the addictive nature of their product, at least since the 1960s. The trial judge was of the view that they had been aware of it since the 1950s (while concealing that knowledge, as he notes elsewhere):

> [565] In the Chapter of the present judgment on ITL, we cited Professor Flaherty to the effect that, since the mid-1950s, it was common knowledge that smoking was difficult to quit, and that by that time “the only significant discussion in the news media on this point concerned whether smoking constituted an addiction, or whether it was a mere habit” [Reference omitted].

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171 Exhibit 1379 at 2.

172 Exhibit 1379 at 2.

173 Exhibit 487 at 26887 (J.S.). Paragraph 466 of the judgment *a quo* cites the same exhibit.

174 Exhibit 487 at 26887 (J.S.). See also (merely two examples among many): (1) the letter from Mr. Neville to Mr. G.E. MacDonald (Exhibit 694, August 31, 1988, at 47826 (J.S.)), part of which is quoted in paragraph 467 of the judgment *a quo*) and (2) the *“Philip Morris International - Spokesperson’s Guide, June 1990,”* which suggests that the spokesperson “*discredit the use of the word addiction in relation to tobacco use*” (Exhibit 846-AUTH). This semantic reluctance was not, however, unique to the appellants or the tobacco industry (see Exhibit 601-2014B, *The Health Consequences of Smoking - 50 Years of Progress: A Report of the Surgeon General*, 2014, at 30).

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> [566] Consistent with our reasoning throughout, we conclude that if the Companies believed that the public knew of the risk of dependence by the 1950s, each of the Companies had to have known of it at least by the beginning of the Class Period.

[134] The appellants did not seriously contest these facts (toxicity of an otherwise addictive product) at trial, nor do they challenge them on appeal, except to assert that, despite the addictive effect of tobacco, many smokers succeed in quitting (something the trial judge did not fail to mention).[175]

[135] The trial judge also held that, throughout the relevant period (1950-1998), the appellants were well aware of the risks and dangers of tobacco,[176] including, as we have just seen, addiction.[177] He also held that they marketed this product without adequately informing users and, through various strategies and actions,[178] falsely created the impression among users and the general public that the product was first harmless and even beneficial, and then relatively harmless. They systematically undermined attempts to inform the public (smokers and non-smokers), perpetuated alleged scientific controversies about the harmful effects of cigarettes and tobacco use, used various

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175 The appellants' reluctance to use the term "addiction" seems to persist, since at trial they were quick to argue, for example, that the *Diagnostic and Statistical Manual of Mental Disorder* (known under the acronym DSM) does not use that term to refer to nicotine addiction (although, as the trial judge noted, the DSM refers to a *tobacco use disorder*, described at paragraph 180 of the judgment *a quo*).

176 Judgment *a quo* at para. 70:

> [70] Although to a large degree the Court rejects the evidence of Messrs. Flaherty and Lacoursière, as explained later, there is no reason not to take account of such an admission as it reflects on the Companies' knowledge. It is merely common sense to say that, advised by scientists and affiliated companies on the subject, the Companies level of knowledge of their products far outpaced that of the general public both in substance and in time. These experts' evidence leads us to conclude that the Companies had full knowledge of the risks and dangers of smoking by the beginning of the Class Period. [Reference omitted]

177 Addiction induces, among other things, the "compensation" phenomenon, which causes a smoker to unconsciously seek to maintain his nicotine level and therefore increases the amount or intensity of his or her consumption when switching from a regular cigarette to one that is "*légère* / light" or "*douce* / mild." The compensation phenomenon ensures that a smoker who believes that he or she is reducing the risk associated with tobacco by smoking a milder cigarette does not receive the expected benefit (see judgment *a quo* at paras. 340 *et seq*.).

178 For example, interviews in the media, statements made during participation in parliamentary commissions and committees of inquiry or other public presentations and communications, support for pressure groups such as the "*Société pour la liberté de fumeurs* / Smokers' Freedom Society"(on this last point, see in particular: judgment *a quo* at paras. 468 and 469), etc.

179 Judgment *a quo* at para. 485.

180 Judgment *a quo* at para. 486.

181 Judgment *a quo* at para. 486

182 Judgment *a quo* at para. 475

183 Judgment *a quo* at paras. 188 to 201.

184 See also paras. 420 to 425 of the judgment *a quo*.

promotional means to convince people to start or continue using, as the case may be, a product, the toxicity of which they claimed had been exaggerated, and finally, presented smoking as a matter of personal choice and freedom. As the trial judge stated, the appellants "knowingly withheld critical information from their customers, but also lulled them into a sense of non-urgency about the dangers"[179] and "remained silent about the dangers to which they knew they were exposing the public yet voluble about the scientific uncertainty of any such dangers."[180] The trial judge added "In doing so, each of them acted 'with full knowledge of the immediate and natural or at least extremely probable consequences that (its) conduct will cause.'"[181] For most of the period concerned, they even conspired to that end and followed a common policy of denial and misinformation, "in order to impede users of their products from learning of the inherent dangers of such use."[182]

[136] However, the trial judge was of the view that the appellants did not deliberately increase the nicotine content of their cigarettes in order to increase tobacco dependence as the respondents alleged.[183] Nor, in his view, did they specifically target adolescents or, more specifically "Young Teens" under the age at which they can legally obtain cigarettes (16 or 18 depending on the year in question) in their advertising or marketing strategies:[184]

> [419] The evidence is not convincing in support of the allegation of wilful marketing to Young Teens. There were some questionable instances, such as sponsorship of rock concerns and extreme sports but, in general, the Court is not convinced that the Companies focused their advertising on Young Teens to a degree sufficient to generate civil fault.

[137] The judge acknowledged that the appellants undoubtedly may have tried to attract non-smokers generally and induce them to start smoking, but found that this in itself is not unlawful, at least as long as the product remains legal and the advertising is directed at people of a certain age and, as is the case here, does not contain any misinformation:

> [433] Hence, the Court finds that, perhaps only secondarily, the Companies' targeted adult non-smokers with their advertising. So be it, but where is the fault in that? Not only did the law allow the sale of

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> cigarettes to anyone of a certain age, but also the Companies respected the government-imposed limits on the advertising of those products.
>
> [434] There is no claim based on the violation of those limits or, for that matter, on the violation of any of the Voluntary Codes in force from time to time. Consequently, we do not see how the advertising of a legal product within the regulatory limits imposed by government constitutes a fault in the circumstances of these cases.
>
> [435] This is not to say that the Companies' marketing of their products could not lead to a fault. The potential for that comes not so much from the fact of the marketing as from the make-up of it. For a toxic product, the issue centers on what information was, or was not, provided through that marketing, or otherwise. That aspect is examined elsewhere in this judgment, for example, in section II.D.
>
> ...
>
> [438] We find no fault on the Companies' part with respect to conveying false information about the characteristics of their products. It is true that the Companies' ads were not informative about smoking and health questions, but that, in itself, is not necessarily a fault and, in any event, it is not the fault proposed in the Common Question E.

[138] While the first conclusion is not surprising, the others, at least as regards young adolescents, and the absence of fault regarding the conveying of false information about the characteristics of the products in question, warrant several comments.

[139] As the trial judge pointed out, it is self-evident that the appellants wished to entice non-smokers, in that they intended to maintain or increase their market. But the assertion that they did not want to target "Young Teens" is debatable. The evidence establishes that they had a sustained interest in this category of users (or potential users), whose habits and motivations they assiduously analyzed.[185] Their explanations on that subject

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[185] The evidence is too abundant to make useful reference to it, but one can almost randomly select an example, which is not unique, i.e., an excerpt from a November 20, 1984, memo to Mr. Wayne Knox, Director of Marketing (ITL) from Mr. Robert Bexon, employed in the Marketing Department (ITL). Given that smokers are gradually beginning to give up cigarettes, which are attracting fewer new users, Mr. Bexon states that he is considering various strategies to counter this trend and ensure the viability of the tobacco industry in Canada (Exhibit 267 at 2 and 3 of the Appendix):

> In the domestic environment - ensuring future viability for the tobacco industry involves “fixing” two areas - maintaining our current franchise as buyers of our products and creating new users. There are other strategies. These two predominate.
>
> …
>
> Objective
>
> To ensure that the incidence of use of tobacco products is higher in the Canadian population than would be the case if we did nothing. (For number fans, I think we could even get a number.)
>
> Strategies

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were accepted by the trial judge,[186] but in view of the evidence, they remain doubtful.[187] But just because a finding is controversial does not mean that is reversible; the standard of palpable and overriding error requires more, and the Court will therefore rely on the trial judge's finding on this point.

[140] The question of whether the appellants conveyed false or erroneous information about the characteristics of their products will be discussed below. Suffice it to say for the time being that paragraphs 433 to 435 and 438 of the judgment *a quo* cited above, appear to be based on a very narrow view of what constitutes false or misleading information and an even narrower view of the appellants' obligation to provide information under the general law. However, the trial judge seems to reject this way of viewing things when, in a subsequent part of his judgment, he gives the following explanation:

> [458] It is the overall look and feel of the message, however, that most violates the Companies' obligation to inform consumers of the true nature of their products. By attempting to lull the public into a sense of non-urgency about the health risks, this type of presentation, for there were many others, is both misleading and dangerous to people's well-being.

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1. Moderate the perceptions of smoking and smokers to a situation where they are more conducive to continued tobacco use.
2. Develop and introduce new products that can act as an acceptable alternative to both cigarettes and quitting.
3. Initiate projects to insure the continued uptake of tobacco products by young Canadians.

A brief but not exhaustive review of each area, and a plan of attack for next steps, follow.

[Emphasis added.]

Elsewhere in the same memo, it is stated that the young Canadians in question are 15 and older. Mention should also be made of Exhibit 142, Consumer Research Library - Proposal for Imperial Tobacco Ltd. 19 September 1977, which suggests examining "what the smoking young have in mind about smoking," an objective detailed in eight points to be addressed through "four group discussions among smokers aged 16 or 17" (it is true that at the time, it was not illegal to smoke at 16) (at 2 and 4). The results of the study are set forth in Exhibit 142B, October 18, 1977.

See also Exhibit 658A (JTM), *Youth Target 1987, by the Creative Research Group*, June 8, 1987,

which targets young people between the ages of 15 and 24; Exhibit 762 (ITL), *A Strategic Review - The Canadian Tobacco Industry - by C. Ellis,* August 1994, at 13-14, which is aimed particularly at people under 20 years of age.

[186] Judgment *a quo* at paras. 421 to 424.

[187] It should be noted that in 2001, the Superior Court, in *J.T.I. MacDonald Corp. v. Canada (Attorney General)*, [2003] R.J.Q. 181, found:

> [TRANSLATION]
>
> [122] Moreover, the Court does not believe that the advertising of tobacco companies is directed solely at smokers over 19 years of age. All advertising campaigns contain seductive elements for teenagers who are the future of the industry. The industry knows that people start smoking between the ages of 12 and 18, and they systematically target this vulnerable audience in their advertising and marketing.

The Supreme Court accepted this factual finding in its subsequent 2007 decision (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at para. 14). Of course, there is no *res judicata* in this regard.

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[141] Similarly, the trial judge's comments about the fact that the appellants complied with regulatory requirements are inconsistent with those he subsequently made about the misinformation he accuses them of.

[142] But, let us continue with the inventory of the trial judge's findings. He fixed, and this finding is important, January 1, 1980, as the date on which members of the Blais Class had actual or presumed knowledge of the diseases associated with cigarette smoking (lung or throat cancer, emphysema). The trial judge decided that as of that date, the dangers were public knowledge, and no one could disregard them any longer.

[143] In the Létourneau case, the trial judge was of the view that March 1, 1996, should be fixed as the date that the general public became aware of the fact that cigarettes are addictive. His finding is based on the following equation: in September 1994, the *Tobacco Products Control Regulations*[188] imposed, for the first time, the obligation on the appellants to display the following warning on cigarette packages: "Cigarettes are addictive / *La cigarette crée une dépendance*." According to the trial judge, the information in that message took some time to reach most smokers and register in their minds:

> [129] The addiction Warning was one of eight new Warnings and they only started to appear on September 12, 1994. It would have taken some time for that one message to circulate widely enough to have sufficient force. The impact of decades of silence and mixed messages is not halted on a dime. The Titanic could not stop at a red light.
>
> [130] The Court estimates that it would have taken one to two years for the new addiction Warning to have sufficient effect among the public, which we shall arbitrate to about 18 months, i.e., March 1, 1996. We sometimes refer to this as the "**knowledge date**" for the Létourneau Class.
>
> [Emphasis in original.]

[144] Since a period of 18 months was necessary for effective dissemination of this new warning, the trial judge decided that the addictive nature of cigarettes could be considered a matter of public knowledge only as of March 1, 1996.

[145] Before either of these dates, the Blais and Létourneau Classes (as well as the public as a whole) had little or no reliable information on the subject, or what information was available was conflicting, too general and superficial to be of any use, given the appellants' misinformation on all fronts.

[146] On another point, the trial judge also held that the Blais and Létourneau Classes had suffered harm. As a result of their smoking, the members of Blais Class developed

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[188] The *Tobacco Products Control Regulations*, SOR/89-21, enacted December 22, 1988, proclaimed in force January 1, 1989, and subsequently amended by SOR/89-248, SOR/93-389 and SOR/94-5. SOR/93-389, impose the requirement to state that cigarettes are addictive.

lung or throat cancer or emphysema, conditions that have caused them significant moral damage (the respondents' claim is limited to compensation for this type of damage). As a direct result of their cigarette consumption, the Létourneau Class also sustained moral damage arising from their addiction.

[147] Ultimately, the trial judge held that the harm resulted from the appellants' wrongful conduct, which caused both classes to begin or to continue smoking.

[148] To summarize, the trial judge's main findings of fact are as follows:

> - Tobacco consumed through cigarettes is addictive; it is also carcinogenic (specifically lung and throat cancer); it causes respiratory diseases, including emphysema;
>
> - During the relevant period, the appellants, individually and in concert, first carefully and deliberately concealed the dangers of tobacco use (specifically smoking), as well as the risks associated with its use, dangers and risks of which they were fully aware;
>
> - When the Government, the medical profession and other groups or bodies began to realize and publicize the nature and importance of the dangers and risks in question, the appellants agreed to disclose certain information (including voluntary warnings, beginning in 1972) and then complied with government requirements in this regard;
>
> - At the same time, however, they agreed on a general and systematic policy of misinformation, which they then applied for decades, thereby deceiving and misleading the public about the real effects of smoking;
>
> - The pathogenic effects of smoking were public knowledge as of January 1, 1980, and its addictive effects were public knowledge as of March 1, 1996;
>
> - Because of their smoking, the members of the Blais Class developed lung or throat cancer, or emphysema, and sustained moral injuries as a result;
>
> - The same applies to the Létourneau Class, whose moral injuries result from their cigarette-induced addiction;
>
> - The appellants' conduct is directly related to the decision the Class members made to smoke or continue smoking.

[149] It should be noted that the appellants do not really challenge the trial judge's first four findings, except incidentally and peripherally. Nor do they deny the harm caused to the members of both Classes. Rather, they challenge the legal treatment of the facts and their resulting liability, mainly in terms of causation, which in their view was not proven

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either collectively or individually.[189] They further deny that their breaches led to the decision to start smoking or continue smoking made by the members of both Classes, and they argue that the respondents have not proved such a causal relationship.

[150] Similarly, the appellants vigorously contest the "knowledge dates" set by the trial judge. In their opinion, both Classes, like the general public, had long been aware of the dangers of smoking, including its addictive nature. They may not have been able to put a precise medical or scientific label on the problems associated with the consumption of their product, but that does not matter and does not in any way detract from their practical and concrete knowledge of the situation. However, since the toxicity of cigarettes was well known or deemed to be known by everyone and therefore by the members of both Classes, the appellants, even if at fault, should be exonerated from all liability.

[151] Although the respondents present a much more negative picture of the situation, they also do not contest the trial judge's findings, except indirectly as regards advertising aimed at adolescents, an issue discussed above, and the "knowledge dates."

[152] Before addressing the issues raised by the appeals, it is important to present the different liability regimes that may be applicable to the situation. A manufacturer's liability may be based on contractual or extracontractual grounds that have varied over time and which must now be considered.

1.2. Regimes of civil liability

A. Background

[153] The Class Period extends from 1950 to 1998, during which time the C.C.L.C. (in force before 1994) was replaced by the C.C.Q. (which came into force, as such, on January 1, 1994); the *Charter*, an instrument of public policy, added to the relevant body of legislation in 1975 (and came into force on June 28, 1976), as did a new C.P.A.,[190] also public policy legislation, in 1978 (and came into force on April 30, 1980, with some exceptions).

[154] The sources (contractual or extracontractual) of and the conditions giving rise to a manufacturer's civil liability have changed over the years and must be differentiated according to when the facts likely to trigger that liability occurred. We will use January 1, 1994, which corresponds to the coming into force of the C.C.Q., as the pivotal date. From 1950 to 1998, the liability of a manufacturer who had not adequately informed the user of the dangers related to the product it was marketing – the main subject of this dispute – therefore fell successively under one of the regimes described hereinbelow:

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189 Neither medical causation, nor [TRANSLATION] "behavioural" causation, to use the appellants' expression, were established, either individually or collectively.

190 This act replaced the *Consumer Protection Act*, S.Q. 1971, c. 74, which did not contain any provisions relevant to the present dispute.

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Before 1994

- Under the C.C.L.C., and for most of the Class Period, such liability was either contractual (arts. 1022, 1065, 1506, 1522 *et seq*. C.C.L.C.) or extracontractual,[191] under article 1053 C.C.L.C., and opting to have the matter dealt with on a contractual or extracontractual basis was not excluded;[192]

- A manufacturer's contractual liability and duty to inform the buyer were embodied in the "warranty against latent defects / *garantie des défauts cachés*" (today the seller's legal warranty) prescribed by the second paragraph of article 1506 and articles 1522 *et seq*. C.C.L.C.,[193] a warranty extended to the subsequent purchaser; the law on implied contractual obligations, governed by article 1024 C.C.L.C., is sometimes associated with the obligation to inform imposed on the seller or manufacturer that markets a product which, although not affected by a design or manufacturing defect, is nevertheless inherently dangerous;

- From an extracontractual perspective, the case law interpreting and applying article 1053 C.C.L.C. imposed on the manufacturer an obligation, based on the general duty to act reasonably so as not to cause harm to others, to properly inform the users of its products, with the presumption that it is aware of the risks and dangers of the products in question and their defects;

- As of June 1976, the provisions of the *Charter* could also be used, specifically section 1 (in the event of bodily or moral injury) and section 49 (variation of civil liability under the general law, the violation of a right protected by the *Charter* is a civil fault, with certain civil faults constituting at the same time a violation of the *Charter*[194]);

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191 At that time the relevant terminology was "*délits* / offences" or "*quasi-délits* / quasi-offences."

192 In some cases, a person entitled to a contractual remedy could opt to base his or her claim on a manufacturer's extracontractual liability instead. The issue of opting between contractual and extracontractual liability, permissible before 1994, will be examined below.

193 Article 1522 C.C.L.C. provided as follows:

1522. The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.

1522. Le vendeur est tenu de garantir l'acheteur à raison des défauts cachés de la chose vendue et de ses accessoires, qui la rendent impropre à l'usage auquel on la destine, ou qui diminuent tellement son utilité que l'acquéreur ne l'aurait pas achetée, ou n'en aurait pas donné si haut prix, s'il les avaient connus.

194 . See *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.,* [1996] 2 S.C.R. 345 at paras. 119 to 121 (majority reasons per Gonthier J.), subject to the autonomous nature of punitive damages (see *de Montigny v. Brossard (Succession)*, 2010 SCC 51 , which however recognizes the convergence of an action in compensatory damages based on section 49 of the *Charter* and one in damages governed by the C.C.Q. rules of

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- Lastly, as of April 1980, section 53 C.P.A. gave the consumer the right to sue the manufacturer directly, not only in the event of a latent defect, but also if the manufacturer failed to provide information necessary to protect the user against a risk or danger inherent in the product (failure to inform);

- In addition, there are prohibitions against certain practices, including false or misleading representations (advertising and other forms of publicity) (ss. 219 to 222 C.P.A.) or incomplete representations (s. 228 C.P.A.), all of which obviously affect the quality of the information conveyed to consumers. Section 272 C.P.A. prescribes the recourses for the infringement of those provisions.

After January 1, 1994

- Under the C.C.Q., the liability of a manufacturer in breach of its obligation to inform the user of the product continues to be stated in contractual and extracontractual terms, but the possibility of opting between recourses was prohibited as of 1994;[195]

- From a contractual perspective, the legislator modernized the legal warranty against latent defects, now a "warranty of quality," enshrined in articles 1716 and 1726 *et seq*. C.C.Q., expressly imposed on manufacturers by article 1730[196] and implied in article 1442 C.C.Q.; as regards implied contractual obligations, articles 1375 and 1434 C.C.Q.

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liability). See also *Bou Malhab v. Diffusion Métromédia CMR inc.,* 2011 SCC 9 at para 23.

[195] The issue of opting between contractual and extracontractual remedies, prohibited under article 1458 C.C.Q. as of 1994, is discussed below.

[196] Articles 1726 and 1730 C.C.Q. provide as follows:

1726. The seller is bound to warrant the buyer that the property and its accessories are, at the time of the sale, free of latent defects which render it unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them.

The seller is not bound, however, to warrant against any latent defect known to the buyer or any apparent defect; an apparent defect is a defect that can be perceived by a prudent and diligent buyer without the need to resort to an expert.

1726. Le vendeur est tenu de garantir à l'acheteur que le bien et ses accessoires sont, lors de la vente, exempts de vices cachés qui le rendent impropre à l'usage auquel on le destine ou qui diminuent tellement son utilité que l'acheteur ne l'aurait pas acheté, ou n'aurait pas donné si haut prix, s'il les avait connus.

Il n'est, cependant, pas tenu de garantir le vice caché connu de l'acheteur ni le vice apparent; est apparent le vice qui peut être constaté par un acheteur prudent et diligent sans avoir besoin de recourir à un expert.

1730. The manufacturer, any person who distributes the property under his name or as his own, and any supplier of the property, in particular the wholesaler and the importer, are also bound to a seller's warranty.

1730. Sont also tenus à la garantie du vendeur, le fabricant, toute personne qui fait la distribution du bien sous son nom ou comme étant son bien et tout fournisseur du bien, notamment le grossiste et l'importateur.

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replaced article 1024 C.C.L.C.;

- From an extracontractual perspective, the legislator, codified and strengthened principles previously set out in the case law, implemented a specific liability regime in articles 1468, 1469 and 1473 C.C.Q., applicable to manufacturers in the event of a safety defect (including product failures resulting from the lack or insufficiency of proper information concerning the thing or its use); article 1457 C.C.Q. replaced article 1053 *C.C.L.C.*;

- The above-cited provisions of the *Charter* and the C.P.A. remain in force.

[155] Lastly, some clarification is necessary regarding the application over time of the provisions of the C.C.L.C. or of the C.C.Q. and the regimes they establish regarding manufacturer's liability: the old law continues to apply to legal warranties[197] arising before January 1, 1994; similarly, the old law governs liability related to events that occurred before that date. Sections 83 and 85 of the *Act respecting the application of the reform of the Civil Code*[198] provide as follows:

83. In any contract made before 1 January 1994, the former legislation continues to apply to the warranties, both legal or conventional, to which the contracting parties are obliged between themselves or in respect of their heirs or successors by particular title.	**83.** Pour tout contrat conclu antérieurement au 1er janvier 1994, la loi ancienne demeure applicable aux garanties, légales ou conventionnelles, dues par les parties contractantes entre elles ou à l'égard de leurs héritiers ou ayants cause à titre particulier.
85. The conditions of civil liability are governed by the legislation in force at the time of the fault or act which causes the injury.	**85.** Les conditions de la responsabilité civile sont régies par la loi en vigueur au moment de la faute ou du fait qui a causé le préjudice.

[156] Section 85, which does not distinguish contractual from extracontractual liability, applies to the conditions giving rise to civil liability, but also to those giving rise to exoneration, its opposite. As Professors Côté and Jutras stated:[199]

[TRANSLATION]

It should be noted that the conditions of civil liability are thus governed by the law in force at the time of the fault or prejudicial act, and it follows that

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[197] As well as to conventional warranties, which do not concern us in this case.

[198] *Act respecting the Implementation of the Civil Code*, S.Q., c. 57 ("A.I.R.C.C.").

[199] Pierre-André Côté & Daniel Jutras, *Le droit transitoire civil*, looseleaf, Update No, 28, April 18, 2018, (Cowansville, Qc.: Yvon Blais, 1994) at II/85-1.

> the grounds for exemption from liability, necessarily linked to the conditions of such liability, will also be governed by that same law, as will questions relating to the sharing of liability.

[157] An action brought against a manufacturer on the basis of the legal warranty against latent defects, which arose before 1994, is therefore governed by the C.C.L.C.; the same applies to an action based on a manufacturer's liability (contractual or extracontractual) where the facts that likely triggered occurred before 1994.[200]

[158] This explains why the present case combines the provisions of the C.C.L.C. and those of the C.C.Q., that is, the facts giving rise to the dispute occurred both before and after January 1, 1994, and why it refers concomitantly to the public policy provisions of the *Charter* and the C.P.A., as of 1976 and 1980, as the case may be.

[159] The respondents based their two actions on the general rules of extracontractual liability (arts. 1053 C.C.L.C. and 1457 C.C.Q.), the provisions of the *Charter* that protect the integrity, freedom and dignity of the person (arts. 1, 4 and 49) and the provisions of the C.P.A. dealing with misleading or incomplete advertising (ss. 219, 220(*a*), 228 and 272). They did not rely on articles 1468, 1469 and 1473 C.C.Q., which establish the extracontractual liability regime specifically governing the manufacturer's liability for product safety defects, although the appellants referred to it.[201] However, the Parties [TRANSLATION] "agree that it is the extra contractual liability regime that applies.[202] Therefore, the issues of contractual liability, the warranty of quality or an implied contractual obligation to inform do not arise.

[160] The judgment of first instance, which finds largely in favour of the respondents, is based first and foremost on article 1053 C.C.L.C. (concerning facts pre-dating January 1, 1994) and articles 1468, 1469 and 1473 C.C.Q., but also, and especially, on article 1457 C.C.Q. (concerning facts arising after that date). It is also based on sections 1 and 49 of the *Charter* and sections 219, 228 and 272 C.P.A. (the argument based on s. 220 C.P.A. was rejected), provisions that the appellants' conduct is alleged to have contravened as of 1976 and 1980 respectively. In all cases, the trial judge's reasoning is focused on the information that the appellants did or did not disclose throughout the Class Period, the misleading strategies they continually employed to maintain and reinforce an artificially positive image of their products, which they were aware were harmful.

[161] However, the judgment does not consider the dispute from the perspective of the appellants' contractual liability, which is potentially triggered by those same facts. Specifically, it does not deal with the issue of liability for latent defects. Section 53 C.P.A.

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200 For an example of a judgment combining sections 83 and 85 A.I.R.C.C., see *ABB Inc. v. Domtar Inc.*, 2007 SCC 50 at para 26 *et seq*. (see in particular para. 30: "In the case at bar, Domtar has brought against C.E. an action in contract for damages that is based on the warranty against latent defects. All the facts alleged in support of this action occurred before 1994. In light of ss. 83 and 85 A.R.I..C.C., we conclude that in this case, the issues relating to the warranty against latent defects must be resolved by applying the C.C.L.C."

201 Respondents' Arguments at para 55.

202 Respondents' Arguments at para 24. See also the judgment *a quo* at para 20.

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is also not mentioned. Is this problematic? Could the respondents have brought their actions on a purely extracontractual basis, under the ordinary rules of the general law? Did the trial judge err in confining himself to extracontractual liability?

[162] More precisely, given that, under the C.C.L.C. (art. 1065 or 1522 *et seq*.) and the C.C.Q. (arts. 1375, 1434, 1442 and 1726 *et seq*.), the sub-purchaser of a dangerous product[203] that was harmed by the product, could sue the manufacturer directly on a contractual basis even if that purchaser did not personally contract with it, would it not have been appropriate, or even necessary, to consider the issue of the Appellants' contractual liability? It can be assumed that the vast majority of the members of the Blais and Létourneau Classes are or were purchasers of cigarettes[204] and therefore subsequent purchasers[205] specifically covered by articles 1442 and 1730 C.C.Q. If they had a remedy under these provisions, should they not have availed themselves of it? Lastly, what about section 53 C.P.A.?

[163] As the parties did not address these issues in their factums, the Court wrote to their respective lawyers before the hearing advising them thereof in the following terms:

> [TRANSLATION]
>
> The judgment of first instance is based on an analytical framework based entirely on the principles of extracontractual liability. Would it be useful or appropriate, however, to consider some of the issues involved from a contractual perspective (including the issue of opting between remedies)? Thus, what would happen to the warranty of quality for which the manufacturer may be liable (under art. 1730 C.C.Q. or, under the C.C.L.C., *General Motors Products of Canada Ltd*. v. *Kravitz*, [1979] 1 S.C.R. 790)? What about section 53 of the *Consumer Protection Act*? Could the issue of the appellants' contractual liability be otherwise considered (or not)? Would recourse to these other liability regimes be likely to affect the treatment of the issues in dispute and the outcome of the appeal?

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[203] A thing may be dangerous due to a (latent) design or manufacturing defect (it would then be referred to as a "dangerous latent defect" or a "dangerous defect"): this is the defect that causes the danger. On the other hand, a thing without a defect may, however, by its nature or use, pose a danger of which the potential user is not (or not sufficiently) informed. In both cases, in articles 1468 and 1469 C.C.Q., the legislator refers to a "safety defect / *défaut de sécurité*," but it is nevertheless necessary to distinguish between these two situations. On this distinction, see generally Pierre-Gabriel Jobin and Michelle Cumyn, *La vente*, 4th ed. (Cowansville, Qc.: Yvon Blais, 2017) at 298–299, para. 210. The distinction also exists in the general law, as reflected in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, which discusses a product that is "perfectly sound … properly installed" (para 33), but which posed a risk against which the manufacturer and supplier had not warned users.

[204] There may be a few who were not and only ever smoked cigarettes given to them by others, but, given the time and consumption scales set by the trial judge, this seems unlikely.

[205] Unless they had procured all their cigarettes from the manufacturer, and never through an intermediary, which is equally unlikely.

> You will need to address these issues in your respective pleadings at a time that is convenient for you.

[164] The Parties therefore had the opportunity to consider these issues, which will be examined in the following section.

B. Basis of the claims: extracontractual liability, contractual liability, section 53 C.P.A., subsequent purchaser's situation and option

[165] It is the Court's view that the trial judge did not err in deciding the case on the basis of the rules of extracontractual civil liability (art. 1053 C.C.L.C., and articles 1457, 1468, 1469 and 1473 C.C.Q.), the rules of the *Charter* (ss. 1 and 49) and those of the C.P.A. (ss. 219, 228 and 272 C.P.A.). On certain points, he could probably be criticized for having misapplied the rules in question, but not for having made them the basis of his judgment. That being said, had he been required to apply the contractual rules (in particular those of the warranty of quality / warranty against latent defects), the result would have been the same. The judgment *a quo* states:

> [18] The Plaintiffs argue that the rules of extracontractual (formerly delictual) liability apply here, and not contractual. Besides the fact that the Class Members have no direct contractual relationship with the Companies, they are alleging a conspiracy to mislead consumers "at large", both of which would lead to extracontractual liability.
>
> [19] And even where a contract might exist, they point out that, as a general rule, the duty to inform arises before the contract is formed, thus excluding it from the contractual obligations coming later. Here too, in their view, it makes no difference whether the regime be contractual or extracontractual, since the duty to inform is basically identical under both.
>
> [Reference omitted.]

[166] Furthermore, while the trial judge should not have disregarded section 53 C.P.A., this error is of no consequence since that section would simply have provided a further basis for the conclusions of the judgment, as will be seen below.

[167] Ultimately, the question raised by the Court regarding the contractual or extracontractual nature of the actions brought by the respondents and potentially the issue pertaining to opting between remedies are of limited interest with respect to the pre-1994 law.

[168] Until 1979, the subsequent purchaser of a dangerous thing that caused him or her harm[206] was generally held not to be in a contractual relationship with the

[206] Whether it was dangerous because of a latent defect in the strict sense of the word (i.e., a design or manufacturing defect, etc.) or whether it was a thing or product free from defects, but inherently dangerous or potentially dangerous if not handled properly without sufficient information allowing the buyer to be aware of it and to protect himself or herself accordingly.

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manufacturer and had recourse against the latter only under article 1053 C.C.L.C. and the rules of extracontractual liability (i.e., delict or quasi-delict).[207] They imposed a duty on the manufacturer to know its products and their defects, even latent ones, but also to warn potential purchasers of their dangers.[208] With few exceptions, it could not avoid this obligation by proving ignorance, which in itself was regarded as a fault.

[169] In 1979, the Supreme Court, in *General Motors Products of Canada v. Kravitz* formally acknowledged that the sub-purchaser has a contractual right based on the transfer to him or her of the original seller's (the manufacturer's) warranty against latent defects provided to the initial purchaser:[209]

> I think that we must acknowledge the existence of a direct remedy in warranty by a subsequent purchaser against the original seller. A claim in warranty against latent defects is not one that is personal to the purchaser in the sense that he is entitled to it *intuitu personae;* the purchaser is entitled to it as the owner of the thing. As we have seen, it is a claim that is tied to the thing to which it relates. It is therefore transferred to the successors by particular title at the same time as the thing itself, in that the initial seller is liable on it to any purchaser of the thing sold. …
>
> It must therefore be said that when a sub-purchaser acquires ownership of the thing he becomes the creditor of the legal warranty against latent defects owed by the first seller to the first purchaser.

[170] Professors Jobin and Vezina[210] provide the following explanation:

See *supra* note 203.

207 For a cautiously expressed contrary view, see: Pierre Legrand, "Pour une théorie de l'obligation de renseignement du fabricant en droit civil canadien" (1981) 26 McGill L.J. 207 at 263 and note *infra* at 231. See also, where the danger of the object is due to a latent defect, the decision in *Gougeon c. Peugeot Ltée*, [1973] C.A. 824 (which the Supreme Court distinguished in *General Motors Products of Canada v. Kravitz*, [1979] 1 S.C.R. 790).

208 See for example *Ross v. Dunstall*, (1921) 62 S.C.R. 393; *Modern Motor Sales Ltd. v. Masoud*, [1953] 1 S.C.R. 149 (specifically the reasoning of Taschereau J. at 157, who (in *obiter*) assimilates the subpurchaser to a third party user, without any contractual relationship); *Cohen v. Coca-Cola Ltd.*, [1967]
S.C.R. 469; *Alliance Assurance Co. v. Dom. Electric*, [1970] S.C.R. 168 at 173 and 174; *National Drying Machinery Co. v. Wabasso Ltd.*, [1979] C.A. 279 (at 285, Mayrand J. for the majority, gives the sub-purchaser as an example of the third party to whom the manufacturer is liable in delict, having failed to inform the sub-purchaser of a danger inherent in a product otherwise free of any particular defect), rev'd *Wabasso Ltd. v. National Drying Machinery Co.*, [1981] 1 S.C.R. 578, but not on that point, which is not really discussed by the Supreme Court; *Mulco inc. v. Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68 (majority reasons of Gendreau J.), aff'd *Garantie (La), Cie d'assurance de l'Amérique du Nord v. Mulco Inc.*, [1985] C.S. 315 (although the judgment does not mention article 1053 C.C.L.C., its conclusions award the additional indemnity provided by article 1056c C.C.L.C. in the case of damages resulting from a delict or quasi-delict, while article 1078.1 C.C.L.C. applies to the breach of a contractual obligation).

209 *General Motors Products of Canada v. Kravitz*, [1979] 1 S.C.R. 790 at 813–814.

210 Jean-Louis Baudouin, Pierre-Gabriel Jobin & Nathalie Vézina, *Les obligations*, 7th ed.

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[TRANSLATION]

> The existence of a direct legal relationship between the sub-purchaser and the manufacturer was first raised in *Ross*, but doubts remained as to whether this remedy could be considered from any perspective other than an extracontractual one. Then, further to a development in the case law, *Kravitz* reversed that position by giving the subsequent purchaser a *contractual* recourse against the manufacturer based on warranties against latent defects. Under this approach, subsequent purchasers do not exercise their own rights; the warranty owed under the first sale is transferred by the intermediary seller as an accessory to the item purchased, thus giving the sub-purchaser the same rights as the *original purchaser*.
>
> [Emphasis in original; reference omitted.]

[171] Consequently, it became accepted law that the sub-purchaser could sue the manufacturer on such a contractual basis. It was still necessary (which was the case in *Kravitz*) to consider the issue of "latent defect" within the meaning of 1522 C.C.L.C., a subject regarding which there was some uncertainty:[211] did such a defect encompass a safety defect resulting from the fact that potential buyers or users had not been informed of the risk inherent in an intrinsically dangerous thing unaffected by any manufacturing defect? Did it encompass a defect resulting from the lack or insufficiency of information regarding its use?

[172] Regarding the last question, in 1965, Professor Crépeau published a landmark article,[212] suggesting that this situation should be distinguished from a situation involving a latent defect. On the basis of article 1024 C.C.L.C., he considered it more appropriate to view the duty to disclose such information as a safety obligation, which, unless expressly excluded by the parties, requires the seller to inform its contracting partner of the precautions required when using or handling the thing sold. This implied contractual obligation, which is not the same as the legal warranty against latent defects, would give rise to an action that need not satisfy the requirements of articles 1522 *et seq*. of the C.C.L.C.

[173] This theory persuaded certain scholarly writers and earned a place in the case law. For example, in 1979, in a judgment subsequently overturned by the Supreme Court on another point (*National Drying Machinery Co. c. Wabasso Ltd.*), Mayrand J. for the majority, stated: [213]

(Cowansville, Qc.: Yvon Blais, 2013) at 903, para. 760.

211 This is illustrated in *Ross v. Dunstall*, (1921) 62 S.C.R. 393. This issue will be addressed again later on in this judgment.

212 Paul-André Crépeau, “Le contenu obligationnel d'un contrat” (1965) 53 R. du B. can. 1, see especially at 16 *et seq*.

213 *National Drying Machinery Co. c. Wabasso Ltd.*, [1979] C.A. 279 at 285. In that case, the buyer purchased a machine from the manufacturer for processing polyester fibers. The manufacturer did not inform the buyer that the upper part of the machine had to be cleaned

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> [TRANSLATION]
>
> 3. This safety obligation is ancillary. arising under the sales contract.
>
> It has been suggested that the obligation arises under article 1527 of the *Civil Code*, but I would hesitate to characterize the particularity of the thing that makes it dangerous, when certain precautions are not taken, as a "defect." If this were true, many drugs would be "defective," since they are dangerous irrespective of dosage. In this case, I would instead base the obligation on article 1024 of the *Civil Code*.

[174] Mayrand J. held that with regard to the sub-purchaser, the manufacturer's liability remains extracontractual, as its obligation to inform is based on the general obligation not to harm others:

> [TRANSLATION]
>
> 4. With regard to a third party,(7) the manufacturer-seller of machinery that poses a non-apparent hazard must take reasonable measures to ensure that the potential user is advised of the precautions that must be taken to prevent damage being caused. This safety obligation is based on article 1053 of the *Civil Code* and gives rise to delictual or quasi-delictual liability.
>
> (7) E.g., a sub-purchaser, neighbour or employee of the purchaser.
>
> [Emphasis added.]

[175] Barely a month later, the Supreme Court rendered judgment in *Kravitz*,[214] which established the rule we all know. If the manufacturer's obligation to inform the buyer of the danger posed by an otherwise non-defective thing is an implicit contractual obligation pursuant to article 1024 C.C.L.C. (now 1434 C.C.Q.), then applying reasoning similar to that of *Kravitz*, could it not be extended to the sub-purchaser[215]?

[176] That point of view does not appear to have been considered by the Court of Appeal in *Royal Industries Inc. c. Jones*.[216] In that case, a garage operator was seriously injured using machinery manufactured by the appellant and purchased from a distributor. In discussing the manufacturer's liability towards the sub-purchaser, Mayrand J stated:[217]

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regularly and that the accumulation of polyester and cotton deposits was dangerous. These deposits ignited, causing a fire that destroyed the buyer's plant.

214 *Kravitz* was decided on January 21, 1979, whereas *National Drying Machinery Co. v. Wabasso Ltd.* was decided on December 27, 1978.

215 Lluelles and Moore suggest this (based on article 1442 C.C.Q., which codifies the principle first recognized in *Kravitz*): Didier Lluelles & Benoît Moore, *Droit des obligations*, 3rd ed. (Montreal, Thémis, 2018) at 1380–1381, para 2309.

216 *Royal Industries Inc. v. Jones*, [1979] C.A. 561. The judgment was handed down November 8, 1979, some 10 months after *Kravitz*.

217 *Royal Industries Inc. c. Jones*, [1979] C.A. 561 at 563–564.

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> [TRANSLATION]
>
> The manufacturer's liability in this case is based on a lack of information rather than on a design or manufacturing defect in its equipment. The manufacturer who places a dangerous product on the market is obliged to inform its buyer and even the potential user who may become the purchaser of the product [reference omitted]. Normally, the obligation is fulfilled by providing written explanations with the product explaining how to avert danger when using it. Such written explanations are normally sent to the various sub-purchasers so that the user benefit from them.

[177] And further on, Mayrand J. held:[218]

> [TRANSLATION]
>
> Moreover, since the victim's recourse against the manufacturer is not contractual but strictly quasi-delictual, I would order appellant Royal Industries to pay Percy Jones an additional indemnity of 3% pursuant to the last paragraph of article 1056c of the *Civil Code*.
>
> [Emphasis added.]

[178] Both passages clearly state that, according to Mayrand J., the manufacturer's duty to inform the sub-purchaser is extracontractual. The trial judge does not seem to have even considered the possibility that this duty could be regarded as accessory to the product sold and give rise to a contractual remedy as per the *Kravitz* approach, of which he was undoubtedly aware.

[179] *Bank of Montreal v. Bail Ltée*,[219] rendered in 1992, sheds little light on the issue, because Gonthier J., for the Supreme Court, acknowledged that, between the contracting parties themselves, the obligation to provide information may be pre--contractual or contractual, depending on the circumstances, and thereby give rise to extracontractual or contractual liability. He noted in passing that articles 1469 and 1473 C.C.Q., the extracontractual liability provisions of the new C.C.Q., enshrine the manufacturer's obligation to provide information.[220] He also pointed out that the manufacturer knows or is presumed to know about the risks and dangers or manufacturing defects affecting its products, which it must disclose, since [TRANSLATION] "[s]uch information has a definite influence on the consumer's decisions regarding the purchase and use of the products in question,"[221] a comment that, in the first case at least, characterizes the manufacturer's obligation with regard to this type of information, as pre-contractual and extracontractual.

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218 *Royal Industries Inc. c. Jones*, [1979] C.A. 561 at 566.

219 *Bank of Montreal v. Bail Ltee,* [1992] 2 S.C.R. 554 at 585 *et seq*.

220 *Bank of Montreal v. Bail Ltee,* [1992] 2 S.C.R. 554 at 585 *in fine.* See also at 588, where the Supreme Court stated that "a duty to inform may also arise independently of any contractual relationship". In that case, where the client was sued by a subcontractor, the Court held that there was extracontractual liability.

221 *Bank of Montreal v. Bail Ltee*, [1992] 2 S.C.R. 554 at 587.

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[180] However, after *Wabasso Ltd. v. National Drying Machinery Co.*,[222] the issue regarding whether the liability of a manufacturer that breaches its duty to inform was contractual or extracontractual became irrelevant. The Supreme Court, per Chouinard J. confirmed in such a situation the legitimacy of opting between contractual or extracontractual liability, an option previously applied by earlier case law.[223] His explanation is as follows:[224]

> I conclude that the same fact can constitute both contractual fault and delictual fault, and that the existence of contractual relations between the parties does not deprive the victim of the right to base his remedy on delictual fault.

[181] On that point, Chouinard J. agreed with Paré J. of the Court of Appeal, specifically regarding the following:[225]

> [TRANSLATION]
>
> [T]he fact that a contracting party, the seller in the case at bar, committed some contractual fault is not a sufficient basis for the conclusion that he is delictually liable under art. 1053 C.C. on account of his fault on the one hand and the damage suffered by the contracting party on the other. Thus, the seller will not be liable under art. 1053 C.C. if he sells a defective item that is unsuited to its purpose and this results in commercial loss for the buyer responsible, under article 1053 C.C.
>
> It is therefore necessary that the fault committed within the framework of the contract be in itself a fault sanctioned by art. 1053 C.C. even in the absence of a contract. In the case at bar, the fault alleged was committed within the contract under consideration, but it would exist whatever the

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222 *Wabasso Ltd. v. National Drying Machinery Co.*, [1981] 1 S.C.R. 578. In that case, the Supreme Court stated that "it was so designed that it appeared that this upper part did not require any maintenance or cleaning" (at 580) and therefore the manufacture should have informed the purchaser that such maintenance was necessary.

223 For an overview of the case law, see e.g., André Nadeau & Richard Nadeau, *Traité pratique de la responsabilité civile délictuelle*, 2nd ed. (Montreal: Wilson & Lafleur, 1971) at 28 to 32, paras. 44 to 46. For a critique, see Jean-Louis Baudouin, *La responsabilité civile délictuelle* (Montreal: Les Presses de l'Université de Montréal, 1973) at 15 to 18, paras 21 to 23.

224 *Wabasso Ltd. v. National Drying Machinery Co.*, [1981] 1 S.C.R. 578 at 590. The Supreme Court agreed with Pigeon J., writing for the Supreme Court in *Alliance Assurance Co. v. Dom. Electric*, [1970] S.C.R. 168 at 173 ("It is true that the existence of contractual relations does in no way exclude the possibility of a delictual or quasi-delictual obligation arising out of the same fact"). Mignault, J. in *Ross v. Dunstall*, (1921) 62 S.C.R. 393, came to the same conclusion in finding that a manufacturer who sold a gun to a purchaser was extracontractually liable. He held that the purchaser's action "can stand, notwithstanding the contractual relations between the parties, upon article 1053 as well as upon articles 1527, 1528 C.C.," and notwithstanding the presence of a latent defect in that case, added "I cannot assent to the broad proposition that where the relations between the parties are contractual there cannot also be an action *ex delicto* in favour of one of them" (at 422).

225 *Wabasso Ltd. v. National Drying Machinery Co.*, [1981] 1 S.C.R. 578 at 590.

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> contract and whatever its nature (I am of course excluding cases of contractual limitations of liability). This liability would exist even if there had been no contract, and respondent had come into possession of the dangerous object only as the result of appellant's inaction. Indeed, from the viewpoint of art. 1053 C.C., it is not so much the sale which gives rise to liability here, but rather the fact that appellant permitted respondent to use an object made by it, knowing the risks of using it, without warning respondent of those risks. This duty to warn becomes the basis of the liability, and it exists whether or not there is a contract. It is an aspect of negligence which could be cited without recourse to the contract, for anyone who places an object which he knows to be dangerous in use in the hands of another has a duty to warn him of this.
>
> [Emphasis added.]

[182] The manufacturer's failure to warn the user of the danger of a thing or product was therefore a delict under article 1053 C.C.L.C. and, notwithstanding the fact that it could also constitute a contractual fault (the manufacturer (the contracting party) having failed in its duty to provide information), the buyer could just as well bring an action on an extracontractual basis.

[183] Subsequently, in 1989, in *Air Canada v. McDonnell Douglas Corp.*, Gonthier J., writing for the Supreme Court, further stated:[226]

> I see nothing in *Canadian Motor Sales Corp.,* which would support a statement of principle to the effect that where a plaintiff alleges a hidden defect or danger in a thing sold to him the action is necessarily based on the warranty against latent defects in arts. 1522 *et seq. C.C.L.C.* Such a principle would be contrary to this Court's decision in *Wabasso* which held that a plaintiff who is party to a contract may choose to pursue the defendant either on the basis of the contract or on the basis of a quasi-delict, provided of course that the facts constitute delictual as well as contractual fault. The facts alleged by the respondents in the case at bar may ground several causes of action. But paragraph 13 of the respondents' declaration clearly indicates that the respondents have opted to base their action on art. 1053 *C.C.L.C.* The fact that the respondents make no mention in their declaration of the contract of sale between Air Canada and McDonnell Douglas can only support the conclusion that the respondents' action is not contractual in nature.
>
> [Emphasis added.]

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226 *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554 at 1567–1568. In that case, an aircraft purchased by the appellant was affected by various defects, which constituted a serious danger. The aircraft's fuel tank exploded, resulting in the loss of the aircraft and damage to the hangar that housed it. It appears that the manufacturer had not informed the buyer of the aircraft's defects, either at the time of sale (when it was actually unaware of them) or after it became aware of them.

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[184] In 1990, in *Houle v. Canadian National Bank,* L'Heureux-Dube J., writing for the Court, restated the rule in the following terms:[227]

> In order to find delictual liability between the contracting parties themselves however, there must exist, independently of the contract, a legal obligation deriving from art. 1053 *C.C.L.C.*, which would apply generally, not only to the contracting parties. In *Air Canada*, the action was not based on the contract but on art. 1053 *C.C.L.C.*, alleging the extra-contractual fault of the failure to warn the purchaser of a hidden danger in the goods sold.

[185] In *Wabasso*, like in *Air Canada*, it was the purchaser who exercised the recourse, but there is no doubt that the subsequent buyer (sub-purchaser) would have had the same option.

[186] Given that opting between contractual and extracontractual liability was permissible as long as the facts giving rise to the damage would also be considered a fault that, by its nature, would contravene article 1053 C.C.L.C., it therefore did not matter whether articles 1024 or 1522 C.C.L.C. or article 1053 C.C.L.C. were relied on. When a manufacturer put a dangerous product on the market (irrespective of the source of the danger: defect, nature of the object, lack of instructions regarding use of the product), it has an obligation to inform, and breach of that obligation is a fault in all cases. If a manufacturer puts a dangerous product on the market (whether by effect of its nature, its handling or the defect affecting it) and fails to disclose that fact, it commits a fault.

[187] Consequently, and to return to the case at hand, even if the respondents could have taken the contractual liability route, they validly opted for the extracontractual liability route with respect to facts occurring before January 1, 1994, in accordance with article 1053 C.C.L.C. Did the coming into force of the C.C.Q. change anything regarding this conclusion?

[188] Article 1458 C.C.Q. now prohibits this type of election, at least between the contracting parties themselves:

1458. Every person has a duty to honour his contractual undertakings.	**1458.** Toute personne a le devoir d'honorer les engagements qu'elle a contractés.
Where he fails in this duty, he is liable for any bodily, moral or material injury he causes to the other contracting party and is bound to make reparation for the injury; neither he nor the other party may in such a case avoid the	Elle est, lorsqu'elle manque à ce devoir, responsable du préjudice, corporel, moral ou matériel, qu'elle cause à son cocontractant et tenue de réparer ce préjudice; ni elle ni le cocontractant ne peuvent alors se soustraire à l'application des règles

[227] *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122 at 165.

rules governing contractual liability by opting for rules that would be more favourable to them.	du régime contractuel de responsabilité pour opter en faveur de règles qui leur seraient plus profitables.

[Emphasis added.]

[189] Authors Lluelles and Moore (the latter is now a judge of the Superior Court) write that this [TRANSLATION] "exclusion of option is based on public order and 'is incumbent on all the parties to the contract.'"[228] Contractual and extracontractual liabilities would henceforth belong to watertight silos, and one would not have recourse to the latter if one had access to the first. The conditional is used here not because the proposition is contested, but simply because it does not necessarily have the very broad scope some might want to attribute to it.

[190] As regards the recourses that are the subject of this appeal, a reading of article 1458 para. 2 C.C.Q. raises two questions, which we will address in turn: (1) does this provision apply to the recourse launched *after* January 1, 1994, based on faults or facts occurring *before* this date? (2) Does it apply to the sub-purchaser of a dangerous product (whether the danger stems from a latent defect affecting the product or from the absence or insufficiency of information pertaining to the inherent danger of a product without defects)?

[191] *Syndicat du garage du Cours Le Royer v. Gagnon* answers the first of these questions in the negative. In that case, the appellant brought a suit in September 1994 against the real estate developer and the architect of a real estate complex based on facts occurring *before* the coming into force of the C.C.Q. Basing its decision on section 85 A.I.R.C.C.,[229] Brossard J., speaking for the Court, held as follows:[230]

> [TRANSLATION] On the whole, I am therefore of the opinion that article 1458 of the new *Civil Code of Québec* does not apply in the case at bar and that the former legal rules must be applied to the legal effects of civil liability resulting from the legal situation of the parties created before the new Code came into force.

[192] Because Brossard, J.'s conclusion is of general scope, it applies to the sub-purchaser of a dangerous product in all the cases referred to above.

[193] That being the case, the preceding conclusion of the Court is confirmed:

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[228] Lluelles & Moore, *supra* note 215 at 1885, para. 2958. See also Baudouin & Jobin, *supra* note 210 at 887, para. 752; Nathalie Vézina, "L'indemnisation du préjudice corporel sur le fondement de l'obligation de sécurité en droit québécois: solution efficace ou défectueuse?" in Barreau du Québec, Service de la formation continue *Le préjudice corporel (2006)*, vol. 252 (Cowansville, Qc.: Yvon Blais, 2006) 115 at 122.

[229] This provision has already been reproduced *supra* in para. [155] of this decision, as has section 83 A.I.R.C.C.

[230] *Le Royer v. Gagnon*, [1995] R.J.Q. 1313 at 1320.

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notwithstanding the fact that they brought their action in 1998 (after the coming into force of the C.C.Q.), the respondents were, in light of section 85 A.I.R.C.C., required to rely on the former law as regards the faults allegedly committed by the appellants before 1994. Because they had the right to choose in this regard, they could base their claim on the extracontractual liability of the appellants, even if a contractual claim against the appellants was available to them (which, under section 83 A.I.R.C.C., would also have been based on the pre-1994 law as to the facts occurring at that time).

[194] But what about that portion of the recourses pertaining to the conduct – and thus the liability –- of the Appellants as of January 1, 1994? To answer this question, one must first determine whether the respondents had, in this regard, a contractual recourse available to them. Only on this condition does the second paragraph of article 1458 C.C.Q. come into play. This brings us to the second question posed above: does this provision apply to the sub-purchaser of a product, and does it make the contractual path available to it obligatory?

[195] The issue divides the authors; as for case law, it is unclear and often adjudicates without addressing the second paragraph of article 1458 C.C.Q. and the prohibition against the option,[231] especially since the outcome of the litigation would, in many cases, be the same regardless of the path taken.[232]

[196] To properly understand the controversy, let us first remember that, since the coming into force of the C.C.Q., the sub-purchaser has enjoyed the benefit, against the manufacturer, of the warranty of quality set forth in articles 1726 *ff.* C.C.Q., via two distinct channels. On the one hand, article 1442 C.C.Q., a provision that enshrines the lessons of *Kravitz*[233] by generalizing them, states that:

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[231] That was the case, for example, in *Desjardins Assurances générales inc. c. Venmar Ventilation inc.*, 2016 QCCA 1911, in which a malfunctioning air exchanger caused a fire in the insureds' residence. The equipment was already in place when they bought the building and had been installed in 1996. The evidence showed that the manufacturers had been informed, as early as 1998, that there was a problem with the overheating motor on the equipment, which furthermore had insufficient thermal protection. They kept this to themselves. The trial judge applied articles 1468, 1469 and 1473 C.C.Q., which the Court confirmed, without addressing article 1458 C.C.Q.:

> [TRANSLATION]
>
> [4] The judge was correct to apply article 1468 C.C.Q., which provides that the manufacturer of a thing is bound to make reparation for injury caused to a third person by reason of a safety defect in the thing. He was right to apply this provision to the sub-purchaser of the thing, and to the insurer subrogated in the rights of the sub-purchaser [reference omitted].

In another case, the Court had previously recognized the contractual nature of the recourse exercised by the sub-purchaser against the manufacturer under articles 1442 and 1730, once again without much discussion of or reference to article 1458 C.C.Q. See *Ferme Avicole Héva inc. v. Coopérative fédérée de Québec (portion assurée)*, 2008 QCCA 1053 at paras. 74–75.

[232] As noted by Prof. Nathalie Vézina in 2006 (*supra* note 228 at 122–123) and it remains accurate. See also Nathalie Vézina & Françoise Maniet, "La sécurité du consommateur au Québec. deux solitudes: mesures préventives et sanctions civiles des atteintes à la sécurité", (2008) 49 C. de D. 5795 at 75 *in fine*.

[233] *General Motors Products of Canada v. Kravitz*, [1979] 1 S.C.R. 790.

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1442. The rights of the parties to a contract pass to their successors by particular title if the rights are accessory to the property which passes to them or are closely related to it.	**1442.** Les droits des parties à un contrat sont transmis à leurs ayants cause à titre particulier s'ils constituent l'accessoire d'un bien qui leur est transmis ou s'ils lui sont intimement liés.

[197] The seller's warranty of quality is such an accessory; furthermore, it is closely related to the product and ensures the usefulness thereof, and therefore runs with this product into the hands of the sub-purchaser.

[198] On the other hand, the sub-purchaser enjoys, against the manufacturer (and the other participants in the product distribution chain), the direct recourse available to him or her under article 1730 C.C.Q.:

1730. The manufacturer, any person who distributes the property under his name or as his own, and any supplier of the property, in particular the wholesaler and the importer, are also bound to a seller's warranty.	**1730.** Sont également tenus à la garantie du vendeur, le fabricant, toute personne qui fait la distribution du bien sous son nom ou comme étant son bien et tout fournisseur du bien, notamment le grossiste et l'importateur.

[199] As regards article 1442 C.C.Q., [TRANSLATION] "the legal warranty of quality that the manufacturer owes to the first purchaser ..., is passed on to any sub-purchaser and confers upon him or her a direct contractual right against the manufacturer."[234] The sub-purchaser thus exercises the rights of the first buyer. As regards article 1730, the sub-purchaser exercises the personal right that falls to him or her by reason of the sale entered into with his or her own seller against any of the participants in the distribution chain, up to and including the manufacturer (initial seller). More precisely:[235]

> [TRANSLATION]
>
> Whereas article 1442 prescribes a transfer of rights, article 1730 creates a legal fiction, in the felicitous words of two authors. The first rule is a general provision susceptible of applying to the sub-purchaser and, as we have seen, allowing him or her to invoke the warranty due by the manufacturer to the first buyer in the chain of successive sales. However,

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[234] Jobin & Cumyn, *supra* note 203 at 341, para. 235.

[235] Jobin & Cumyn, *supra* note 203 at 344 and 345, para. 236. In the same vein, see also Baudouin & Jobin, *supra* note 210 at 903 to 905, para. 760; Lluelles & Moore, *supra* note 215 at 1385, para. 2316. This explanation, which is generally accepted by the authors of legal commentary, seems preferable to the one that suggests that the sub-purchaser enjoys the warranty of the last seller as against the manufacturer. On this topic, see e.g., Lluelles & Moore, *supra* note 215 at1386-1387, paras. 2318 to 2320.

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> the buyer who invokes article 1730 does not exercise the rights of a previous owner of the product, but his or her own rights resulting from *his or her purchase contract.*
>
> … Indeed, under this article, the rights of the first purchaser do not pass to the sub-purchaser; instead, one or more *additional debtors* are added to the last seller, as debtors of the warranty due under the *last sale*.
>
> [Emphasis in original; references omitted]

[200] In brief, the sub-purchaser of a product affected by a latent defect may exercise against the manufacturer, the contractual rights (this classification is generally accepted) conferred upon it under articles 1442 and 1730 C.C.Q. and may *a fortiori* do so in the case of a dangerous latent defect, i.e., a non-apparent defect that creates or constitutes a danger.

[201] Can he or she do so as well in the case of a product, which although not affected by a defect, nevertheless represents a danger, whether by its very nature (as in the case of cigarettes) or by reason of the specifics of the handling thereof?

[202] Here again there is controversy (which is not new[236]) and we must, in this regard, open a lengthy parenthesis.

[203] A few authors, in fact, are of the opinion that this type of failure, as regards the manufacturer/sub-purchaser tandem, falls under the regime of extracontractual liability

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[236] The question was already being asked in *Ross v. Dunstall*, (1921) 62 S.C.R. 393, which involved a rifle whose breech, if improperly assembled, provoked a dangerous recoil action to which the respondents, two experienced hunters, had fallen victim. The manufacturer had neither disclosed nor explained how to avoid this danger. After much consideration, Anglin J. held that "it is perhaps not so clear that it [the warranty against latent defects] also covers the unusual latent sources of danger not amounting to defects" (at 401). Mignault J. concluded for his part that "there was a hidden and undisclosed danger and this certainly was a defect in the rifle and a latent one," within the meaning of article 1522 C.C.L.C. (at 420). This did not prevent him from concluding (as did his colleague Anglin J., in fact) that the manufacturer's failure to adequately inform potential users of this danger constituted a fault within the meaning of article 1053 C.C.L.C.
A short passage in *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554 at 1567 *in fine*, implies that an undisclosed inherent danger, like a dangerous latent defect, is a "latent defect" within the meaning of article 1522 C.C.L.C., but this is not clear, and the Court held that, in any case, in the presence of a dangerous defect coupled with a failure to inform, as in the case at bar, the appellant enjoyed a delictual recourse based on article 1053 C.C.L.C. One presumes that this is the reason why the case law at the time did not clearly distinguish between a dangerous defect and the inherent danger of a non-defective product. Because the delictual recourse was available, the issue did not have the same importance.
As we saw earlier in *National Drying Machinery Co. v. Wabasso Ltd.*, [1979] C.A. 279, the Court, in reasons written by Mayrand J., instead viewed the manufacturer's duty to warn its buyer of the dangers of a product, which was otherwise completely functional, as an implicit contractual obligation governed by article 1024 C.C.L.C., and this same duty constituted an obligation governed by article 1053 C.C.L.C. in the case of the sub-purchaser.

established by articles 1468, 1469 and 1473 C.C.Q.[237] They say that under no circumstances would this be a latent defect (no more so than it would be a latent defect under the former law).[238] If they are right, then the second paragraph of article 1458 is no longer relevant: there is no option, the only recourse available to the sub-purchaser being extracontractual.

[204] Others, on the contrary, view the safety defect related to the absence or insufficiency of required information as a form of latent defect, and thus subject to the warranty of quality under article 1726 C.C.Q., which the sub-purchaser may assert against the manufacturer under articles 1442 or 1730 C.C.Q. According to the proponents of this point of view, including the author Edwards (now a Court of Quebec judge), there is no need in this regard to rely on a theory based on the obligation to inform, since [TRANSLATION] "[t]he product sold is defective within the meaning of the warranty, as it is unaccompanied by instructions or disclosures sufficient for the safe use thereof,"[239] which forms an integral part of the use for which any product is intended. In this sense, a safety deficiency would necessarily be included in the use deficiency that defines a latent defect according to article 1726 C.C.Q., even if, strictly speaking, the product contains no defect. In a way, the undisclosed danger would be the defect. And if that is the case, the second paragraph of article 1458 C.C.Q., according to some, would prevent the sub-purchaser, who is the holder of a recourse against the manufacturer by the effect of article 1730 or article 1442 C.C.Q., from taking the extracontractual path under articles 1468 and 1469 C.C.Q.

[205] This latter proposition is attractive, but was refuted by the Supreme Court in *ABB Inc. v. Domtar Inc.*, which defines "latent defect" more narrowly, both within the meaning of article 1522 C.C.L.C. (the relevant facts having occurred prior to 1994) and of article 1726 C.C.Q.[240] LeBel and Deschamps JJ. stated:

> 47. The legislature has not expressly defined what constitutes a "defect".

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[237] See for example Jobin & Cumyn, *supra* note 203 at 198, para. 157 (where they distinguish between a dangerous defect and the "failure to warn the buyer of an inherent danger," as the basis for the liability regime is not the same), at 201, para. 159 (as regards the sub-purchaser, subject to article 1442 C.C.Q.) and at 299, para. 211. See also Guylaine Vaillancourt, *La responsabilité pour le défaut de sécurité des biens: de l'importance de différencier les fondements de la garantie de qualité de ceux de l'obligation de sécurité* (Thesis, University of Ottawa Faculty of Law, January 2004).

[238] See the description of latent defects by Professors Jobin and Cumyn, *supra* note 203 at 210 to 214, para. 168.

[239] Jeffrey Edwards, *La garantie de qualité du vendeur en droit québécois*, 2nd ed. (Montreal: Wilson & Lafleur, 2008) at 150, para. 322 (see generally at 147 to 151, paras. 318 to 325). In the same vein, see Mathieu Gagné & Mélanie Bourassa Forcier, "Le devoir du fabricant d'assurer la qualité et la sécurité des médicaments: responsabilité" in *Précis de droit pharmaceutique*, 2nd ed. (Cowansville, Qc.: Yvon Blais, 2017) at 302 *et seq*.

[240] The Supreme Court, in reasons written by LeBel and Deschamps JJ., stated that "whether it is the C.C.L.C. or the C.C.Q. that is applied will have no impact on the outcome of the case, since the C.C.Q. essentially reproduces the C.C.L.C.'s rules where the warranty against latent defects in issue here is concerned, despite certain changes in the wording of the provisions relating to the issues of this case." (*ABB Inc. v. Domtar Inc.*, 2007 SCC 50 at para. 31).

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> Article 1522 C.C.L.C. does, however, contain some useful information. For example, the first criterion for determining whether a latent defect exists is the loss of use it causes. The purpose of the warranty against latent defects is thus to ensure that the buyer of a good will be able to make practical and economical use of it.
>
> 48. There are three main types of latent defects: the material defect, which relates to a specific good; the functional defect, which relates to the good's design; and the conventional defect, which arises where the buyer has disclosed that the good is to be put to a particular use. Material and functional defects are assessed in light of the normal use to which buyers put the good, whereas a conventional defect is assessed in light of the particular use indicated by the buyer to the seller. However, it is necessary, in discussing this classification, to briefly consider the problem of technological change.
>
> 49. Technological change is a modern-day reality that is characterized by the rapid pace at which improvements are made to products. The trial judge rightly noted that manufacturers are constantly redesigning their products: [2003] R.J.Q. 2194, at para. 161. He was wary, and rightly so, of a tendency to condemn a manufacturer simply because a different version of the original product has since emerged on the market. Selling an improved or better performing version of a product does not render the previous version defective. Differences in quality and possible use between these two versions of the product cannot be characterized as a latent defect. The key factor in the analysis resides in the loss of use, as assessed in light of the buyer's reasonable expectations.
>
> 50. The categories of defects can sometimes overlap. In the case at bar, Domtar complains that the tie welds, which were integral to the superheater, compromised the normal operation of the boiler by causing cracks and unforeseeable shutdowns. According to Domtar, the argument that it should not have to accept untimely shutdowns flows from the very nature of the equipment purchased and from the fact that this equipment operates continuously. In this sense, the defect of which Domtar complains is both functional and conventional. However, regardless of how the defect is characterized, it must have four characteristics, all of which are essential to the warranty: it must be latent, must be sufficiently serious, must have existed at the time of the sale and must have been unknown to the buyer.

[206] Further, they add that:

> 107. <u>The trial judge found that C.E. had breached its duty to inform, whereas in the Court of Appeal's view, the issue related to the warranty against latent defects. The two concepts overlap, but it is important to distinguish them in order to identify the circumstances in which each rule will be applied</u>.

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> 108. Whereas the warranty against latent defects is expressly provided for in the C.C.L.C. and the C.C.Q., the duty to inform derives instead from the general principle of good faith *(Bank of Montreal v. Bail Ltée,* [1992] 2 S.C.R. 554, at p. 586; arts. 6, 7 and 1375 C.C.Q.) and the principle of free and informed consent. Furthermore, the scope of the general duty to inform is much broader than that of the disclosure of a latent defect. This duty encompasses any information that is of decisive importance for a party to a contract, as Gonthier J. stated in *Bail* (see pp. 586-87). It is therefore easy to imagine a situation in which a seller would be in breach of the duty even though no latent defect exists.
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> 109 Where a seller fails to discharge the duty to disclose a defect, on the other hand, it can probably be said at the same time that he or she has also breached the general duty to inform the buyer of a factor of decisive importance in respect of the good sold, namely the existence of a latent defect. The instant case is one example of this. If a party invokes the seller's warranty against latent defects, the duty to inform is in a sense subsumed in the analysis of the seller's liability for latent defects, and there is no need for the court to conduct a separate analysis on the seller's duty to inform. As a result, our analysis and conclusion regarding C.E.'s liability under the warranty against latent defects are sufficient to dispose of the case before the Court.
>
> [Emphasis added.]

[207] Read in parallel, these passages from *ABB Inc.* indicate that the danger of a product that is marketed without information about the risk associated with the use thereof or the information required to use it safely is not a "defect" within the meaning of article 1522 C.C.L.C., nor a "defect" within the meaning of article 1726 C.C.Q., unless such danger is the result of a material defect (i.e., a manufacturing, production or storage defect), a functional defect (i.e., a design defect) or even, imaginably, a conventional defect (i.e., the impossibility or difficulty of using the product for a specific purpose intended by the buyer and disclosed to the seller).[241] In other words, the danger derived

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[241] In this sense, see also *Gouin Huot v. Équipements de ferme Jamesway inc.*, 2018 QCCA 449 at para. 8; Jobin & Cumyn, *supra* note 203 at 210 to 214, para. 168; Jean-Louis Baudouin, Patrice Deslauriers &Benoît Moore, *La responsabilité civile*, 8th ed., vol. 2 (Cowansville, Qc.: Yvon Blais, 2014) at 400, para. 2-389 [*La responsabilité civile*, vol. 2]; Dany Lachance, "La garantie légale revisitée" (2014) 2 C.P. du N. 323 at 330–332; Pierre-Gabriel Jobin, "Précis sur la vente", in Barreau du Québec and Chambre des notaires du Québec, *La réforme du Code civil*, vol. 2 (Obligations, contrats nommés) (Ste-Foy, Qc.: Les Presses de l'Université Laval, 1993) at 462, para. 150.
It should be noted in passing that the legislature imported into article 1469 C.C.Q., at least in part, this definition of "defect," which is specific to articles 1522 C.C.L.C. and 1726 C.C.Q.*:* the safety defect referred to in this provision may in fact result from a "defect in design or manufacture", or from "poor preservation or presentation," it being understood that, even if it is not affected by such a defect, a product may nevertheless present a safety defect resulting from "the lack of sufficient indications as to the risks and dangers" the product contains "or as to the means to avoid them." The buyer of a product presenting a safety deficiency related to

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from a material or functional (or even conventional) defect would be a defect giving rise to the warranty of quality and related contractual recourse,[242] but not the danger related to a product containing no defect of the kind, as the absence of a defect prevents the triggering of the warranty of quality set out in articles 1522 *et seq*. C.C.L.C. or 1726 *et seq*. C.C.Q.[243]

[208] According to Prof. Vézina, whose words are applicable to the manufacturer:[244]

> [TRANSLATION]
>
> It is true that the seller's warranty of quality is designed to apply in quite a number of situations where the buyer falls victim to a dangerous product, as the danger that such product presents is often attributable to a defect that the buyer could not discern. In other words, the warranty applies each time the danger results from the defect of the product.
>
> The warranty of quality must nevertheless be distinguished from the obligation to
> provide information about a dangerous product where this obligation pertains rather to a situation where the product contains an inherent danger and not strictly speaking a defect.
>
> **Example**
>
> Many products present an inherent danger, which is separable from the intended use thereof, like the cutting edge of a blade or the corrosiveness of a solvent.

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a defect may invoke article 1726 C.C.Q. against its own seller or the manufacturer, in which case article 1458 C.C.Q. prevents such buyer from opting for the extracontractual recourse provided in articles 1468 and 1469 C.C.Q.

242 See Jobin & Cumyn, *supra* note 203 at 216, para. 169

243 The earlier case law had also made this distinction and, in this vein, ee e.g., *Royal Industries Inc. v. Jones*, [1979] C.A. 561 at 563–564; and *National Drying Machinery Co. v. Wabasso Ltd.*, [1979] C.A. 279 at 284 *in fine* and 285 of the majority reasons of Mayrand J. (as we know, the Supreme Court set aside the Court of Appeal's decision, but not on this point). The same distinction underlies *O.B. v. Lapointe*, [1987] R.J.Q. 101, in which the safety defect of the product resulting from lack of information was not viewed as a latent defect.
This distinction was already made, conceptually, by Prof. Crépeau in his 1965 article (even though he did not focus on differentiating between the pre-contractual and contractual stage), in addressing the seller's safety obligation and its duty to inform the buyer about the proper use of the product which, without such information, presented a danger: P.-A. Crépeau, *supra* note 212 at 1617. See also Thérèse Rousseau-Houle, "Les lendemains de l'arrêt Kravitz: la responsabilité du fabricant dans une perspective de réforme" (1980) 21 C. de D. 5 at 10; P. Legrand, *supra* note 207 at 231–233.

244 Nathalie Vézina, "Obligation d'information relative à un bien dangereux et obligation de sécurité: régime général et droit de la consommation", in *Droit de consommation et de la concurrence*, fasc. 4, Jurisclasseur Québec, loose-leaf (Montreal: LexisNexis Canada, 2014, update no. 7, August 2018) at 4/7 and 4/8 para. 12 [*Droit de la consommation*].

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> When the danger does not constitute a defect, the warranty of quality does not apply, and one must then turn to the obligation to provide information. Indeed, the criticism does not lie in the fact that the seller provided a defective product but rather in the fact that it omitted to point out the inherent danger presented by the product and the means to avoid such danger.
>
> [Emphasis added.]

[209] If the sub-purchaser does not have the right to sue the manufacturer contractually under the warranty of quality (which warranty is available to the sub-purchaser by way of article 1442 or article 1730), is the second paragraph of article 1458 para. 2 C.C.Q. not inapplicable? In this respect, wouldn't the only liability regime applicable to the harm resulting from the danger engendered by the manufacturer's or the seller's failure to inform be the extracontractual regime (in this case the regime established by articles 1468 and 1469 C.C.Q.)? These two questions must *a priori* be answered in the affirmative.

[210] Before coming to this conclusion, however, we must consider another possibility. Is it possible that the intrinsic danger of a product not affected by a defect within the meaning of *ABB Inc.* can nevertheless give rise to a contractual recourse which would here be related to the combined effects of articles 1434 and 1442 C.C.Q.? We already asked this question above when examining article 1024 C.C.L.C., but without having to answer it. However, the question needs to be asked anew by reason of article 1434 C.C.Q., which succeeded article 1024 C.C.L.C. On this issue, similar to the answer proposed by Prof. Crépeau in 1964, the authors Baudouin, Deslauriers and Moore suggest the following:[245]

> [TRANSLATION]
>
> **2-392** - ... When the safety defect arises from a defect of design or manufacture, the seller's warranty of quality logically applies to the extent that the usefulness of the product is thereby affected. The same applies, fairly easily, when the safety defect results from a lack of information related to such latent defect. The question is trickier when the harm was caused by lack of information related to the inherent danger of the product sold and the use thereof. In such case, it may be difficult to connect this safety defect to the seller's obligation of quality. It is then possible to fall back on article 1434 C.C.Q. to graft an implicit obligation to provide information and safety onto the contract of sale or other contract.
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> [Emphasis added; references omitted.]

[211] Pushing the reflection in this direction and asking what constitutes an "accessory to the property" within the meaning of article 1442 C.C.Q., the authors Lluelles and

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[245] Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 2, *supra* note 241 at 406. See also Baudouin & Jobin, *supra* note 210 at 406.

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Moore add the following:[246]

> [TRANSLATION]
>
> **2309.** However, there is still some uncertainty about a few personal rights. Thus, what about the *obligation to warn* that a seller/manufacturer owes to its buyer as to the dangers of using a product or the methods for the optimal use thereof? Would the personal rights generated by this implicit obligation, based on equity (art. 1384) or even good faith (art. 1375), be as indispensable to the property as those stemming from the legal warranty for latent defects? A negative answer would be surprising. Subject to a possible "*intuitu personae*," a solution that is favourable to the sub-purchaser should therefore come as no surprise.
>
> [References omitted.]

[212] The proposition that emerges from these remarks may be formulated as follows:

> - in addition to the legal warranty of quality required of the manufacturer under articles 1726 *et seq*. C.C.Q., the manufacturer has the contractual obligation under article 1434 C.C.Q. (reinforced by article 1375 C.C.Q.) to inform and warn the buyer of any danger relating to a non-defective product or to the handling thereof;
>
> - this obligation is an accessory to the property and is closely related therewith, so that the benefit would pass to the sub-purchaser under article 1442 C.C.Q.

[213] In other words, the manufacturer's obligation to inform about a dangerous but non-defective product would be a sort of safety warranty, an accessory that would run with the product into the hands of the sub-purchaser. And if that is the case, a safety defect affecting a product would give rise to a contractual recourse based on the first paragraph of article 1458 C.C.Q., which recourse would be available to the sub-purchaser by reason of article 1442 C.C.Q. The second paragraph of article 1458 C.C.Q. would then deprive the sub-purchaser of the ability to commence an action against the manufacturer on an extracontractual basis, that is, on the basis of articles 1468 and 1469 C.C.Q.

[214] In the opinion of the Court, however, this proposition raises more problems than it solves and seems to emerge from a willingness to artificially contractualize that which, at first blush, is not contractual or, at least, not always contractual.

[215] Indeed, as we have already seen, the manufacturer's duty to inform often has a pre-contractual dimension, which can lead only to an extracontractual sanction.[247] Let us

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[246] Lluelles & Moore, *supra* note 215 at 1380. This is a point of view that authors Jobin and Cumyn appear to share: Jobin & Cumyn, *supra* note 203 at 157 to 159, para. 123 and at 340, para. 234. See also N. Vézina & F. Maniet, *supra* note 232 at 73 *in fine* and 74.

[247] See *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554. In 2009, Prof. Jobin even wrote that [TRANSLATION] "[the] obligation to inform at the time the contract is formed is not part of the

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consider here a product which, by its very nature, is dangerous, even when used as intended and as recommended by the manufacturer. Medication, for example, when administered as it should be, may have side effects about which users must be forewarned. Cigarettes are another example: here is a product which, when used precisely as it is intended to be used, the right way, nevertheless presents a danger to health. Such danger must be disclosed to the buyer before the product is even acquired, as this information is essential to the decision to procure the product.[248] Information of this kind, wrote Gonthier J., cited above, "will have a definite influence on the consumer's decisions as to whether to purchase and use such products."[249]. Such a pre-contractual obligation does not fall under article 1434 C.C.Q. and does not easily tie in with article 1442 C.C.Q., which is a provision which pertains to the effects of contracts, but fits naturally with the extracontractual regime of articles 1468, 1469 and 1473 C.C.Q.

[216] In brief, a safety defect that is not the result of a defect in the product but of a failure to fulfil the manufacturer's obligation to inform is not, as per the Supreme Court in *ABB Inc. v. Domtar Inc.*, *supra*, a latent defect within the meaning of articles 1726 *et seq*. C.C.Q. and does not trigger the warranty of quality (whether by way of article 1730 or article 1442 C.C.Q.). Furthermore, as the nature of the defect in this case requires pre-contractual disclosure, article 1434 C.C.Q., once again combined with article 1442 C.C.Q., is not any more applicable. The sub-purchaser of the product affected by such defect cannot therefore invoke contractual liability on the part of the manufacturer, and no other contractual path is open to him or her. This being the case, the second paragraph of article 1458 C.C.Q., even presuming that it concerns the sub-purchaser, is wholly inapplicable and cannot preclude him or her from having recourse to the rules of the extracontractual regime.

[217] Finally, note that the second paragraph of article 1458 2 C.C.Q. does not apply to recourses set forth in the C.P.A., which function in a completely autonomous framework

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contract and is governed by extracontractual liability," which [TRANSLATION] "is not controversial" (Pierre-Gabriel Jobin, "Les ramifications de l'interdiction d'opter. Y a-t-il un contrat? Où finit-il?" (2009) R. du B. can. 355 at 363). In their book on sale in which they address the obligation of the seller (who may be a manufacturer) to provide its direct buyer with instructions on use, maintenance and preservation, Profs. Jobin and Cumyn distinguish between the information which is provided at the time of, and with a view to, the formation of the contract, and the information stemming from such formation, referring to the contractual or extracontractual regime, as the case may be (Jobin and M. Cumyn, *supra* note 203 at 157, para. 122). Regardless of this distinction, they nevertheless place the seller's obligation to warn its buyer of a danger inherent to the product in the realm of the implicit contractual obligation of article 1434 C.C.Q. (at 157-158, para. 123).

248 For other examples of the obligation to inform as a pre-contractual obligation, see *Option Consommateurs v. Infineon Technologies, AG*, 2011 QCCA 2116 at paras. 30 to 32 (affirmed by the Supreme Court of Canada, without expressly discussing the issue, except to ratify the extracontractual nature of the claim – See *Infineon Technologies AG v. Option Consommateurs,* 2013 SCC 59). See also *Sudenco inc. v. Club de golf de l'île de Montréal (2004) inc.*, 2016 QCCA 439; *Mignacca v. Provigo inc.* J.E. 2004-1777 (C.A.). Paragraph 19 of the judgment *a quo* takes note of the pre-contractual nature of the manufacturer's duty to inform about the dangers of the product at issue.

249 *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554 at 587.

(of public order).[250] Article 270 C.P.A.[251] leaves no doubt about this:

270. The provisions of this Act are in addition to any provision of another Act granting a right or a recourse to a consumer.	**270.** Les dispositions de la présente loi s'ajoutent à toute disposition d'une autre loi qui accorde un droit ou un recours au consommateur.

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[218] Consumers may therefore, at their option, base their action solely on the C.P.A. or, concurrently with the C.C.L.C. or the C.C.Q. This form of cumulation is allowed, even though, it goes without saying, the plaintiff may not cumulate the compensatory damages associated with the harm incurred.[252] There is therefore nothing wrong with the fact that the respondents based their claims on articles 219, 228 and 272 C.P.A. (just as they could have invoked section 53 C.P.A., which will be addressed below).

[219] This is also true for the recourse under the *Charter*.

[220] In brief, at the end of this lengthy parenthesis, the Court finds that the respondents could validly base their recourse on the extracontractual liability of the appellants, just as they could invoke the *Charter* and the C.P.A. The trial judge did not err in accepting this juridical framework.

C. Civil liability of the manufacturer marketing a dangerous product: general regimes

[221] Given the claims of the parties, the evidence and his findings of fact, did the trial judge err in applying the rules pertaining to the appellants' liability under the C.C.L.C., the C.C.Q., the C.P.A. and the *Charter*? We know what he ultimately faults the appellants for: (1) as manufacturers of a product that is intrinsically harmful, they deliberately failed to fulfil their duty to inform their (existing and potential) customers on the dangers and risks associated with the consumption of cigarettes and (2) for decades, they just as deliberately orchestrated and conducted, on all fronts, a campaign of disinformation in that regard. We also know that, in his opinion, this conduct gives rise to civil liability under articles 1053 C.C.L.C. and 457 C.C.Q., article 1468 C.C.Q., articles 219, 228 and 272 C.P.A. and sections 1 and 49 of the *Charter*. What can be said about this? If we examine things in the light of section 53 C.P.A., are the same conclusions justified?

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[250] Lluelles & Moore, *supra* note 215 at 1381 to 1384, paras. 2311 to 2314; Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 2, *supra* note 241 at 376 *et seq*., para. 2-359 *et seq*.; Luc Thibaudeau, *Guide pratique de la société de consommation*, t. 2 (*Les garanties*) (Cowansville, Qc.: Yvon Blais, 2017) at 5–6, para. 8, and at 11, para 19.

[251] This provision has not been amended since its adoption in 1978 and coming into force in 1980.

[252] Jobin & Cumyn, *supra* note 203 at 358-359, para. 243; Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 2, *supra* note 241, in particularl at 376 at para. 2-359.

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[222] Before addressing these questions, however, we should take a detailed look at the legal treatment which the trial judge applied to the various issues in dispute.

i. Summary of the judgment *a quo* regarding liability

[223] We should note, preliminarily, that at no point does the trial judge find that the cigarettes manufactured by the appellants were affected by a defect, i.e., a defect in design or manufacture, whether within the meaning of article 1469 C.C.Q. or of articles 1522 C.C.L.C. or 1726 C.C.Q. (and the same is true within the meaning of section 53 C.P.A.). Furthermore, the trial judge did not view the danger inherent in the consumption of cigarettes as a defect in design or manufacture within the meaning of the aforementioned provisions, nor the consequence of such a defect. Admittedly, he did not explicitly examine the issue, which was not raised before him, but nothing suggests that that could have been the case.

[224] For if cigarettes are dangerous, and that is exactly what emerges from the evidence and the judgment, it is not because they are defective (or because of poor preservation, the other hypothetical case contemplated in article 1469 C.C.Q. and, implicitly, articles 1522 C.C.L.C. or 1726 C.C.Q.), nor because they do not satisfy one's expected use thereof. What is the purpose of a cigarette? To smoke, essentially, answered one of the appellants' lawyers,[253] and this sober but correct answer clearly shows that we are not in the realm of the use deficiency associated with a product defect, a notion which, as we have seen, has a precise meaning. A perfect cigarette is no less harmful: the problem, as in this case, is with the information relating to such harmfulness.

[225] And, on that subject, the trial judge first held that, to the extent that no law prohibits the sale or distribution thereof, the marketing and merchandizing of a product that is intrinsically dangerous to health do not ordinarily constitute faults[254] (whether within the meaning of the C.C.L.C.*, the* C.C.Q., the *Charter or* the C.P.A.). He therefore rejects the proposition that merely marketing such a product or simply promoting the consumption thereof are intrinsically wrongful acts that are sufficient to engender civil liability in the case of harm.

[226] The respondents did not reiterate these arguments on appeal and, had they done so, the Court in the circumstances, let us say it forthwith, would not have overruled the conclusions of the trial judge on this point.

[227] Certainly, we cannot totally exclude the possibility that the marketing of a product which is intrinsically dangerous,[255] but the distribution of which is not prohibited by the State, can in and of itself constitute a fault susceptible of giving rise to civil liability on the part of a manufacturer, regardless of the transparency and breadth of the information

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253 Stenographic notes of November 30, 2016 (SténoFac) at 112.

254 Judgment *a quo* at paras. 221 to 226, 384 and 482.

255 This term means a product or object that is not in any way defective but which, by its very nature, is dangerous.

provided by such manufacturer.[256] By the same token, we cannot assert that the distribution of such a product is invariably wrongful.

[228] It is true that, in *Alliance Assurance Company Limited v. Dominion Electric*, Pigeon J. speaks of the "duty lying upon the manufacturer not to put such things on the market",[257] a duty which is "independent of his contractual obligation, as vendor."[258] Given the context of such decision, it is not certain that the intention was to suggest that the marketing of a dangerous product was a fault in and of itself, which adequate information could not remedy. It is also true that, in a case originating in British Columbia, Sopinka J.,[259] comparing the liability of a physician who prescribes, uses or administers a dangerous product (to wit, a biological substance) to that of a manufacturer who marketed it, says tersely that:[260]

> 95 ... the physician cannot control the safety of these products beyond exhibiting the reasonable care expected of a professional to ensure that the biological substance is free from harmful viruses. By contrast, in the commercial world, the manufacturer has control over the goods. If they cannot be manufactured to be safe, then the products ought to be removed from the market.
>
> [Emphasis added.]

[229] Does this imply that the manufacturer that places and leaves such products on the market *ipso facto* commits a fault that could give rise to its liability? The inference would be audacious to the extent that the problem in that case was, in large part, gaps in the information dispensed by the manufacturer. Sopinka J. continued by emphasizing that some potentially dangerous products – he gives blood as an example – on the other hand sometimes present advantages such that the abandonment thereof cannot be considered, unless the risks are excessive[261] (risks that "the patient is entitled to

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256 Profs. Jobin and Cumyn formulate the problem in these terms: [TRANSLATION] "One day, aside from cases of legal or regulatory prohibition, the question will arise as to whether a product, by reason of its extreme dangerousness, should not be totally prohibited, despite all the warnings and information that may be given to the buyer and third parties" (Jobin & Cumyn, *supra* note 203 at 159, para. 123). They also state (specifically citing the judgment *a quo*) that: [TRANSLATION] "In the most serious cases, the question arises as to whether an extremely dangerous product should not have been marketed, whatever the warnings may be" (at 289, para. 211 – See also at 331, para. 227).

257 *Alliance Assurance Co. v. Dom. Electric*, [1970] S.C.R. 168 at 174.

258 *Alliance Assurance Co. v. Dom. Electric*, [1970] S.C.R. 168 at 174.

259 Writing the majority opinion for the Supreme Court.

260 *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674. In that case, HIV-contaminated sperm was administered to the appellant as part of artificial insemination therapy. She became infected and sued the doctor who had not warned her of the risk of HIV transmission.

261 *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674. It is a sometimes criticized, sort of cost-benefit or risk-utility equation: See Jobin & Cumyn, *supra* note 203 at 315 *in fine*, 316 and 331, paras. 219. However, see Geneviève Viney, "La mise en place du système français de responsabilité des producteurs pour le défaut de sécurité de leurs produits," in *Propos sur les obligations et quelques autres thèmes fondamentaux du droit - Mélanges offerts à Jean-Luc Aubert* (Paris: Dalloz, 2005) 328 at 345. In the U.S., this equation is resolved by use of the "Learned Hand formula," named after the judge who developed it in *U.S. v. Carroll Towing*,

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weigh,"[262] which of course implies that the patient be informed thereof).

[230] In the end, if we can theoretically contemplate that the commercialization of a dangerous product, the marketing of which is not prohibited by the State, can constitute a fault, even when the manufacturer provides all the information required, we must at the same time acknowledge that, in practice, this will be an exception.

[231] Dangerous products[263] in free circulation abound, and a number of them are very commonly used.[264] They are frequently useful, even indispensable, and the dangers they present range from minor to most serious. Unless we are prepared to jeopardize entire swaths of industry and commerce, it is hard to imagine finding fault solely in the manufacture and marketing of such products, that is to say to view them, within the meaning of articles 1053 C.C.L.C. or 1457 C.C.Q., as a breach of the general obligation imposed on each of us not to harm others by [TRANSLATION] "neglecting a pre-existing duty or the breach of a standard of conduct."[265]

[232] Nevertheless, some could perhaps be tempted to find fault in the case of products that have little or no usefulness, procure no particular pleasure and present inordinate risks associated with substantial dangers (these same people might think that cigarettes are a typical example of such a product). There are, however, in this statement elements of a subjectivity so great that it necessarily requires specific examination. It cannot be a general rule. Furthermore, in this case, the centuries-old history of tobacco consumption, its penetration into the habits of the people and its gradual disgrace, as well as the events of the Class Period (1950–1998), including active

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159 F. 2d 169 (2d Cir. 1947). This formula, used in connection with "negligence" and applied to the liability of the manufacturer, remains highly controversial. See for example Barbara A. White, "Risk-Utility Analysis and the Learned Hand Formula: A Hand that Helps or a Hand that Hides" (1990), 21 Ariz. L. Rev. 77; Benjamin C. Zipursky, "Reasonableness In and Out of Negligence Law", (2015), 163 U. Pa. L. Rev. 2131; Gregory C. Keating, "Must the Hand Formula Not Be Named" (2015), 163 U. Pa. L. Rev. Online 367.

262 *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at 718.

263 By which we still mean products which, without in any way being defective, represent an inherent danger, great or small.

264 At the limit, it could be said that the majority of ordinary objects, though considered harmless, present some danger or potential danger based on the use they are put to, from the smallest LEGO® brick (which must not be swallowed by a child) to a plastic bag (which must not be used to wrap around the head at the risk of causing asphyxia), or a ballpoint pen or screwdriver (which can be used as a weapon to stab an opponent in the eye) or a key (which can be used to injure) or a toaster (which should not be immersed in water when plugged in). Mayrand J., in *National Drying Machinery Co. v. Wabasso Ltd.*, [1979] C.A. 279 at 285, even observed in passing that many medications are dangerous if not properly dosed. That decision was set aside by the Supreme Court, but not on this point.

265 Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 8th ed., vol. 1 (Cowansville, Qc.: Yvon Blais, 2014) at 163, para. 1-162 [*La responsabilité civile,* vol. 1]. If marketing a product that is dangerous but in no way defective is not in and of itself a fault, the same cannot be said about the marketing of a defective product, especially where the defect creates a danger that would not otherwise exist. Some view this as an objective fault (See Geneviève Viney, *supra* note 261 at 330), others see it as the affirmation of an irrebuttable presumption of fault. But this is not the issue in this appeal.

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government involvement,[266] ensure that it would be perilous to conclude that the very fact of having marketed, and continuing to market, tobacco products (and more particularly cigarettes) constitutes a fault.

[233] Rather, it is in the duty to inform, which is incumbent upon designers, manufacturers, sellers, distributors and other participants in the distribution chain, and in the corollary thereto, the knowledge of the user, that the law usually sees the means of managing the risk associated with products that are inherently dangerous, and of regulating the civil liability of those who market such products (when not prohibited by the State). As stated by the trial judge, to whom we must now return:

> [482] To start, the Court held above that the Companies manufactured, marketed and sold a product that was dangerous and harmful to the health of the Members. As noted, that is not, in itself, a fault or, by extension, an unlawful interference. That would depend both on the information in the users' possession about the dangers inherent to smoking and on the efforts of the Companies to warn their customers about the risk of the Diseases or of dependence, which would include efforts to “disinform” them.

[234] As to the question of whether it may be wrongful to engage in the advertising (in whatever form, including labelling) and merchandizing of a dangerous product, the answer, there again, depends entirely on the circumstances. Certainly, one does not expect the manufacturer to denigrate its own product, but does the advertising of such product comply with applicable governmental standards (if any) and, in the affirmative, is this sufficient? Who is the target audience for such advertising? Is the advertising accompanied by adequate information? On the contrary, is it misleading? This, in the case at bar, is the crux of the issue and that is exactly what, ultimately, we find at the heart of the analysis by the trial judge: “portraying smoking in a positive light” is perhaps not, in and of itself, a fault,[267] but to do so in the way the appellants did would be.

[235] For if the marketing of a dangerous product, and the advertising accompanying it, cannot, as such, be considered faults, according to the trial judge, the same cannot be said, he found, about failing to disclose the very substantial risks associated with the consumption of such product, risks which the appellants knew (and, furthermore, had to know). This is where there is breach of the manufacturer’s obligation to inform, both under articles 1468 and 1469 C.C.Q. and under the rules in force in accordance with the case law before 1994.

[236] But there is more. According to the trial judge, not only did the appellants fail to

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[266] We note, in particular, the role played by the government in the development of strains of so-called “light” tobacco and the promotion of these products. See in this regard the report of the historian Robert John Perrins, 1 October 2013, Exhibit 40346, Chapter 7 (“The development of government positions on lower tar cigarettes in Canada”) at 129 *et seq*.

[267] More precisely, the trial judge stated:

> [384] ...As for portraying smoking in a positive light, we hold further on that advertising a legal product within the regulatory limits imposed by government is not a fault, even if it is directed at adult nonsmokers.

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fulfil their obligation to inform, they also committed a gross fault within the meaning of articles 1053 C.C.L.C. and 1457 C.C.Q. by circulating through various means information which was deliberately misleading about their products and through a concerted effort (the trial judge speaks of conspiracy and collusion) to conceal the actual nature and scope of the risks and dangers inherent in the use of cigarettes or to confuse perception and comprehension (particularly by the systematic undermining of governmental, scientific and other efforts in this regard).

[237] The trial judge found that this same behaviour was also an attack on the right to life, security and inviolability of the members of the two classes, contrary to section 1 of the *Charter,*[268] hence the application of section 49, including in terms of punitive damages, as such interference was illicit and, what is more, deliberate. Finally, by acting in this manner, the appellants contravened sections 219 and 228 C.P.A., thus triggering the application of section 272 of that Act.[269]

[238] Furthermore, as we have also seen, the trial judge found no fault or breach in the appellants' attitude in respect of the compensation phenomenon described above,[270] given the predominant role played by the government in the promotion of low-tar, low-nicotine cigarettes as well as in the dissemination of related information, but also given the state of knowledge at the time (which would trigger the ground of defence set forth in the second paragraph of article 1473 C.C.Q.).[271] The trial judge dismissed the argument that the use of qualifiers such as "light," "mild," "low tar," "low nicotine" and the like on cigarette packs (or in advertising) was wrongful[272] and, by the same token, dismissed the same argument in respect of paragraph 220(*a*) C.P.A.[273] Other alleged faults were ruled out and need not be listed here.

[239] To sum up, according to the trial judge, the Appellants' fault lies in the fact that they continually failed to fulfil the obligation to inform, incumbent upon them as manufacturers of an inherently dangerous (although not defective) product, a failure which comes under articles 1468 and 1469 C.C.Q., and the corresponding former law, under article 1053 C.C.L.C. But that is not their only fault. By means of skillful and concerted strategies, they also propagated fallacious and specious information about cigarettes, thereby intentionally misleading users and the public in general, which constitutes a fault within the meaning of articles 1053 C.C.L.C. and 1457 C.C.Q., a fault

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[268] In the relevant portion of his judgment, the trial judge occasionally refers to the notion of dignity of the person, that of the smoker in this case, within the meaning of section 4 of the *Charter*, and seems to indicate implicitly that the appellants violated the right enshrined in this provision (see e.g., judgment *a quo* at paras. 183 and 638). However, he does not make this one of the express reasons of his decision.

[269] We know that section 219 prohibits false or misleading representations by any means whatsoever; section 228 prohibits merchants, manufacturers or advertisers from failing to mention an important fact in any representation made to a consumer; section 272 lists the recourses that a consumer may exercise in the event of the failure to fulfil any of these provisions. See *infra* at para. [867] *et seq*.

[270] See *supra* note 177.

[271] Judgment *a quo*, particularly at paras. 353 to 356.

[272] Judgment *a quo*, particularly at paras. 412 and 413.

[273] Judgment *a quo* at para. 542 to 544.

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that is distinct from, and in addition to, the preceding one, while contravening sections 1 and 49 of the *Charter* as well as sections 219 and 228 C.P.A.

[240] In addition to these faults, the trial judge also noted the existence of harm among the members of the two classes: Mr. Blais and the other members of his class developed lung or throat cancer or emphysema (and many have died thereof since the launch of this class action), bodily harm which engenders an inseparable moral prejudice; Ms. Létourneau and the other members of her class are addicted to cigarettes, a drug dependence of which they are unable to free themselves (like a large part of the members of the Blais Class), which here again results in moral prejudice.

[241] Finally, the trial judge addressed the issue of causation between the appellants' faults and the harm incurred by the members of the Blais and Létourneau Classes. Considering what he termed a "multi-link chain involving several intermediate steps,"[274] he concluded in a way that could be summarized thus as concerns the members of the Blais Class: the appellants' faults are the cause of the consumption of cigarettes by these persons[275] (or at least are a direct and significant cause, even if not the only one), the use of which cigarettes, beyond a specific quantity,[276] is in itself the cause, medically speaking, of the diseases affecting each member,[277] and which constitute bodily harm, to which substantial moral prejudice is closely related (moral and physical pain and suffering, loss of life expectancy, loss of quality of life, worries, trouble and inconvenience related to both the diseases and the treatment thereof).[278] The appellants' faults may therefore be held to be the cause of this moral prejudice and this causality (causality by transitivity, we might say[279]) is sufficiently direct to result in their civil liability.

[242] The trial judge used the same type of reasoning in respect of the Létourneau Class: the appellants' faults caused the consumption of cigarettes by the members of

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274 Judgment *a quo* at para. 647.

275 Judgment *a quo* at para. 791 *et seq*.

276 Judgment *a quo* at para. 671: "The Court is satisfied that the principal cause of lung cancer is smoking at a sufficient level"*;* para. 673: "The Court is satisfied that the principal cause of cancer of the larynx, the oropharynx and the hypopharynx is smoking at a sufficient level"; para. 675: "The Court is satisfied that the principal cause of emphysema is smoking at a sufficient level." The level of consumption required was determined by the judge based on epidemiological evidence and incorporated into the final description of the two classes (at paras. 1208 and 1233 of the conclusions of the judgment *a quo*).

277 Paragraphs 668 *et seq*. of the judgment *a quo* address the question of medical causation on two levels: the scientific links between the consumption of cigarettes and each of the diseases affecting the members of the Blais Class, and the link between the personal consumption of each member and the development of the disease contracted. The trial judge concluded that the consumption of cigarettes is, generally speaking, the main cause of the diseases at issue and of the addiction to tobacco; he further concluded that it is the main cause of the disease or addiction of each member.

278 Paragraphs 657 to 663 of the judgment *a quo* explain, disease by disease, the moral prejudice caused to the members of the Blais Class.

279 The Court will return to this issue as regards causation, the principal ground for appeal, and the various theses prevailing in Quebec case law, particularly that of adequate causation (see *infra* at para. [660] *et seq.*).

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this class[280] and the resulting tobacco dependence in each of them[281] (or at least they are a direct and significant cause, even if not the only one), tobacco dependence which, in and of itself, is bodily harm (of a physico-psychological nature) to which is closely related substantial moral prejudice (fear of contracting a fatal disease, curtailed life expectancy, social reprobation, loss of self-esteem, humiliation).[282] Thus, the causality between the appellants' faults and the harm caused to the members of the Létourneau Class is established.

[243] It should be noted that in deciding this way, the trial judge dismissed two of the appellants' main arguments in connection with causation:

> (1) the argument relating to the absence of evidence on a balance of probabilities of medical causation: if, scientifically speaking, a link can be made between the consumption of cigarettes and lung or throat cancer, emphysema and, more generally, tobacco dependence, this medical causation has still not been established on an individual basis in respect of each member, which is indispensable. In other words, even if it can be said that, statistically speaking, cigarettes are the main cause of any of these diseases, the evidence does not demonstrate that each of the members of the Blais Class or each of the members of the Létourneau Class owes his or her personal pathology to his or her consumption of cigarettes directly.
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> (2) the argument relating to the absence of evidence on a balance of probabilities of conduct causation: proof was not made that, but for the appellants' faults, the members of the class would not have started

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280 Judgment *a quo* at para. 810 *et seq*.

281 Tobacco dependence, which the judgment *a quo* defines more precisely in paras. 770 *et seq* It is not sufficient to have smoked once or even to smoke once a day to be able to call it an addiction. The trial judge also proposed a ""workable definition" of tobacco dependence" (para. 771), which he established after analyzing the evidence (paras. 772 to 785):

> [786] Based on the above, the Court holds that the threshold of daily smoking required to conclude that a person was tobacco dependent on September 30, 1998 is an average of at least 15 cigarettes a day. The Companies steadfastly avoided making any evidence at all on the point, so there is nothing to contradict such a finding.
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> ...
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> [788] Consequently, the Court finds that medical causation of tobacco dependence will be established where Members show that:
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> a. They started to smoke before September 30, 1994 and since that date they smoked principally cigarettes manufactured by the defendants; and
> b. Between September 1 and September 30, 1998, they smoked on a daily basis an average of at least 15 cigarettes manufactured by the defendants; and
> c. On February 21, 2005, or until their death if it occurred before that date, they were still smoking on a daily basis an average of at least 15 cigarettes manufactured by the defendants.

This lead to a redefinition of the Letourneau Class (para. 1233 of the conclusions of the judgment *a quo*).

282 Paras. 665 to 667 of the judgment *a quo* provide a detailed description of the moral prejudice caused by addiction to cigarettes.

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> smoking or continued to smoke. Many factors can explain these decisions, factors which vary according to individuals, and nothing allows for the conclusion on a balance of probabilities that each smoked because of the faults alleged against the appellants.

[244] With regard to the Blais Class, the trial judge excluded the first of these claims on the one hand, based on the lessons of the Supreme Court in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*[283] and, on the other hand, on s. 15 of the T.R.D.A. According to the trial judge, this provision is applicable to the case pursuant to ss. 24 and 25 T.R.D.A. and allowed him to find individual medical causation on the basis of epidemiological evidence.[284] H concluded that this evidence was established[285] on a balance of probabilities in accordance with the standard prescribed by article 2804 C.C.Q.:[286] "The Court finds that each of the Diseases in the Blais Class was caused by smoking at least 12 pack years before November 20, 1998."[287].

[245] With regard to the Létourneau Class, the trial judge dismissed the appellants' claim concerning medical causation, as tobacco dependence cannot, as he pointed out, result from a factor other than the consumption of this product.[288]

[246] With respect to conduct causation, the trial judge concluded that it is inferred from a series of facts which establish, by presumption under article 2849 C.C.Q., the direct link between the appellants' faults and the consumption by each member of both classes (whether to start smoking or not to stop smoking). The appellants failed to rebut that presumption. Admittedly, he stated, other factors may have played their part in these decisions ("peer pressure, parental example, the desire to appear "cool", the desire to rebel or to live dangerously, etc."[289]), but, ultimately:

> [807] In spite of those, this conclusion is enough to establish a presumption of fact to the effect that the Companies' faults were indeed one of the factors that caused the Blais Members to smoke. This, however, does not automatically sink the Companies' ship. It merely causes, if not a total shift of the burden of proof, at least an unfavourable inference at the Companies' expense.
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> [808] The Companies were entitled to rebut that inference, a task entrusted in large part to Professors Viscusi and Young. We have

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283 *Quebec (Public Curator)* v. *Syndicat national des employés de l'hôpital St-Ferdinand* [1996] 3 SCR 211.

284 Judgment *a quo* at paras. 678 to 694.

285 Judgment *a quo* at para. 695 *et seq*. In this regard, the judgment essentially retains the view of the expert Siematycki (paras. 695 to 718), not without considering that of the appellants' experts (para. 719 *et seq*.). Moreover, the judge took into account the criticisms made by the latter and adapted the findings he drew from the report and from the expert Siematycki's testimony (particularly with regard to the level of consumption).

286 Judgment *a quo* at paras. 724 to 730.

287 Judgment *a quo* at para. 767.

288 Judgment *a quo* at paras. 768 and 769.

289 Judgment *a quo* at para. 806.

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> examined their evidence in detail in section II.D.5 of the present judgment and we see nothing there, or in any other part of the proof, that could be said to rebut the presumption sought.
>
> [809] Consequently, the question posed is answered in the affirmative: the Blais Members' smoking was caused by a fault of the Companies.
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> **VI.F. WAS THE LÉTOURNEAU MEMBERS' SMOKING CAUSED BY A FAULT OF THE COMPANIES?**
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> [810] Much of what we said in the previous section will apply here. The only additional issue to look at is whether the presumption applies equally to the Létourneau Class Members.
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> ...
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> [813] The first point is rebutted on the basis of the same presumption we accepted with respect to the Blais Class in the preceding section, i.e., that the Companies' faults were indeed one of the factors that caused the Members to smoke. Our conclusions in that regard apply equally here.
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> [814] As for the second, sufficient proof that each Class Member is tobacco dependent flows from the redefinition of the Létourneau Class in section VI.D above. Dr. Negrete opined that 95% of daily smokers are nicotine dependent and the new Class definition is constructed so as to encompass them. This makes it probable that each Member of the Létourneau Class is dependent.
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> …
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> [817] Consequently, the question posed is answered in the affirmative: the Létourneau Members' smoking was caused by a fault of the Companies.
>
> [Emphasis in original]

[247] In brief, the trial judge found that the appellants' faults are probably not the only cause of smoking by the Blais Class, but they are nevertheless a determining factor. The same can be said for the Létourneau Class.

[248] In principle, therefore, as fault, injury and the causal connection between the two have been established, the appellants' liability with regard to the members of both classes ensues, regardless of whether their liability arises under the general law (article 1053 C.C.L.C.; articles 1457, 1468 C.C.Q.) or under ss. 1 and 49 of the *Charter* or ss. 219, 228 and 272 C.P.A.

[249] Could the knowledge that users, informed through other channels, may have had of the risks and dangers associated with smoking exonerate the appellants from this liability? The trial judge answered this question in the negative. He found that it was not

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until January 1, 1980, that it became known – and thus presumed to be common knowledge – that tobacco causes a number of deadly diseases, including lung and throat cancer, as well as emphysema. As for addiction, it was not until March 1, 1996, 18 months after labels to this effect were affixed to cigarette packaging, that the addictive effect of cigarettes became known as well. Prior to these respective knowledge dates, the information regarding the toxicity of tobacco was insufficient to speak of true knowledge of the danger and risk among users.

[250] Finally, taking into account the knowledge dates established in 1980 (diseases) and 1996 (addiction), the trial judge attributed a portion of liability, up to 20%, to the members for the harm suffered. In his opinion, there is indeed, in the conduct of people who started smoking in 1976 or 1992 or after (the period of addiction development being set at four years[290]) and who did not stop doing so in 1980 or 1996, when they were still able to, an acceptance of risk and therefore a contributory fault.[291] This results, in the case of some of the members of the Blais Class, in a corresponding decreased compensation for the moral damages of each.[292] In the case of the Létourneau Class, because only punitive damages are awarded, this contributory fault has no impact and does not diminish the compensation, "given the continuing faults of the Companies and the fact that awards of this type are not based on the victim's conduct."[293]

[251] Was it appropriate to conclude that such a contributory fault existed and, consequently, apportion liability? One may disagree (and the Court shall revisit this matter), but it should again be noted that the respondents, in their cross-appeal, have not taken issue with this conclusion, nor its consequences for the Blais Class. For their part, the appellants are not contesting this finding, nor the ensuing apportionment, at least not from this point of view, as they argue instead that, even if they are at fault, they should have been exonerated of *all* liability as of the knowledge dates determined by the trial judge, and even earlier.[294]

ii. General comments on the rules of liability

[252] Despite the above summary, it must be acknowledged from the outset that it is sometimes difficult to distinguish, in the trial court decision, what falls under the general civil liability regime, governed by articles 1053 C.C.L.C. and 1457 C.C.Q., from what derives from the specific regime of articles 1468, 1469 and 1473 C.C.Q., previous case law or the provisions of the C.P.A. or even the *Charter*. The chronological dimension and the evolution of the law during this time period further increases the difficulty (although the evolution of the law went one way, by the broadening and reinforcement of manufacturers' liability rules). Even if we may, from this point of view, criticize the text for

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290 Judgment *a quo* at paras. 773 to 776.

291 Judgment *a quo* at paras. 818 to 836.

292 As such, in the case of members with lung or throat cancer, the $100,000 indemnity was reduced to $80,000 for members who started smoking as of January 1, 1976; for members with emphysema, the $30,000 indemnity was reduced to $24,000.

293 Judgment *a quo* at para. 836.

294 It should be recalled that the appellants are challenging these dates, which they allege to be much earlier.

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a certain confusion of the genres, and even some errors, it remains, however, that there is no reason to intervene, and nothing that goes beyond rectification, a rectification that does not go against the main conclusions of the decision or its findings.

[253] What relates to the general law will be examined first, then, secondly, the C.P.A. and, finally, the *Charter*.

[254] It should be noted that the following pages will refer generally to the duty or obligation to provide information or to inform, to designate the manufacturer's duty or obligation to warn the purchaser or user of the danger inherent in the product or of the danger that may be caused by its misuse. Some have already criticized this terminology, arguing that the manufacturer is not only required to warn of the danger, but that it must, generally speaking, inform the buyer or the user of the characteristics and instructions for use of the product even when it does not present any particular danger.[295] These would be the two facets of the obligation to provide information,[296] [TRANSLATION] "which are nonetheless closely related."[297] Indeed:[298]

> [TRANSLATION] The relationship between the two aspects of the general duty to provide information cannot be doubted. Indeed, insofar as this machine conceals potential dangers, the latter will materialize only as a result of the inadequate use of the product. If the instructions provided are accurate and complete, with adequate warnings, the purchaser does not have to fear these dangers, which are potential. They become threatening only in the event that the instructions prove to be erroneous or insufficient. The materialization of danger, therefore, appears as the consequence of flawed instructions, the latter being the cause of the former.

[255] On this basis, these reasons shall use the term *duty or obligation to provide information or to inform* to designate the obligation incumbent on the manufacturer to warn users of the danger of the product or its use and means of avoiding its materialization, which corresponds to the factual framework of the case. From time to time, the terms duty or obligation *to warn* or *to provide warning* shall be alternatively used to mean the same.

[256] Furthermore, we have already defined a *dangerous product* several times as one which, without being defective, poses a danger by its very nature or by the use made of it. Here again, the distinction between these two situations is sometimes fine or evasive. Hence, are circular saws and explosives dangerous by their very nature, or do they become so only because of improper handling? No doubt there is a difference between the product that poses a danger even when it is used in the manner recommended by the manufacturer, under strict observance of its instructions, and the product whose

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295 Legrand, *supra* note 207 at 224 *et seq*.
296 Legrand, *supra* note 207 at 224 *et seq*.
297 Legrand, *supra* note 207 at 230.
298 Legrand, *supra* note 207 at 230–231.

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danger results from an awkward or inappropriate use.[299] In each case, however, it is a *dangerous product*, and it is in this sense that, unless otherwise indicated, this term shall be used.

iii. Obligation to provide information and civil liability of the manufacturer: article 1053 C.C.L.C.; articles 1457, 1468, 1469 and 1473 C.C.Q.

[257] Whether under the C.C.L.C. or the C.C.Q., the principle is firmly established, and it is not disputed here: a dual obligation of safety is imposed upon the manufacturer to the benefit of users (even potential ones) of a movable thing that it has put on the market. Firstly, the manufacturer must ensure that the impugned product is not affected by any defect or loss causing danger (i.e., "dangerous defect") and, if it is the case, it must warn users. Its failure to do so can be sanctioned contractually[300] or extra-contractually,[301] depending on the circumstances. Secondly, even in the case where the product is free of defect, the manufacturer must inform the user about the inherent danger and the means to avoid or remedy it. If it fails to do so, it shall in principle be liable, extracontractually, for the harm resulting from the materialization of the danger and to repair the damage caused to the user.

[258] As we know, this case concerns the second part of this obligation of safety and the duty to provide information relating to the product which, without being defective or otherwise altered, that is to say affected by a defect, is nevertheless dangerous. The analysis will be divided into two parts, one regarding the application of the provisions of the C.C.L.C. (article 1053) and of the C.C.Q. (articles 1457, 1468, 1469 and 1473), the other relating to s. 53 C.P.A.

a. Overview of the manufacturer's obligation to provide information pursuant to the C.C.L.C. or the C.C.Q.

[259] Let us present in broad strokes the obligation to provide information which the law imposes on the manufacturer, as well as the parameters of extracontractual liability that apply to it in the event of a default. Specific aspects of this regime shall be examined later in detail.

[260] The following is the text of the relevant legislative provisions:

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299 This is a distinction that Professor Jobin had already made in 1975 in the following book: Pierre-Gabriel Jobin, *Les contrats de distribution de biens techniques* (Québec: Les Presses de l'Université Laval, 1975) at 221, para 183.

300 The manufacturer is, of course, obliged to disclose the defects affecting the product it puts on the market, defects which, in principle, it is presumed to know, a presumption which is difficult to rebut and which rebuttal could itself establish the existence of a fault. Regarding this last point, see *Ross v. Dunstall*, [1921] 62 SCR 393, in particular at 400 and 403 (Anglin J.), as well as at 419-420. See also *General Motors Products of Canada v. Kravitz*, [1979] 1 SCR 790 at 797–798.

301 We may think here of a third party who would be harmed by a defective product used in his or her presence by the purchaser.

C.C.L.C.

1053. Every person capable of discerning right from wrong is responsible for the danger caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

1053. Toute personne capable de distinguer le bien du mal, est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabileté.

Civil Code of Quebec

1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.

He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.

1457. Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.

Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.

Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.

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1468. The manufacturer of a movable thing is bound to make reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.

The same rule applies to a person who distributes the thing under his name or as his own and to any supplier of the thing, whether a wholesaler or a retailer and whether or not he imported the thing.

1468. Le fabricant d'un bien meuble, même si ce bien est incorporé à un immeuble ou y est placé pour le service ou l'exploitation de celui-ci, est tenu de réparer le préjudice causé à un tiers par le défaut de sécurité du bien.

Il en est de même pour la personne qui fait la distribution du bien sous son nom ou comme étant son bien et pour tout fournisseur du bien, qu'il soit grossiste ou détaillant, ou qu'il soit ou non l'importateur du bien.

1469.A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in design or manufacture, poor preservation or presentation, or the lack of sufficient indications as to the risks and dangers it involves or as to the means to avoid them.

1469. Il y a défaut de sécurité du bien lorsque, compte tenu de toutes les circonstances, le bien n'offre pas la sécurité à laquelle on est normalement en droit de s'attendre, notamment en raison d'un vice de conception ou de fabrication du bien, d'une mauvaise conservation ou présentation du bien ou, encore, de l'absence d'indications suffisantes quant aux risques et dangers qu'il comporte ou quant aux moyens de s'en prémunir.

1473. The manufacturer, distributor or supplier of a movable thing is not bound to make reparation for injury caused by a safety defect in the thing if he proves that the victim knew or could have known of the defect, or could have foreseen the injury.

Nor is he bound to make reparation if he proves that, according to the state of knowledge at the time that he manufactured, distributed or supplied the thing, the existence of the defect could not have been known, and that he was not neglectful of his duty to provide information when he became aware

1473. Le fabricant, distributeur ou fournisseur d'un bien meuble n'est pas tenu de réparer le préjudice causé par le défaut de sécurité de ce bien s'il prouve que la victime connaissait ou était en mesure de connaître le défaut du bien, ou qu'elle pouvait prévoir le préjudice.

Il n'est pas tenu, non plus, de réparer le préjudice s'il prouve que le défaut ne pouvait être connu, compte tenu de l'état des connaissances, au moment où il a fabriqué, distribué ou fourni le bien et qu'il n'a pas été négligent dans son devoir d'information lorsqu'il a eu connaissance de l'existence de ce défaut.

of the defect.

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[261] Long before the coming into force of the *C.C.Q*., the courts, on the basis of article 1053 C.C.L.C. and the general obligation not to harm others, had gradually imposed upon the manufacturer the obligation to inform users of the danger of the product it produces and markets, in a manner that allows them not only to be aware of such danger, but to avoid it. The manufacturer's failure to comply with this obligation triggered its extracontractual liability towards the user who suffered harm in relation to such danger.

[262] The issue was so well-established that in 1992, the Supreme Court, in a judgment written by Gonthier J., was able affirm that "[t]he obligation to inform is now well established in Quebec law," the law of manufacturers' liability being "probably the area in which this obligation is most highly developed," as evidenced, he said, by "several decisions of this Court,"[302] including *Ross v. Dunstall*, [303] rendered in 1921.

[263] The situation did not change with the coming into force of the C.C.Q., including articles 1468, 1469 and 1473 C.C.Q., which enshrined the previously acknowledged obligation to provide information while, as we will see, strengthening the liability regime applicable to the manufacturer who breaches it.

[264] Let us see what the situation was, starting with the law prior to 1994.

[265] *Ross v. Dunstall* is certainly one of the milestones in the history of the duty to provide information and manufacturers' liability, which Duff, Anglin and Mignault JJ. already acknowledged in that case.

[266] The first found negligence, and thus fault, within the meaning of article 1053 C.C.L.C., by not notifying the potential purchaser of a latent danger that the manufacturer could not have not detected after a "competent and careful inspection and testing."[304] Referring to an English decision,[305] which confirmed the manufacturer's liability "if he negligently manufactures and puts into circulation a mischievous thing which is or may be trap to people using it," he added that this same statement "is, in my opinion, a principle of responsibility which by force of Art. 1053 C.C. is part of the law of Quebec."[306]

[267] The second, going further, insisted that the manufacturer, bound to know the thing it produces, cannot claim ignorance of the danger, nor attempt to prove this ignorance, as it cannot exonerate itself through its incompetence:[307]

> The failure of the appellant to take any reasonable steps to insure that warning

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302 *Bank of Montreal v. Bail Ltée*, [1992] 2 SCR 554 at 585.
303 *Ross v. Dunstall*, (1921) 62 SCR 393.
304 *Ross v. Dunstall*, (1921) 62 SCR 393 at 395.
305 *George v. Skivington*, [1869] L.R. 5 Ex.1.
306 *Ross v. Dunstall*, (1921) 62 SCR 393 at 396.
307 *Ross v. Dunstall*, (1921) 62 SCR 393 at 399–400 and 403.

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> of the latent danger of the misplaced bolt – whether it did or did not amount to a defect in design – should be given to purchasers in the ordinary course of the sporting rifles which he put on the market in my opinion renders him liable to the plaintiffs in these actions. His omission to do so was a failure to take a precaution which human prudence should have dictated and which it was his duty to have taken and as such constituted a fault which, when injury resulted from it to a person of a class who the manufacturer must have contemplated should become users of the rifle, gave rise to a cause of action against him.
>
> The cases fall within the purview of Art. 1053 C.C. Taking no steps to warn purchasers of the rifle of its peculiar hidden danger was "neglect" and "imprudence" on the part of the defendant (whether his knowledge of it was actual or should be presumed) which caused injury to the plaintiff in each instance. If his failure to make an effort to give such warning was due to ignorance of the danger, such ignorance may well be deemed "want of skill" *(imperitia)* under the circumstances.
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> …
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> The duty of a manufacturer of articles (such as rifles), which are highly dangerous unless designed and made with great skill and care, to possess and exercise skill and to take care exists towards all persons to whom an original vendee from him, reasonably relying on such skill having been exercised and due care having been taken, may innocently deliver the thing as fit and proper to be dealt with in the way in which the manufacturer intended it should be dealt with. The manufacturer of such articles is a person rightly assumed to possess and to have exercised superior knowledge and skill in regard to them on which purchasers from retail dealers in the ordinary course of trade may be expected to rely. From his position he ought to know of any hidden sources of danger connected with their use. The law cannot be so impotent as to allow such a manufacturer to escape liability for injuries—possibly fatal—to a person of a class who he contemplated would use his product in the way in which it was used caused by a latent source of danger which reasonable care on his part should have discovered and to give warning of which no steps have been taken.
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> [Emphasis added.]

[268] We know that Anglin J. was hesitant regarding the characterization of the issue: does the danger posed by the rifle originate from a design defect (which would be covered by the warranty against latent defects provided for at the time by articles 1522 *et seq*. C.C.L.C.) or a latent safety defect, independent of any defect (it would be a latent danger, characteristic of the weapon)?[308] That, however, did not prevent him from concluding that, regardless of this characterization, the manufacturer is under an obligation to provide information in both cases and to remedy the harm caused by this "latent source of danger."

[269] Mignault J. did not say otherwise:[309]

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[308] See *supra* note 236.

[309] *Ross v. Dunstall*, (1921) 62 SCR 393 at 420–421.

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> After due consideration, I have come to the conclusion that the possibility of the rifle being fired in an unlocked position, when to the ordinary and even cautious user the bolt action would appear to be locked, is a latent defect of the Ross rifle entailing the civil liability of the appellant as its manufacturer for the damages incurred by the respondents. I have been careful to say that I do not consider the design of the rifle defective, as a design, for a properly constructed locking device was provided, but there was a hidden and undisclosed danger and this certainly was a defect in the rifle and a latent one, as an inspection of the rifle locked or unlocked shows. That such a defect might have been detected by an expert is no reason to hold the defect to be other than latent, or to free the appellant from liability, for it suffices that a reasonably prudent user could be deceived by the appearance of the rifle into thinking that it was properly locked and ready to fire. <u>And to put on the market without proper instructions or warning such a rifle—whether the liability be contractual or delictual—is a fault for the consequences of which the appellant must be held liable</u>.
>
> [Emphasis added.]

[270] Admittedly, he wrote, “I have no intention to hold that every manufacturer or vendor of machinery must instruct the purchaser as to its use,” but he immediately specified that “where as here there is a hidden danger not existing in similar articles and no warning is given as to the manner to safely use a machine, it would appear contrary to the established principles of civil responsibility to refuse any recourse to the purchaser,” each case being otherwise unique.[310]

[271] The case law that followed until 1994, when the C.C.Q. entered into force, solidified the manufacturer’s duty to provide information and the liability for its breach.[311] For example, in 1965, Chief Justice Dorion recalled that:[312]

> [TRANSLATION]
>
> One must examine whether the machine was dangerous in itself and, in this case, whether the manufacturer, namely the defendant, gave the necessary instructions for its handling. Indeed, the manufacturer is liable for the damage caused by the use of a non-defective item, when the dangers of use, unknown by the purchaser, are such that the seller had to give special instructions.

[272] Without it being necessary to review each of these decisions, their teachings may be summarized as follows:[313]

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310 *Ross v. Dunstall*, (1921) 62 SCR 393 at 421.

311 The obligation to inform and ensuing liability may not yet have been very well conceptualized (see Jobin, *supra* note 299 at 216 *et seq*., paras. 181 *et seq*.), but they were nevertheless acknowledged and implemented, although, until the 1970s and even the 1980s, the case law was not particularly abundant (like the commentary, which is also scant).

312 *Gauvin v. Canada Foundries and Forgings Ltd.*, [1964] C.S. 160 at 162. In that case, the plaintiff (a sub-purchaser) purchased a mower from a hardware store and cut his foot using it for the first time. He sued the manufacturer who did not warn him of the dangers of the machine.

313 Regarding the duty to provide information or the obligation to inform incumbent on the manufacturer under the *Civil Code of Lower Canada*, see in particular: Jobin, *supra* note 299 at 216 *et seq.,* paras.

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- the manufacturer is presumed to know not only the defects, but also the dangers of the product (in other words, the dangers arising from the very nature of the product or its use) that it manufactures, a quasi-irrebuttable factual presumption that it cannot normally avoid by establishing that it was not aware of the dangers in question;[314]

- it must inform the users and potential users, in other words, provide them in this regard with truthful (which goes without saying), understandable and sufficient information to understand the existence of the danger and how to avoid or remedy it, and make sure the information reaches them;[315]

- if it fails to do so, it commits a fault pursuant to article 1053 C.C.L.C. and is liable for the harm caused to the user by the materialization of the danger (at least when it is a danger inherent in the normal or foreseeable use of the product[316]), without, in principle, being able to claim its own ignorance as a defence;

- as for the rest, the specific obligational content, or the intensity of this duty to provide information or to inform, varies according to the circumstances, in other words, the nature of the product, the use that can be made of it, the identity of the clientele for whom it is intended, the more or less apparent magnitude and character of the danger, the seriousness of the harm likely to result from its materialization, etc.

[273] However, the manufacturer is not left without grounds of defence. Obviously, it is entitled to the general means available to defendants sued under extracontractual liability: it can thus attempt to establish that, notwithstanding its own failure, the harm of the plaintiff results from

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181 *et seq*.; Pierre-Gabriel Jobin, *La vente dans le Code civil du Québec* (Cowansville, Qc.: Yvon Blais, 1993) at 112 and 114–115, paras. 144 and 146; Thérèse Leroux & Michelle Giroux, "La protection du public et les médicaments: les obligations du fabricant", (1993) 24 R.G.D. 309 at 324 *et seq*.; Lise Côté, "La responsabilité du fabricant vendeur non-immédiat en droit Québecois", (1975) 35 R. du B. 3 at 16 *et seq*. See also: Jean-Louis Baudouin, *La responsabilité civile*, 4th ed. (Cowansville, Qc.: Yvon Blais, 1994) at 581 *et seq*., paras. 1114 *et seq*., and especially at 591–592, para. 1127, which includes a summary; Claude Masse, "La responsabilité civile" in Barreau du Québec et Chambre des notaires du Québec, *La réforme du code civil*, vol. 2 (Obligations, contrats nommés) (Ste-Foy, Qc.: Les Presses de l'Université Laval, 1993) at 235 *et seq.*, para 73, and 297 [*La responsabilité civile*].

314 It should be noted that the courts have not always applied this factual presumption, despite *Ross v. Dunstall*. Professor Claude Masse even expressed the opinion that this refusal of the presumption was one of the weaknesses of the regime based on article 1053 C.C.L.C., at least in the case of a dangerous defect, which is not at issue in this case where the fault alleged is one of information (Masse, *La responsabilité civile*, *supra* note 313 at 292, para. 70). See, however, what he writes regarding the failure to [TRANSLATION] “inform purchasers and users of the latent dangers that may arise from the normal use of its product” (at 298, para. 73). Moreover, it is clear that the manufacturer who, *in fact*, knows the danger of its product and remains silent, commits a fault triggering its civil liability if damage is caused by the materialization of that danger (unless it can exonerate itself by establishing that the victim also knew of the danger).

315 This is a subject dealt with in *Royal Industries Inc. v. Jones*, [1979] C.A. 561, in which the Court noted that potential users are usually reached through written explanations accompanying the product.

316 In this case, the danger associated with the consumption of cigarettes is of this kind.

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superior force or from the causal fault of the victim of the harm (who failed in his or her duty of prudence or used the product for unforeseeable purposes) or another *novus actus interveniens*. It can also counter the plaintiff's evidence by attempting to establish the absence of fault[317] (i.e., demonstrating that sufficient information, warnings and instructions were provided[318]), the absence of harm, or the absence of a causal link between the fault and the harm.[319]

[274] On another issue, although in principle the manufacturer cannot claim its ignorance of the danger of the product it has marketed,[320] can it be excused for its failure to inform by demonstrating that the state of scientific or technical knowledge did not allow it to know the danger, hence the reason why it did not warn potential users? The answer to this question, with respect to the pre-1994 law, is not entirely clear: *Ross v*. *Dunstall* does not address this issue (although it may suggest a negative response) and Quebec case law on the topic stands out for its paucity. Admittedly, with regard to latent defects, case law has, over time, been able to answer this question in the affirmative,[321] although there remains a debate which the Supreme Court pointed out in *ABB Inc. v*. *Domtar Inc.*[322] In any event, it is not necessary to rule on the state of the law in this regard, as, in this case, the appellants are not pleading this defence as the evidence reveals that they were well aware, for a long time, of the dangers associated with the use of cigarettes and the importance of the associated risk.

[275] Finally, the manufacturer may also attempt to demonstrate that the danger and the risk of its materialization were known to the user or entirely foreseeable and, as implied, accepted by it, which is an obstacle to what would otherwise be its liability, or free it from liability. Not to mention the situation where the manufacturer has provided all necessary information to the user, thus informed of the danger (or who had at his or her disposal all the means to be so informed). This knowledge can also result from the fact that the user is a professional aware of the characteristics of the product and of the danger it poses (or should have been).[323] It may also be because the danger in the product is apparent, can be visually assessed and obviously requires

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317 The burden of establishing fault lies, of course, with the plaintiff, but the manufacturer may wish to rebut the evidence provided by the plaintiff.

318 This was the case in *Gauvin v. Canada Foundries and Forgings Ltd.*, [1964] C.S. 160. It is understood that, normally, the user who has failed to take cognizance of this information or who has not taken it into account shall be considered as the author of his own misfortune, in whole or in part.

319 The issue of causation and the burden of the relevant proof shall be discussed below in more detail.

320 This is quite clear from *Ross v*. *Dunstall*, [1921] 62 SCR 393, but also *Samson & Filion v*. *The Davie Shipbuilding & Repairing Co.*, [1925] SCR 202 at 209 *in fine et seq*. (majority reasons of Anglin J.), although that case concerns a latent defect.

321 See for example *London & Lancashire Guarantee & Accident Co. of Canada v*. *La Compagnie F.X. Drolet*, [1944] SCR 82 (although it does not concern a manufacturer in the strict sense of the term, but an elevator installer; the Supreme Court found that, given the nature of the knowledge available at the time when the elevator was installed and the industry standards at that time, the negligence of the manufacturer was not established); *Samson & Filion v. The Davie Shipbuilding & Repairing Co.*, [1925] SCR 202; *Manac Inc./Nortex v. The Boiler Inspection and Insurance Company of Canada*, 2006 QCCA 1395.

322 *ABB Inc. v. Domtar Inc.*, 2007 SCC 50 at para. 72.

323 See e.g., *Inmont Canada Ltd. v. National Insurance Company of Canada*, J.E. 84-884 (C.A.). In that case, the Court exonerated the manufacturer who did not affix a warning on containers of a highly inflammable product subject to spontaneous combustion, characteristics which in the Court's view, should have been known to the purchaser, itself a manufacturer of furniture and a professional and regular user of the product in question.

taking precautions,[324] or because it is a characteristic of common knowledge, which cannot be ignored by an ordinary, reasonable person[325] (including common sense),[326] etc. In these cases, the user's knowledge (actual or presumed) is an obstacle to the manufacturer's liability.

[276] The general rules relating to the duty to provide information incumbent on the manufacturer and the liability it incurs in the event of a default thus being established, it is appropriate to pay a little more attention to the intensity of the duty to inform imposed by the case law. Under what conditions is the manufacturer relieved of this obligation? What is sufficient information?[327]

[277] In order to answer these questions, let us first consider *Mulco inc.* c. *La Garantie, compagnie d'assurance de l'Amérique du Nord*. The facts are the following: the insured purchased a flammable glue which, after coming into contact with the pilot light of the furnace, caused his house to burn down. The label affixed to the glue container clearly indicated the flammable nature of the product but, as Beauregard J. stated in dissent, [TRANSLATION] "did not warn the consumer of the risk of using the glue in a place where there was a pilot light of a heater of some sort."[328] Drawing on the similarity between common law and civil law in this matter, Gendreau J.A., writing for the majority, stated:[329]

> [TRANSLATION]
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> Surprisingly, this file is, for all intents and purposes, identical to *Lambert v. Lastoplex Chemicals Company Limited*, [1972] SCR 569.

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[324] See e.g., *Gauvin v*. *Canada Foundries and Forgings Ltd*., [1964] C.S. 160. The judge, after finding that the instruction booklet formally warned the user of the risk of putting a foot or a hand under the mower, noted:

> [TRANSLATION] Moreover, one may wonder if it was necessary to draw the attention of the purchaser of the machine, as, ultimately, every owner knows or should know that the grass is cut by means of a rotating blade, which turns at a speed of several hundred revolutions per second, and which is certainly dangerous while it is in motion.
>
> The purpose proposed by the plaintiff in purchasing this machine was precisely to obtain a tool equipped with a blade rotating at a considerable speed and used to cut the grass. It is obviously unnecessary to have scientific knowledge to realize that when using such a machine, one should be careful not to place fingers or feet where the blade turns. (at 164)

The judge also found that [TRANSLATION] "the only dangers that this machine could present were those inherent in any tool used in the ordinary course of life, such as scissors, knives, etc." (at 165).

[325] See e.g., *Fortin v*. *Simpsons-Sears*, [1978] C.S. 1154 (the judge found that the user should have guarded himself against the obvious danger inherent in the elasticity of a strap having a metal hook at the tip: [TRANSLATION] "Everyone knows that by stretching an elastic object, there is a danger, when released, that a rapid return movement may cause pain or injury"(at 1156), hence the obvious need to take precautions).

[326] In some cases, moreover, the case law does not really differentiate the apparent from the commonly known.

[327] Beyond the essence of the information provided, there is also the issue of the clarity of the information given by the manufacturer, according to the target audience – clarity on a material level (the information must be able to be decrypted) and on an intellectual level (the information must be understandable). Incomprehensible information is not information. This is not, however, one of the issues in this dispute, and it is not necessary to delve further into the subject.

[328] *Mulco inc*. *c. Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68 (C.A.) at 69.

[329] *Mulco inc*. *c. Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68 (C.A.) at 70–71.

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> In both cases, a fire broke out when the highly flammable vapours from a product used in construction came into contact with the pilot lamp placed inside a water heater or a furnace operating on natural gas. The container, in *Lambert*, bore, in four (4) languages, the following warning: "Caution, inflammable – do not use near open flame or while smoking. Ventilate room while using"; here, the cautions are in two (2) languages: "Danger - Extremely inflammable - Harmful vapour. Warning: Use in a ventilated space"; in addition, information on first aid was given in case of ingestion. Mr. Lambert was a mechanical engineer and Mr. Laniel, the insured of La Garantie, was an experienced handyman. The Supreme Court unanimously found that the manufacturer was at fault when it neglected, while providing a general warning, to specify "that the likelihood of fire may be increased according to the surroundings in which it may reasonably be expected that the product will be used"(at 575), per Laskin J.
>
> The Supreme Court had therefore, nine years prior to Mr. Laniel's accident, established a rule of conduct that should be known by all manufacturers of dangerous products offered to the public.(1) In this case, the appellant is one of these manufacturers, and it is clear that it did not comply with the lessons of the courts. Its conduct therefore constitutes a fault in my opinion.
>
> With respect for the contrary opinion, I believe this fault gives rise to liability. Indeed, the trial judge found that the fire was caused by the use of glue made by the appellant while the pilot lights were still active. However, this use by the Respondent's insured of Mulco's product was not in itself at fault. No information warned him that he had to proceed other than he did. Furthermore, he did not know that his way of doing things could be dangerous.
>
> (1) [TRANSLATION] "The impugned conduct must have been contrary to either the standard imposed by the legislator or to that recognized by the case law. It is thus the departure from the conduct judged acceptable by law or case law that carries with it the obligation to remedy the harm caused," J.L. Baudouin, *La responsabilité civile délictuelle*, Montreal, Yvon Blais, 1985, at 54, no. 87.

[278] *Lambert v. Lastoplex Chemicals*[330] is indeed particularly interesting. Despite being a common law case, what the Supreme Court wrote in the words of Laskin J. (who was not yet Chief Justice) echoes the extracontractual rules found in civil law and resonated in some judgments of the Quebec courts, in addition to *Mulco*.[331] Some excerpts follow:[332]

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330 *Lambert v. Lastoplex Chemicals*, [1972] SCR 569. Reference to common law here responds to a concern for comparison, in the mind of Gendreau J., not standardization. See Professor Gardner's warning in: Daniel Gardner, *L'harmonisation des solutions en droit privé canadien : un regard sur quelques arrêts de la Cour suprême*, Conférences Roger-Comtois (Montreal: Thémis, 2017).

331 See e.g., *Fortin v. Simpsons-Sears Ltée*, J.E. 78-998, [1978] C.S. 1154; *Didier v. G.S.W. Ltée* (1981), J.E. 81-781 (Sup. Ct.); *Plamondon v. J.E. Livernois Ltée*, [1982] C.S. 594 (aff's on somewhat different grounds, *J.E. Livernois Ltée v. Plamondon*, J.E. 85-619, AZ-85011206 (C.A.); *Compagnie d'assurances Wellington v. Canadian Adhesives Ltd.*, [1997] R.R.A. 635 (C.Q.).

332 *Lambert v. Lastoplex Chemicals*, [1972] SCR 569 at 574–575. See also, in the same vein, *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] SCR 1189, in which the Supreme Court, per Ritchie J., acknowledged the "liability for breach of the duty to warn" of the manufacturer who markets a machine

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> The appellants founded their action against the respondent on negligence, including in the specifications thereof failure to give adequate warning of the volatility of the product, and it was argued throughout on that basis and on the defence, inter alia, that the male appellant was the author of his own misfortune. The hazard of fire was known to the manufacturer, and there is hence no need here to consider whether any other basis of liability would be justified if the manufacturer was unaware or could not reasonably be expected to know (if that be conceivable) of particular dangers which its product in fact had for the public at large or for a particular class of users.
>
> Manufacturers owe a duty to consumers of their products to see that there are no defects in manufacture which are likely to give rise to injury in the ordinary course of use. Their duty does not, however, end if the product, although suitable for the purpose for which it is manufactured and marketed, is at the same time dangerous to use; and if they are aware of its dangerous character they cannot, without more, pass the risk of injury to the consumer.
>
> The applicable principle of law according to which the positions of the parties in this case should be assessed may be stated as follows. Where manufactured products are put on the market for ultimate purchase and use by the general public and carry danger (in this case, by reason of high inflammability), although put to the use for which they are intended, the manufacturer, knowing of their hazardous nature, has a duty to specify the attendant dangers, which it must be taken to appreciate in a detail not known to the ordinary consumer or user. A general warning, as for example, that the product is inflammable, will not suffice where the likelihood of fire may be increased according to the surroundings in which it may reasonably be expected that the product will be used. The required explicitness of the warning will, of course, vary with the danger likely to be encountered in the ordinary use of the product.
>
> [Emphasis added.]

[279] This Court's decision in *Mulco*, quoted above, applies the same principles, which are part of Quebec law. The same is true of *O.B. Canada Inc. v. Lapointe*,[333] a case concerning a safety defect affecting an aerial bucket truck, the arm of which came into contact with a wire and caused the user to be electrocuted. In a context where the amount of information provided by the manufacturer was not however insignificant, Monet J., writing for the Court, noted that:[334]

> [TRANSLATION]
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> Regarding the obligation to provide information, including the conditions of use of the thing, an obligation imposed on the manufacturer, the notes of Geneviève

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that is, to its knowledge, dangerous and of a nature to cause damage, even when used for the purposes for which it was designed and intended (the analogy with cigarettes is striking). It should be noted that the reasons of the majority delivered by Ritchie J. are founded in part on *Ross v. Dunstall*. It should also be noted that the minority, per Laskin J., were of the same opinion on this point, differing solely in their opinion on the issue of compensation for economic loss.

333 *O.B. v. Lapointe*, [1987] R.J.Q. 101.

334 *O.B. v. Lapointe*, [1987] R.J.Q. 101 at 106–107.

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> Viney [reference omitted] and Philippe Malinvaud [reference omitted] are of particular interest.
>
> Not only was that duty to inform not met but, in addition, the information provided by the manufacturer was itself misleading and likely to [TRANSLATION] "lull" "sedate" the user into a false sense of security.
>
> ...
>
> It is important to emphasize the purpose of the machine itself: work "near or in contact with live electrical equipment." It goes without saying that the manufacturer is fully aware of the obvious danger to which the user is exposed and in respect of which the latter has no control. This is why the manufacturer must not only indicate, in black on white, the danger, but also of how to avoid such danger. During the demonstration made by its representative to the employees of *B.G. Checo,* which was attended by the respondent, however, it was not even mentioned. (See testimony of a companion of the Respondent, Mr. Lafontaine: A.F. 920.) Moreover, drawings and instructions are silent on this point; there seems to be more interest in spare parts than in the user. These are factual findings of the judge (*supra* at 6 and 7).
>
> For the user, considered from the viewpoint of the traditional "*bon père de famille*," the danger posed by the arm was not obvious. Indeed, the morning of the accident, the respondent used it without any problem. (See Lafontaine's testimony: A.F. 816–819.) It goes without saying that if the situation, in the respondent's opinion, could reasonably have lead him to suspect a danger, he would not have then, no more than before (A.F. 893–894), acted recklessly or even carelessly. What the respondent knew, because the appellant's product clearly showed him, was that the yellow colour meant safety. This was not the case however. The appellant had to know this, but the "*bon père de famille*" was not, under the circumstances, required to know.
>
> [Emphasis added.]

[280] *Royal Industries Inc. v. Jones*[335] is also worth citing:

> [TRANSLATION]
>
> The liability of the manufacturer here lies more in a lack of information than in a defect in design or in manufacture of its device. The manufacturer who puts on the market a product presenting some danger has the obligation to inform its purchaser, as well as the potential user who may acquire it [reference omitted]. This obligation is usually fulfilled by handing over written explanations with the product on how to avoid danger when using it. These written explanations are normally transmitted to the various sub-purchasers so that the user can benefit from them.

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[335] *Royal Industries Inc.* v. *Jones*, [1979] C.A. 561 at 563–564.

> The extent of the manufacturer's obligation varies according to various factors. It is not required to warn against danger that is manifest to all. On the other hand, the complexity of the product, its novelty and the gravity of the dangers it poses intensify the obligation of the manufacturer [reference omitted].
>
> The appellants point out that their device is not intended for laypersons but for car maintenance professionals. As an experienced car mechanic, the respondent should have realized, according to them, the risk involved in using it. Just as the obligation of the specialized seller is more onerous than that of the ordinary seller (article 1527 C.C.Q.), the obligation to inform decreases according to the knowledge of the product and its dangers that the purchaser or the user may have. Despite his experience as a mechanic, however, the respondent is neither an engineer, nor a physicist, nor a machine designer. He purchased a new type of device that presented advantages over previous devices with respect to the speed of execution. It was natural for him to rely on the written instructions he was provided; ...

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[281] On this point, Quebec law at the time was generally aligned with that of the other provinces. Thus, in *Hollis v. Dow Corning Corp.*, LaForest J., writing for the majority of the Supreme Court, stated:[336]

> 22 The nature and scope of the manufacturer's duty to warn varies with the level of danger entailed by the ordinary use of the product. Where significant dangers are entailed by the ordinary use of the product, it will rarely be sufficient for manufacturers to give general warnings concerning those dangers; the warnings must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product. This was made clear by Laskin J. in *Lambert*, *supra*, where this Court imposed liability on the manufacturer of a fast-drying lacquer sealer who failed to warn of the danger of using the highly explosive product in the vicinity of a furnace pilot light. The manufacturer in *Lambert* had placed three different labels on its containers warning of the danger of inflammability. The plaintiff, an engineer, had read the warnings before he began to lacquer his basement floor and, in accordance with the warnings, had turned down the thermostat to prevent the furnace from turning on. However, he did not turn off the pilot light, which caused the resulting fire and explosion. Laskin J. found the manufacturer liable for failing to provide an adequate warning, deciding that none of the three warnings was sufficient in that none of them warned specifically against leaving pilot lights on near the working area. At pages 574-75, he stated:
>
> ...
>
> 23 In the case of medical products such as the breast implants at issue in this appeal, the standard of care to be met by manufacturers in ensuring that consumers are properly warned is necessarily high. Medical products are often designed for bodily ingestion or implantation, and the risks created by their improper use are obviously substantial. The courts in this country have long recognized that manufacturers of products that are ingested, consumed or otherwise placed in the body, and thereby have a great capacity to cause injury to consumers, are subject to a correspondingly high standard of care under the law of negligence; see *Shandloff v. City Dairy*, [1936] 4 D.L.R. 712 (Ont. C.A.), at p. 719; *Arendale v. Canada Bread Co.*, [1941] 2 D.L.R. 41 (Ont. C.A.), at pp. 41-42; *Zeppa v. Coca-Cola Ltd.*, [1955] 5 D.L.R. 187 (Ont. C.A.), at pp. 191-93; *Rae and Rae v. T. Eaton Co. (Maritimes) Ltd.* (1961), 28 D.L.R. (2d) 522 (N.S.S.C.), at p. 535; *Heimler v. Calvert Caterers Ltd.* (1975), 8 O.R. (2d) 1 (C.A.), at p. 2. Given the intimate relationship between medical products and the consumer's body, and the resulting risk created to the consumer, there will almost always be a heavy onus on manufacturers of medical products to provide clear, complete and current information concerning the dangers inherent in the ordinary use of their product.

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[336] *Hollis* v. *Dow Corning Corp.*, [1995] 4 SCR 634.

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…

> 26 In light of the enormous informational advantage enjoyed by medical manufacturers over consumers, it is reasonable and just to require manufacturers, under the law of tort, to make clear, complete and current informational disclosure to consumers concerning the risks inherent in the ordinary use of their products. A high standard for disclosure protects public health by promoting the right to bodily integrity, increasing consumer choice and facilitating a more meaningful doctor-patient relationship. At the same time, it cannot be said that requiring manufacturers to be forthright about the risks inherent in the use of their product imposes an onerous burden on the manufacturers. As Robins J.A. explained in *Buchan*, *supra*, at p. 381, "drug manufacturers are in a position to escape all liability by the simple expedient of providing a clear and forthright warning of the dangers inherent in the use of their products of which they know or ought to know".
>
> [Emphasis added.]

[282] It can be seen from these decisions that the intensity of obligation imposed on the manufacturer to provide information is directly proportional to the level of the danger and the potential harm associated with the use of the product[337] and must be adjusted to the nature of the clientele. The mass market product intended for the public or for lay users usually requires more in this respect[338] than the niche product intended for experts or professionals,[339] although in the latter case, as exemplified by *Lapointe*[340] and *Jones*,[341] they are also entitled to information of a scope and precision proportional to the danger they incur by using the product. Moreover, the product intended to be ingested or implanted or introduced into the body requires a particularly high level of information, especially when the harm likely to result from its use is serious or the probability of its materialization is not insignificant.

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337 Along these lines, see also *J.E. Livernois Ltée v. Plamondon*, J.E. 85-619, AZ-85011206 at 4 (C.A.) (in particular: [TRANSLATION] "[t]he danger of the product, in the context of its use, imposed a particularly heavy obligation [of information] on Livernois here"). See generally Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 2, *supra* note 241 at 370, para. 2-342, para 2-354; Jobin & Cumyn, *supra* note 203 at 332, para. 227.

338 See *Livernois Ltée v. Plamondon*, J.E. 85-619, AZ-85011206 (C.A.) at 4. See generally Jobin & Cumyn, *supra* note 203 at 330 *in fine* and 331, para 228.

339 This is a distinction that underlies this Court's decision in *Trudel v. Clairol Inc. of Canada*, [1972] C.A. 53, and that of the Supreme Court in *Trudel v. Clairol Inc. of Canada*, [1975] 2 SCR 236. In that case, the respondent marketed a product distributed on the one hand to the general public and on the other hand to hair care professionals. Containers intended for the public were accompanied by precise information and instructions for use and indicating the problems to which the user is exposed. Information for professionals is less detailed. Concerned about its liability to individuals, the respondent sought to prevent the appellant from selling to the public the containers he purchased as a hair care professional.

340 *O.B. v. Lapointe*, [1987] R.J.Q. 101.

341 *Royal Industries Inc. v. Jones*, [1979] C.A. 561.

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[283] In any event, however, the presence of a danger must be indicated, and general information will not be deemed sufficient. The information provided by the manufacturer must be accurate and complete; the warnings or instructions must be sufficient in order for the user to fully understand the danger and risk associated with the use of the product, as well as its possible consequences and know what to do (or not do) to avoid them or, if necessary, remedy them. *Lambert*, *Mulco*, *O.B. v*. *Lapointe* and *Hollis* eloquently illustrate the fact that even seemingly detailed information may be considered insufficient. Conversely, and this goes without saying, as otherwise the manufacturer's duty would be largely neutralized, the user who has only a general idea of the danger and consequently does not assess it correctly cannot be found to possess knowledge if he or she was not adequately informed.[342]

[284] The reason for this is explained by Gonthier J. in *Bank of Montreal v*. *Bail*, rendered two years before the coming into force of the C.C.Q.:[343]

> The advent of the obligation to inform is related to a certain shift that has been taking place in the civil law. While previously it was acceptable to leave it to the individual to obtain information before acting, the civil law is now more attentive to inequalities in terms of information, and imposes a positive obligation to provide information in cases where one party is in a vulnerable position as regards information, from which damages may result. The obligation to inform and the duty not to give false information may be seen as two sides of the same coin. As I noted in *Laferrière v. Lawson, supra,* both acts and omissions may amount to fault, and the civil law does not make a distinction between them. Like P. Le Tourneau, "De l'allégement de l'obligation de renseignements ou de conseil", D. 1987. Chron., p. 101, however, I would add that the obligation to inform must not be defined so broadly as to obviate the fundamental obligation which rests on everyone to obtain information and to take care in conducting his or her affairs.
>
> [Emphasis added.]

[285] Inequality in terms of information is in fact the recurring theme of the manufacturer's extracontractual liability in the event of a safety defect of a product that is not otherwise affected by any defect in the strict sense of the term. This is a

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342 As was the case, for example, in *Mulco inc.* c. *Garantie (La), Compagnie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68 and *Lambert v. Lastoplex Chemicals*, [1972] SCR 569, and in *J.E. Livernois Ltée v*. *Plamondon*, JE 85-619, AZ-85011206 (C.A.), where knowledge that the user could have had of the dangers of the product, in particular due to the notices appearing thereon, was not considered sufficient to exonerate the manufacturer of its failure to provide all necessary information and its silence regarding one of the safety dangers inherent in the product. In *Plamondon*, however, this general knowledge led to an apportioning of liability (a subject which shall be discussed later). See also, on the inadequacy of information intended for the normal and uninformed user of the danger of a deep fryer, a product offered to the general public, the handling of which required instructions that were not provided by the manufacturer: *Didier v*. *G.S.W. Ltée*. (1981), J.E. 81-781 (Sup. Ct.).

343 *Bank of Montreal v*. *Bail Ltée*, [1992] 2 SCR 554 at 587.

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fundamental theme in *Ross v. Dunstall*, but also in *Lambert*, *Hollis*, *Mulco* and *Lapointe*, to name just a few. It is this inequality that justifies that the manufacturer, except when the exception regarding scientific and technical knowledge applies, usually assumes the risk associated with bringing its manufactured product to market.

[286] The same theme, moreover, underlies articles 1468, 1469 and 1473 C.C.Q., which we will now examine. These provisions are drawn from the *Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products* (the "***European Directive***""), as well as from s. 53 C.P.A. (which will be discussed later). In a more explicit manner, they embody, reinforce and regulate the obligation of safety incumbent on the manufacturer, and the liability it incurs in the event of a safety defect of the product, while increasing user protection by reducing the burden of proof.[344] They therefore impose on the manufacturer a heavy burden of liability, without fault,[345] in the nature of a safety guarantee.[346]

[287] As prescribed by article 1468, the manufacturer is indeed required to remedy the harm caused by the "safety defect in the thing/*défaut de sécurité du bien*." And what is a safety defect? Article 1469 provides a definition based in part on the first paragraph of article 6 of the *European Directive*.[347] As Professor Geneviève Viney explains, although the notion of "defect" or "defectiveness" specific to this Directive, now implemented in French domestic law (article 1245-3, formerly 1386-4 of the French *Code civil*)[348] conveys at first sight [TRANSLATION] "a material imperfection, an

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[344] Regarding latent defects, the regime created by these provisions is similar to that of the regime created in the contractual context by articles 1726 and 1730 C.C.Q.

[345] See *Desjardins Assurances générales inc.* c. *Venmar Ventilation inc.*, 2016 QCCA 1911 at para. 5.

[346] The terms "safety guarantee" or "guarantee against safety defects" are used in the commentary. See e.g., Gagné & Bourassa Forcier, *supra* note 239 at 306.

[347] This provision states:

> *Article 6*
>
> 1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
>
> (a) the presentation of the product;
> (b) the use to which it could reasonably be expected that the product would be put;
> (c) the time when the product was put into circulation.
>
> 2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

[348] Article 1254-3 of the French *Code civil*) provides:

> [TRANSLATION]
> A product is defective within the meaning of this Title when it does not provide the safety that a person is entitled to expect.
> To determine the safety that one is entitled to expect, all the circumstances must be taken into account, including the presentation of the product, the use to which it could reasonably be expected that the product would be put, and the time when the product was put into circulation
> A product should not be considered defective solely because another improved product has been subsequently put into circulation.

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alteration",[349] but is not restricted thereto:[350]

> [TRANSLATION]
>
> Within the meaning of this text, a product in perfect condition may be [TRANSLATION] "defective." To be defective, it is sufficient to show that [TRANSLATION] "it does not present the safety that can legitimately be expected."

[288] This is indeed the essence of the definition put forth in article 1469 C.C.Q.: there is a safety defect when, in the circumstances, the product does not provide the safety that a person is normally entitled to expect. The provision also lists some of the potential origins of such a defect,[351] which may thus be attributable to a defect in design or manufacture, poor preservation or presentation of the thing (the "dangerous defect"), but also "the lack of sufficient indications as to the risks and dangers it involves or as to the means to avoid them / *l'absence d'indications suffisantes quant aux risques et dangers qu'il comporte ou quant aux moyens de s'en prémunir*,"[352] which is the issue in this dispute. However, it is not the origin of the defect that matters,[353] no more than the issue of whether the manufacturer was at fault or not, but rather the defect itself; in other words, the danger and risk it involves for the user, taking into account the expectations that can normally be entertained with regard to the safety of the product.

[289] It has been noted that the legislator establishes the manufacturer's obligation to inform in the negative here: if it does not provide users with sufficient information as to the risks and dangers of the product and as to the means to avoid them, it causes a safety defect, which, if harm is caused, triggers liability under article 1468 C.C.Q. The result is a positive obligation to provide such information, without which the product will not offer the safety to which one is normally entitled to expect in accordance with article 1469 C.C.Q. In this respect, the requirements of the earlier law apply: the manufacturer's obligation to provide information is owed to all potential users of the product; it increases in intensity with the danger and risk inherent in the product and with the seriousness of the possible consequences of the lack of safety; the information provided by the manufacturer must be accurate (i.e., true), exact, understandable and complete and accurately reflect the nature and seriousness of the danger, the risk of its materialization and the significance of the harm that may result.

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349 Viney, *supra* note 261 at 340.

350 Viney, *supra* note 261 at 340.

351 With regard to the non-exhaustive nature of the causes of the safety defect defined by this provision, see, *inter alia*, Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 2, *supra* note 241 at 389, para. 2-377.

352 The wording of this safety defect is similar to that of the second paragraph of s. 53 C.P.A., a provision that allows the consumer to exercise a direct action against the manufacturer of a product in the event of "lack of instructions necessary for the protection of the user against a risk or danger of which he would otherwise be unaware / *défaut d'indications nécessaires à la protection de l'utilisateur contre un risque ou un danger dont il ne pouvait lui-même se rendre compte*."

353 By analogy, see Viney, *supra* note 261 at 340.

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[290] How do we determine whether the product affords the safety that a person is normally entitled to expect? We are not concerned with the victim's particular and personal expectations of safety, but rather that the reasonable expectations of the ordinary user, which refers to an objective individualized standard of evaluation under the "circumstances," which depends on the nature of the product and the danger it involves, the clientele to which it is destined, the use for which it is intended or to which it can lend itself, etc. Indeed, it is these same elements, as has been observed, which determine the intensity of the manufacturer's obligation to inform. This coalescence of concepts is not surprising since, in the case of an inherently dangerous product, which is not affected by any defect, it is information flaws that cause the safety defect: the same measure is therefore used to determine the adequacy of information (in such case, the manufacturer fulfills its obligation) or inadequacy (which causes the safety defect).

[291] When discussing the intended use of the product or the use to which it may lend itself, it should be specified that the expectation of safety is based on the normal use of the product. This is a flexible concept, however, and case law has extended it to the reasonably foreseeable use that can be made of it, even when that use is inappropriate. One example is *Bombardier Inc. v*. *Imbeault*,[354] where the manufacturer was blamed for failing to inform snowmobile users about the dangers of using a certain hook (a trailer hitch) for purposes that were not necessarily the same for which it was intended, but which were otherwise common, and which it could not ignore, thereby creating a safety defect. Of course, and to borrow from McLachlin J. in *Bow Valley Husky (Bermuda) Ltd. v*. *Saint John Shipbuilding Ltd.*, [355] manufacturers "do not have the duty to warn the entire world about every danger that can result from improper use of their product," which is equally true under Quebec law, but they must nevertheless be particularly aware of the potential uses – and dangers – of their products, especially when they are placed in the hands of lay users or the general public and are susceptible to misuse or to unusual, but predictable use.[356]

[292] In short, pursuant to article 1469 C.C.Q., the manufacturer has the duty to inform users of the risks and dangers of the product and the means to avoid them, failing which it will be liable under article 1468 C.C.Q., because the product does not provide the safety to which one is normally entitled to expect.

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[354] *Bombardier inc. v*. *Imbeault*, 2009 QCCA 260 at paras. 25 and 26.

[355] *Bow Valley Husky (Bermuda) Ltd. v*. *Saint John Shipbuilding Ltd.*, [1997] 3 SCR 1210 at para 19.

[356] This principle is also found in case law prior to 1994, although the issue was not frequently discussed.

See *J. E. Livernois Ltee v*. *Plamondon,* J.E. 85-619, AZ-85011206 (C.A.) at 11 (in which the manufacturer's obligation to inform the lay user of the danger of misuse of the product was recognized).

It should be noted that the courts of other Canadian provinces recognize that "[m]anufacturers have a duty to warn of dangers arising from not only normal use of their products, but also reasonable foreseeable misuses" (Lawrence G. Theall et al., *Product Liability*: *Canadian Law and Practice* (Aurora, Ont.: Canada Law Book, 2001, looseleaf, update No. 21, October 2017), L3: 10.20 at L3-7).

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[293] The manufacturer sued by the victim for the harm caused by such a safety defect in the product can defend itself, as was previously the case, by attempting to rebut the evidence of the existence of this defect, by challenging the causal link between this defect and the harm or by invoking *superior force* or the causal fault of the victim or a third party. If the circumstances do not lend themselves to these grounds of defence, however, or if they fail and the safety defect is established, along with causation, the manufacturer is liable, subject, however, to the two means of exoneration available to it under article 1473 C.C.Q.:

> 1. (article 1473, para. (1)) the victim knew or could have known of the defect, or could have foreseen the injury, or
>
> 2, (article 1473, para. (2)) the lack of safety "according to the state of knowledge at the time that he manufactured, distributed or supplied the thing ... could not have been known,"[357] and, this condition being manifestly cumulative, "he was not neglectful of his duty to provide information when he became aware of the defect".

[294] The first ground of defence, taken from earlier law, exonerates the manufacturer of the liability which would otherwise be incurred: if the danger inherent in the product or its use is manifest,[358] or if, for whatever reason, the user knows (actual knowledge) or should have known of it (presumed knowledge), the manufacturer is not required to remedy the harm resulting from the safety defect in the product. Dealing with a means of exoneration intended to free the manufacturer from liability under article 1468 C.C.Q., the first paragraph of article 1473 must be interpreted and applied strictly. Once again, as a corollary to the duty to provide information, we can speak of knowledge when its level allows the user to correctly evaluate the danger, as well as the risk of its materialization, and to assume them.

[295] The first part of the second ground of defence (lack of knowledge) aims to apportion the risks associated with technological innovation.[359] Again, as a means of

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[357] This is what is called the development risk defence, which, it should be noted at the outset, does not apply in the context of an action pursuant to s. 53 C.P.A.

[358] Or, when it is a badly designed or defective product, if the defect is apparent and, likewise, the danger which results from it.

[359] The legislator created this exception in order [TRANSLATION] "to preserve the essential role of research and development of new products for the benefit of society" (Ministère de la Justice, *Commentaires du ministre de la Justice - Le Code civil du Québec,* vol.1, (Québec: Les Publications du Québec, 1993) at 902 (article 1458 C.C.Q*.).* This is an exception which also exists under article 7, para. (c) of the *European Directive*. See also Jobin & Cumyn, *supra* note 203 at 334 *et seq*., paras. 230 to 233; Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 2, *supra* note 241 at 395–396, paras 2-384; Marie-Ève Arbour, "Portrait of Development Risk as a Young Defence" (2014) 59 McGill L. J. 911; Marie-Ève Arbour, "Itinéraires du risque de développement à travers des codes et des constitutions" in Benoît Moore, ed., *Mélanges Jean-Louis Baudouin* (Cowansville, Qc.: Yvon Blais, 2012) at 677 *et seq*.; Nathalie Vézina, "L'exonération fondée sur l'état des connaissances scientifiques et techniques, dite du "risque de développement" : regard sur un élément perturbateur dans le droit québécois de la responsabilité du fait des produits" in Pierre-

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releasing the manufacturer of its liability, strictness is required. The manufacturer cannot simply show that it has taken reasonable precautions in this regard and, as Professors Jobin and Cumyn explain:[360]

> [TRANSLATION]
>
> Indirectly, the manufacturer is therefore obliged to stay up-to-date on the scientific knowledge concerning its product and to verify the quality of the products it puts on the market. A very specific exception is created for the development risk which was impossible for *everyone* to know when the product was put on the market; in other words, if the development risk was unknown to the impugned manufacturer, but known in the scientific or industrial community, there will be liability.
>
> [Emphasis in original.]

[296] It is not, therefore, its own ignorance of science or technology that the manufacturer must establish, but rather the impossibility of detecting or identifying the danger in consideration of the state of the science or technology at the time it was required to know.

[297] The second part of this same ground of defence (continuous information) confirms a rule that adds to the manufacturer's obligation, which the Supreme Court already endorsed in 1995 in *Hollis v. Dow Corning Corp.*,[361] a common law case which, like *Lambert*, corresponds to Quebec law. On behalf of the majority, La Forest, J., stated:[362]

> 20 It is well established in Canadian law that a manufacturer of a product has a duty in tort to warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge. This principle was enunciated by Laskin J. (as he then was), for the Court, in *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569, at p. 574, where he stated:
>
> > Manufacturers owe a duty to consumers of their products to see that there are no defects in manufacture which are likely to give rise to injury in the ordinary course of use. Their duty does not, however, end if the product, although suitable for the purpose for which it is manufactured and marketed, is at the same time dangerous to use;

Claude Lafond, ed., *Mélanges Claude Masse : en quête de justice et d'équité* (Cowansville, Qc.: Yvon Blais, 2003) at 435 *et seq*. [*Mélanges Claude Masse*].

360 Jobin & Cumyn, *supra* note 203 at 325–326, para. 225. See also *Desjardins Assurances générales inc.* c. *Venmar Ventilation inc.*, 2016 QCCA 1911. See also Jobin, *supra* note 313 at 125, para. 157 (the comment deals with dangerous latent defects but applies equally to dangers inherent in products not affected by any defect).

361 *Hollis v. Dow Corning Corp.*, [1995] 4 SCR 634.

362 The dissent of Sopinka J. (McLachlin J., concurring) is not on this point. On the contrary, Sopinka J. wrote that he "agree[s] with Justice La Forest in his analysis of the principles relating to the duty to warn" (at para. 64). Their divergence relates to causation.

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> and if they are aware of its dangerous character they cannot, without more, pass the risk of injury to the consumer.
>
> The duty to warn is a continuing duty, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered; see *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, at p. 1200, per Ritchie J. All warnings must be reasonably communicated, and must clearly describe any specific dangers that arise from the ordinary use of the product; see, for example, *Setrakov Construction Ltd. v. Winder's Storage & Distributors Ltd.* (1981), 11 Sask. R. 286 (C.A.); *Meilleur v. U.N.I.-Crete Canada Ltd.* (1985), 32 C.C.L.T. 126 (Ont. H.C.); *Skelhorn v. Remington Arms Co.* (1989), 69 Alta. L.R. (2d) 298 (C.A.); *McCain Foods Ltd. v. Grand Falls Industries Ltd.* (1991), 116 N.B.R. (2d) 22 (C.A.).
>
> [Emphasis added.]

[298] The manufacturer's obligation to inform is therefore not limited to the dangers that could not have been known at the time of the initial putting onto the market of the product, but extends to those which are revealed to it afterwards and that it must, therefore, disclose to the users. Its obligation in this respect lasts and remains as long as the product is on the market.

[299] Once again, it is the inequality of information, and the nature of implicit relationship of trust between the manufacturer and the users that justifies such an obligation. Let us once again quote La Forest J.'s comments in *Hollis*,[363] which intersect with the legal reality of Quebec, now enshrined in articles 1468, 1469 and 1473 C.C.Q., and even reflect the earlier law:

> 21 The rationale for the manufacturer's duty to warn can be traced to the "neighbour principle", which lies at the heart of the law of negligence, and was set down in its classic form by Lord Atkin in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). When manufacturers place products into the flow of commerce, they create a relationship of reliance with consumers, who have far less knowledge than the manufacturers concerning the dangers inherent in the use of the products, and are therefore put at risk if the product is not safe. The duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product.
>
> [Emphasis added.]

[300] This is also the reason why articles 1468 and 1469 C.C.Q. should be interpreted and applied in a broad and liberal manner, which favours the implementation of the objective of protection put forward by the legislator, reflected in

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[363] *Hollis v. Dow Corning Corp.*, [1995] 4 SCR 634.

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both the provisions themselves and the comments of the Minister,[364] in the work of the Civil Code Revision Office[365] as well as in the parliamentary debates,[366] and which is consistent with the evolution of the law since *Ross v*. *Dunstall*. Conversely, article 1473 C.C.Q. should be interpreted and applied in a rigorous manner, thus avoiding neutralizing articles 1468 and 1469 *C.C.Q.*

[301] In summary, during the Class Period, under both the C.C.L.C. and the C.C.Q., a manufacturer is deemed to be aware of the characteristics of the product it has produced and, where applicable, the dangers inherent in the product itself and in its normal or foreseeable use. It therefore has a duty to inform users and potential users of that danger and instruct them on how to avoid it. The information so provided must not only be accurate (i.e., true) and comprehensible, but also precise and complete, to the extent of the danger created by the product, particularly when it is meant to enter the user's body through ingestion, inhalation, injection, surgery, etc.

[302] Although it can defend itself through the usual grounds of defence, such as superior force, the causal fault of the victim or a third party, lack of causation, etc., a manufacturer that has breached its duty to inform can also escape liability by showing that the user who is the victim of harm caused by the safety defect knew or should have known of the danger and the inherent risk in the product or could foresee the harm that would result from its use or consumption.

[303] Lastly, and subject to a certain controversy in the law prior to 1994, a

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364 *Commentaires du ministre de la Justice, supra,* note 359 at 896 *et seq*.

365 Office de révision du Code civil, Comité du droit des obligations, *Rapport sur les obligations* (Montreal, 1975) at 162–165; Office de révision du Code civil, *Rapport sur Le Code civil du Québec -*
Projet de Code civil, vol. 1 (Québec: Éditeur officiel du Québec, 1977) at 349, online: http://digital.library.mcgill.ca/ccro/files/Rapport_ORCC_v1_Projet_de_code.pdf (page consulted on
January 17, 2019); Office de révision du Code civil, *Rapport sur Le Code civil du Québec - Projet de Code civil,* v. II - Commentaires tome 2, livres 5 à 9 (Québec: Éditeur officiel du Québec, 1977) at 633–634, online: http://digital.library.mcgill.ca/ccro/files/Rapport_ORCC_v2t2_commentaires_livres_5- 9.pdf (page consulted on January 17, 2019).

366 See e.g., Assemblée nationale, Sous-commission des institutions, *Journal des débats*, 34th Leg, 1st sess. (19 September 1991) at 519–520, online: http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/SCI-34-1/journal-debats/SCI-910919.html#Page00519 (page consulted on January 17, 2019); Assemblée nationale, Sous-commission des institutions, *Journal des débats,* 34th Leg., 1st sess. (9 October 1991) at 573, online: http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/SCI-34-1/journal-debats/SCI-911009.html#Page00573 (page consulted on January 17, 2019); Assemblée nationale, Sous-commission des institutions, *Journal des débats,* 34th Leg., 1st sess. (5 December 1991) at 1223, online: http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/SCI-34-1/journal-debats/SCI-911205.html#Page01223 (page consulted on January 17, 2019); Assemblée nationale, Sous-commission des institutions, *Journal des débats,* 34th Leg., 1st sess. (10 December 1991) at 1339, online: http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/SCI-34-1/journal-debats/SCI-911210.html#Page01339 (page consulted on January 17, 2019).

manufacturer can escape liability if it proves that “the state of knowledge / *l’état des connaissances*” when it manufactured and marketed the product was such that it was impossible for it to be aware of the danger, of which danger it informed users and potential users as soon as it became aware of it.

[304] These are the rules which the trial judge summarized as follows:

> [227] Our review of the case law and doctrine applicable in Quebec leads us to the following conclusions as to the scope of a manufacturer's duty to warn in the context of article 1468 and following:
>
> a. The duty to warn “serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product”;
>
> b. A manufacturer knows or is presumed to know the risks and dangers created by its product, as well as any manufacturing defects from which it may suffer;
>
> c. The manufacturer is presumed to know more about the risks of using its products than is the consumer;
>
> d. The consumer relies on the manufacturer for information about safety defects;
>
> e. It is not enough for a manufacturer to respect regulations governing information in the case of a dangerous product;
>
> f. The intensity of the duty to inform varies according to the circumstances, the nature of the product and the level of knowledge of the purchaser and the degree of danger in a product's use; the graver the danger the higher the duty to inform;
>
> g. Manufacturers of products to be ingested or consumed in the human body have a higher duty to inform;
>
> h. Where the ordinary use of a product brings a risk of danger, a general warning is not sufficient; the warning must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product;
>
> i. The manufacturer's knowledge that its product has caused bodily damage in other cases triggers the principle of precaution whereby it should warn of that possibility;
>
> j. The obligation to inform includes the duty not to give false information; in this area, both acts and omissions may amount to fault; and

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> k. The obligation to inform includes the duty to provide instructions as to how to use the product so as to avoid or minimize risk.
>
> [References omitted]

b. Specific issues

[305] A few specific issues must still be addressed, which will take the above reflection further, on certain specific points. Those issues are the following:

> 1. Does the manufacturer's breach of the duty to inform lead to its liability under article 1457 C.C.Q. (or, previously, article 1053 C.C.L.C.), over and above and separate from its liability under article 1468 C.C.Q. (or the previous case law), and, where applicable, can a manufacturer defend itself by proving that the victim of the harm knew or should have known of the danger of the product or the harm related to its use?
>
> 2. At what point is the knowledge the victim may have about the danger of a product or the harm associated with its use sufficient to release the manufacturer from liability?
>
> 3. How should the issue of the apportionment of liability between the manufacturer and the victim be approached?
>
> 4. What is the burden of proof incumbent upon the parties in an action such as the case at bar?

b.1. Articles 1053 C.C.L.C., 1457 C.C.Q., general fault and defence of knowledge

[306] Does the breach of the duty to inform, which could lead to the manufacturer's liability pursuant to articles 1468 and 1469 C.C.Q. or the corresponding regime of the former law, because it also contravenes the general rules of good faith and good conduct, constitute a parallel and separate source of liability within the meaning of articles 1053 C.C.L.C. and 1457 C.C.Q.? Could the defence of knowledge that the manufacturer can set up, in the first case, against a user informed of the danger inherent in the product, be relied on in the second? These issues arise from certain passages of the judgment *a quo*.

[307] In reading the judgment *a quo*, one might have the impression that, according to the trial judge, a breach of the manufacturer's duty to inform, at least when it is intentional and therefore wrongful (which is the case here), can trigger two liability regimes simultaneously, i.e., first, the specific regime of articles 1468, 1469 and 1473 C.C.Q. or the former case law rules and, second, the general regime of articles 1053 C.C.L.C. and 1457 C.C.Q. However, the knowledge defence developed under the C.C.L.C. and codified by the first paragraph of article 1473 C.C.Q. did not allow a manufacturer to escape that parallel general liability (although there could be a sharing

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of liability among the wrongful manufacturer and the user who knew of the danger).[367] The judge stated:

> [139] As explained above, the Court holds that the public knew or should have known of the risks and dangers of becoming tobacco dependent from smoking as of March 1, 1996 and that the Companies' fault with respect to a possible safety defect ceased as of that date in the Létourneau File.
>
> [140] Let us be clear on the effect of the above findings. The cessation of possible fault with respect to the safety defects of cigarettes has no impact on the Companies' possible faults under other provisions, i.e., the general rule of article 1457 of the Civil Code, the Quebec Charter or the Consumer Protection Act. There, a party's knowledge is less relevant, an element we consider in section II.G.1 and .2 of the present judgment.
>
> ...
>
> [218] The Court sees a fault under article 1457 as being separate and apart from that of failing to respect the specific duty of the manufacturer with respect to safety defects, as set out in article 1468 and following. The latter obligation focuses on ensuring that a potential user has sufficient information or warning to be adequately advised of the risks he incurs by using a product, thereby permitting him to make an educated decision as to whether and how he will use it. The relevant articles read as follows:
>
> …
>
> [240] So far in this section, the Court has focused on the manufacturer's obligation to inform under article 1468 and following but, under article 1457, a reasonable person in the Companies' position also has a duty to warn.
>
> [241] In a very technical but nonetheless relevant sense, the limits and bounds of that duty are not identical to those governing the duty of a manufacturer of a dangerous product. This flows from the “knew or could have known” defence created by article 1473.
>
> [242] Under that, a manufacturer's faulty act ceases to be faulty once the consumer knows, even where the manufacturer continues the same behaviour.
> In our view, that is not the case under article 1457. The consumer's

[367] See in particular paras. 828 and 832 of the judgment *a quo*. According to the judge, the knowledge users could have of the danger of smoking as of 1980 (disease) or 1996 (addiction) also cannot release the appellants from the liability incumbent upon them under the *Charter* or the *C.P.A.*

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knowledge would not cause the fault, *per se*, to cease. True, that knowledge could lead to a fault on his part, but that is a different issue, one that we explore further on.

…

[281] The obligation imposed on the manufacturer is not a conditional one. It is not to warn the consumer "provided that it is reasonable to expect that the consumer will believe the warning". That would be nonsensical and impossible to enforce.

[282] If the manufacturer knows of the safety defect, then, in order to avoid liability under that head, it must show that the consumer also knows. On the other hand, under the general rule of article 1457, there is a positive duty to act, as discussed earlier.

...

[483] We have held that the Companies failed under both tests, and this, for much of the Class Period. With respect to the Blais Class, we held that the Companies fault in failing to warn about the safety defects in their products ceased as of January 1, 1980, but that their general fault under article 1457 continued throughout the Class Period. In Létourneau, the fault for safety defects ceased to have effect as of March 1, 1996, while the general fault also continued for the duration of the Class Period.

…

[824] The Companies are correct in contesting this, but only with respect to the fault under article 1468. There, article 1473 creates a full defence where the victim has sufficient knowledge. The case is different for the other faults here.

[825] Pushing full bore in the opposite direction from the Plaintiffs, JTM cites doctrine to argue in favour of a plenary indulgence for the Companies on the basis that "a person who chooses to participate in an activity will be deemed to have accepted the risks that are inherent to it and which are known to him or "are reasonably foreseeable." That article of doctrine, however, does not support this proposition unconditionally.

[826] There, the author's position is more nuanced, as seen in the following extract:

> *Dès qu'une personne est informée de l'existence d'un risque particulier et qu'elle ne prend pas les précautions d'usage pour s'en prémunir, elle devra, en l'absence de toute faute de la personne qui avait le contrôle d'une situation, assumer les conséquences de ses actes. (The Court's emphasis)*

> [827] As we have shown, the Companies fail to meet this test of "absence of all fault" and thus must share in the liability under three headings of fault. This seems only reasonable and just. It is also consistent with the principles set out in article 1478 and with the position supported by Professors Jobin and Cumyn:
>
> …
>
> [References omitted.]

[308] With respect, this way of looking at things (if that is in fact what we are to understand from the judgment) is debatable and, on this point, we have to agree with the appellants.

[309] It is undoubtedly not impossible for one person to commit separate faults, sanctioned by different regimes of liability. The same conduct can also be sanctioned through recourse to various legislative provisions. The same misconduct can thus constitute a fault pursuant to article 1457 C.C.Q., a breach of the *Charter* and a breach of another statute. This is moreover the case of the manufacturer's breach of its duty to inform, which can concomitantly trigger the application of articles 1468 and 1469 C.C.Q., that of section 53 C.P.A. or that of sections 219 and 228 C.P.A. Where several legislative provisions can apply to the same facts, the conditions of liability may vary, as may the means of defence, the burden of proof, etc., not to mention cases where the same misconduct can trigger contractual liability against one person and extracontractual liability against another.

[310] On the other hand, it is difficult to see how the *same* breach of the manufacturer's duty to inform could trigger *both*, at the *same* time and toward the *same* persons the liability prescribed by articles 1468 and 1469 C.C.Q. *and* the general liability of article 1457 C.C.Q. The rules governing the civil liability of a manufacturer, as prescribed by articles 1468, 1469 and 1473 C.C.Q., are the specific incarnation, in the case of the manufacturer, of article 1457 C.C.Q., a variation on the same theme to a certain extent, just as, under the C.C.L.C., the rules governing the liability of a manufacturer were an illustration of article 1053.

[311] In other words, the rules and conditions of the extracontractual liability of a manufacturer are covered by articles 1468, 1469 and 1473 C.C.Q., without the need to turn to article 1457 C.C.Q., of which they are a variation. As a corollary, in seeking a manufacturer's extracontractual liability due to the safety defect of a product, we must turn to articles 1468, 1469 and 1473 C.C.Q. and those articles alone, not article 1457 C.C.Q. The same applies with respect to the former regime stemming from article 1053 C.C.L.C.: the rules developed for the case of the manufacturer are the ones that applied, concurrently, without being a sort of catch-all general category that acted independently.

[312] In short, there are no parallel regimes in this regard. This means that a manufacturer accused of having breached its duty to inform can claim relief under article 1473 C.C.Q. or under the rule previously established in the case law. If it shows that the conditions for its application are met, it is released from the liability it would

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have incurred as a result of its breach, without the opposing party being able to set up separate liability against it based on article 1457 C.C.Q. or 1053 C.C.L.C.

[313] The judgment *a quo*, however, is unclear in this regard. Other passages suggest instead that the judge distinguished two different faults, each triggering a different liability regime:

> - first, the appellants, deliberately and knowingly, failed to adequately inform users and the public about the harmful effects of smoking, which breach would lead to the application of the regime based on articles 1468, 1469 and 1473 C.C.Q. and the related rules established by the former law;
>
> - second, and this would be an additional fault separate from the first, the appellants participated throughout the entire Class Period in a concerted campaign of disinformation, an organized and systematic sham, the consequences of which are governed by articles 1053 C.C.L.C. and 1457 C.C.Q.

[314] If we understand correctly, this distinction would allow the judge to set aside the effects of the knowledge he attributed to users as of the "knowledge dates" that he also set: although the appellants continued thereafter not to adequately inform their customers and potential users of the dangers of smoking, they would no longer be liable due to that breach and the resulting safety defect since the harmful effects of the product would henceforth be widely acknowledged and therefore known to all; on the other hand, they would remain liable for the consequences of their second fault (subject to sharing liability with users who were aware of the danger).

[315] With respect, this way of looking at things is just as debatable as the first. Why exclude disinformation from the scope of the obligation to provide information imposed on a manufacturer to make it a separate fault that would follow different rules and fall under the general obligation of good conduct stemming from articles 1053 C.C.L.C. and 1457 C.C.Q.? And why could the knowledge the user may have about the danger that is the subject of that disinformation not be relied on by the wrongful manufacturer?

[316] We should instead conclude that the second fault that the judge identifies relates to the obligational content of the duty to inform incumbent upon the manufacturer pursuant to articles 1468, 1469 and 1473 C.C.Q. as well as under the previous case law regime, based on article 1053 C.C.L.C. The liability that could result is therefore subject to the same rules, including in terms of the grounds for exoneration, which include the victim's knowledge of the safety defect (and more specifically the danger).

[317] This is apparent, with respect to the law prior to 1994, from *O.B. v. Lapointe*, for example, in which, criticizing the manufacturer for not suitably informing users of the dangers of the device in question, the Court held that [TRANSLATION] "[n]ot only was that duty to inform not met, but, in addition, the information provided by the manufacturer was itself misleading and likely to [TRANSLATION] "lull" the user into a false sense of

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security."[368] The manufacturer may therefore breach its duty because it did not give any information, because the information provided was insufficient, or because it gave misleading information.

[318] This is confirmed in *Bank of Montreal v. Bail*,[369] decided at the time of the C.C.L.C. Gonthier J. (who mentioned in passing articles 1469 and 1473 C.C.Q.) stated that "the obligation to inform and the duty not to give false information may be seen as two sides of the same coin."[370] That statement is undeniable. Did the coming into force of the C.C.Q. change anything? That is very unlikely since article 1469 C.C.Q., which defines the safety defect of a product, is neither restrictive nor exhaustive.[371] For convenience, this provision is reproduced below:

> **1469.** A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in design or manufacture, poor preservation or presentation, or the lack of sufficient indications as to the risks and dangers it involves or as to the means to avoid them.
>
> **1469.** Il y a défaut de sécurité du bien lorsque, compte tenu de toutes les circonstances, le bien n'offre pas la sécurité à laquelle on est normalement en droit de s'attendre, notamment en raison d'un vice de conception ou de fabrication du bien, d'une mauvaise conservation ou présentation du bien ou, encore, de l'absence d'indications suffisantes quant aux risques et dangers qu'il comporte ou quant aux moyens de s'en prémunir.
>
> [Emphasis added.]

[319] The use of the term "particularly," which precedes the list of breaches that could lead to a safety defect, is crucial. The legislator is simply giving examples of what could lead to a safety defect, including the lack of sufficient indications as to the dangers involved or the means to avoid them. There may therefore be other circumstances in which a manufacturer would breach its duty to inform, resulting in a safety defect. Distributing false information about the true nature of a dangerous product certainly leads to such a defect within the meaning of article 1469 *C.C.Q*. Similarly, misleading the public about the dangers of a toxic product by actively attempting to convince it of its safety or by convincing it to ignore information and warnings to the contrary is a breach of the manufacturer's duty to inform and causes a safety defect. In other words, the safety defect, which can result from the manufacturer's failure to provide "sufficient

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368 *O.B. v. Lapointe*, [1987] R.J.Q. 101 at 106 (passage reproduced at para. [279], *supra*).

369 *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554.

370 *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554 at 587. In 1993, authors Leroux and Giroux, speaking about over-the-counter drugs and pointing out the duty to inform users of their dangers, observed that [TRANSLATION] "the manufacturer must ensure that it does not skew the information provided to consumers through its advertising" and encouraged readers to reflect on that (Leroux and M. Giroux, *supra*, note 313, p. 330). There is no doubt that a manufacturer who [TRANSLATION] "skews the information" it is required to give breaches its duty to inform.

371 See *supra* note 351.

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indications as to the risks and dangers" of the product and as to "the means to avoid them," can also result from the disinformation it is circulating. In both cases, there is deception and a breach of the obligation to provide information.

[320] All this was just as true under article 1053 C.C.Q., although the case law does not provide any examples.

[321] In short, to paraphrase Gonthier J. in *Bail*, not informing and, concurrently, misinforming are two sides of the same misconduct.[372] They cannot be disassociated, and they are both part of a manufacturer's breach of the duty to inform users about the risks and dangers of its product and the means to avoid them.

[322] In terms of principles, there is therefore no reason to move the disinformation strategies used by the appellants during the Class Period outside the scope of article 1469 C.C.Q., and consequently, articles 1468 and 1473,. There is also no reason to extract this type of conduct from the regime applicable to the manufacturer's duty to inform, as developed by the courts, prior to 1994, based on article 1053 C.C.L.C.

[323] Accordingly, a manufacturer who circulates disinformation, like the one who provides inadequate or incomplete information, can escape liability by proving that the user knew (or was deemed to know), at that time, the dangers and risks of the product, a defence recognized under the former regime and entrenched by article 1473 C.C.Q. Contrary to what the trial judge seems to have decided, we can therefore set up against the respondents and the class members the knowledge they allegedly had of the defect of the product, namely the toxic and addictive effects of smoking, or the foreseeability of the harm resulting from it, without distinction according to the faults alleged against the appellants.

[324] Clearly, a manufacturer who has misinformed users would in fact be unable to establish the knowledge referred to in article 1473 C.C.Q. since the purpose and effect of this type of conduct is to alter the knowledge the target individuals had or might otherwise have had of the danger or harm in question. Here, the extracontractual and contractual converge. In terms of the warranty of quality, for example, disinformation can conceal a defect which would otherwise have been apparent (and therefore presumably known) and justify the purchaser who is tricked by not having noticed it.[373] The vendor or manufacturer who provided such misleading information could not then merely establish the knowledge the purchaser *should have had* of the defect, but would have to prove the knowledge he or she actually and in fact had (which knowledge could also have been affected by the vendor or manufacturer's lies). A manufacturer has a similar burden under article 1473 C.C.Q. (or the case law rule in force previously).

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372 *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554 at 587.

373 See *Placement Jacpar Inc. v. Benzakour*, [1989] R.J.Q. 2309 (C.A.) at 2318, reiterated in particular in *Verville v. 9146-7308 Québec inc.*, [2008] R.J.Q. 2025 (C.A.) at para. 44. See also Jobin & Cumyn, *supra* note 203 at 227–228, para. 173. See also Thérèse Rousseau-Houle, *Précis du droit sur la vente et du louage*, 2nd ed. (Sainte-Foy, Qc.: Les Presses de l'Université Laval, 1986) at 133–134.

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[325] At any rate, if we were to see, as the judge did, in the disinformation practised by the appellants a separate and, to a certain extent, independent fault subject to a different legal regime based on article 1457 C.C.Q. (or article 1053 C.C.L.C.), it would not change anything about the case. We do not see how or why considering that fault in such a way should shelter the plaintiff from the knowledge defence asserted by the manufacturer, it being understood, as just mentioned, that such disinformation could prevent it from establishing that danger or harm was apparent or known and even affect the subjective knowledge of the plaintiff.

b.2. Knowledge defence: the extent of the victim's knowledge

[326] But it must be determined what one means by the *knowledge* the victim of the harm may have of the danger relating to the product, a subject which deserves to be explored further.

[327] We have seen that, both under the current law and the law prior to 1994, a manufacturer has a duty to provide users or potential users of the product it sells with true, precise, comprehensible and complete information. We have also seen that the practical scope of that obligation is directly proportional to the extent of the danger and risk created by the product in connection with its normal use or, to be more specific, when the product is used for the purposes for which it is intended or for other but foreseeable purposes given its nature. The obligation is particularly compelling in the case of a product that the user ingests and that could cause significant harm.

[328] As a corollary to that obligation, which we have also seen, it cannot be said that a user has *knowledge* of the danger a product creates if he or she has only a general idea about it and cannot assess it adequately because he or she has not received the necessary information (or, we might add, because he or she has suffered the effects a campaign of disinformation). It can be said there was "knowledge" only if the user understands the nature of the danger (i.e., what about the product threatens or jeopardizes his or her safety) and the risk associated with it (i.e., the level of probability that such danger will materialize and the significance of the potential harm). To the extent, however, that the manufacturer can show that the victim had such knowledge of the safety defect or of the harm that could result, it can escape the liability it would otherwise have borne pursuant to articles 1468 and 1469 C.C.Q., or, previously, under article 1053 C.C.L.C.

[329] But beyond these generalities, what exactly is the *extent* of knowledge required for setting up this ground for the manufacturer's exoneration or, to put it another way, this peremptory exception against the user who is the victim of harm caused by the safety defect of the product?

[330] We cannot answer that question without first considering article 1477 C.C.Q.[374] This general provision, which entrenches a rule previously recognized by the case law

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[374] Authors Baudouin, Deslauriers & Moore allude to this relationship between the first paragraph of article 1473 and article 1477 C.C.Q.: *La responsabilité civile*, vol. 2, *supra* note 241 at 395, para. 2-384, p. 395.

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and commentary,[375] is found, like article 1473 C.C.Q., in a division of the *Civil Code* entitled "Certain cases of exemption from liability / *De certains cas d'exonération de responsabilité*." That division also contains article 1470 C.C.Q., which deals with superior force, article 1471 C.C.Q., which [TRANSLATION] "promotes good citizenship and volunteerism by allowing people who act as good samaritans to be free from liability for errors made in good faith or minor mistakes committed in the performance of socially beneficial acts,"[376] article 1472, which exempts from liability a person who discloses a trade secret for considerations of general interest (including public health or safety), as well as articles 1474, 1475 and 1476, which deal with the exclusion or limitation of liability.

[331] The last article in the division, article 1477, states:

> **1477.** The assumption of risk by the victim, although it may be considered imprudent having regard to the circumstances, does not entail renunciation of his remedy against the author of the injury.
>
> **1477.** L'acceptation de risques par la victime, même si elle peut, eu égard aux circonstances, être considérée comme une imprudence, n'emporte pas renonciation à son recours contre l'auteur du préjudice.

[332] This provision, like the previous rule that it reiterates, is twofold: first, it states that the assumption of risk, although it may be considered imprudent, does not entail renunciation in favour of the author of the injury (and therefore is not, as such, exonerating); second, by making this clarification, it also acknowledges the possibility of such a renunciation (and therefore the complete exoneration of the author of the injury). This is a double rule normally applied to all types of sports activities,[377] construction or home renovation work (and in particular volunteer help for such work)[378] and recreational activities (in the broad sense of the term, including children's games).[379] It has been invoked at times with respect to the use of automobiles, etc.[380]

[333] As authors Baudouin, Deslauriers and Moore explain:[381]

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375 *Commentaires du ministre de la Justice*, *supra* note 359 at 905.

376 *Commentaires du ministre de la Justice*, *supra* note 359 at 900.

377 See e.g., *Zhang v. Deng*, 2017 QCCA 69; *2735-3861 Québec inc. (Centre de ski Mont-Rigaud) v. Wood*, 2008 QCCA 723; *Centre d'expédition et de plein air Laurentien v. Légaré*, [1998] R.R.A. 40 (C.A.); *Canuel v. Sauvageau*, J.E. 91-233 (C.A.). See also Renée Joyal-Poupart, *La responsabilité civile en matière de sports au Québec et en France* (Montreal: Les Presses de l'Université de Montréal, 1975).

378 See e.g., *Éthier v. Briand*, 2010 QCCA 666; *Bernard v. Mattera*, [1991] R.R.A. 446 (C.A.); *Girard v. Lavoie*, [1975] C.A. 904.

379 See e.g., *Gaudet v. Lagacé*, [1998] R.J.Q. 1035 (C.A.); *Larivière v. Lagueux*, [1977] C.A. 245.

380 See for example *Commission des accidents du travail du Québec v. Girard*, [1988] R.R.A. 662 (C.A.); *Martineau v. Marier* (1982), J.E. 82-645, AZ-82011139 (C.A.). For another example, in a different context, see *Kruger Inc. v. Robert A. Fournier & associés Ltée,* [1986] R.R.A. 428 (C.A. - vehicles exposed to acid soot).

381 J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, Vol. 2, *supra*, note

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[TRANSLATION]

> **I-209** - *Assumption of risk* – The theory of the assumption of risk also allows the author of harm to fully or partially escape the consequences of his or her liability. There must be clear proof, however, first, that the victim voluntarily agreed to participate in an activity involving certain risks and, second, that the nature and extent of those risks were clearly disclosed beforehand. Last, the damage must have been caused by the normal occurrence of the risk, not by its aggravation caused by the wrongful conduct of the agent. In addition, pursuant to article 1477 C.C.Q., although such assumption of risk can be considered imprudent and justify a sharing of liability, it does not automatically entail a renunciation of the recourse.
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> [References omitted.]

[334] Professor Tancelin, recalling the prior law as described in two cases in particular of the Privy Council relating to Quebec matters, stated the following:[382]

[TRANSLATION]

> **819.** *Application of the notion of intentional fault* – The assumption of risk defence is not used very frequently due to the strict nature of the conditions in which it applies. They were posed in two Privy Council decisions. In the first, Lord Atkinson held:
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> > "If however a person, with full knowledge and appreciation of risk and danger attending a certain act, voluntarily does that act it must be assumed that he voluntarily incurred the attendant risk and danger and the maxim *volenti non fit injuria* directly applies."[1711]
>
> The assumption of risk is therefore two-fold: knowledge of a risk and the voluntary and knowing submission to that risk. In *Letang*, it was pointed out that the specificity of the defence lay in the second aspect, which had to be specifically proven. It is rare for the defence to be accepted since it is very difficult to prove. Litigators have a tendency to confuse *volenti non fit injuria* and *scienti non fit injuria*, as the Privy Council pointed out in Letang.[1712] If mere knowledge of a risk incurred was enough to set aside the right to compensation for damages, civil liability would not have developed as it has.

1711. *C.P.R. v. Fréchette*, supra No. 813; [195] A.C. 871; *Letang v. Ottawa Electric*, (1926) 41 B.R. 312, aff'd [1926] A.C. 725; A. Mayrand, "L'amour au volant et la règle volenti non fit injuria", (1961) 21 *R. du B.* 366. (To one who is willing, no harm is done).

1712. Supra at 316.

[335] The decision of the Judicial Committee of the Privy Council in *Letang v. Ottawa*

265, p. 205 (see also paragr. 1-711, p. 737-738).

382 Maurice Tancelin, *Des obligations en droit mixte du Québec*, 7th ed., Montreal, Wilson & Lafleur, 2009, p. 579.

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Elec. R. Co. is particularly interesting. In that case, the victim lost her footing on a stairway that had not been cleared of ice. The stairway led to a passageway providing access to the respondent's tramway station. There was nothing to warn users of the danger or prohibiting the use of the stairs. The respondent argued that, given the obvious condition of the steps, the victim had accepted the risk of falling by taking them. Lord Shaw held that:[383]

> The truth is that this case has been, in its later stages, argued, as it was ably argued before the Board, as one in which the maxim *volenti non fit injuria* applied. In the view taken by the Board that maxim and the doctrine underlying it have not been correctly apprehended by some of the Judges in the Court below. This kind of problem is frequently before the Courts. It is quite a mistake to treat *volenti non fit injuria* as if it were the legal equipollent of *scienti non fit injuria*. As Lord Bowen expressed it in *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685, at pp. 696-7:
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> > "The maxim, be it observed, is not *'scienti non fit injuria,'* but *'volenti.'* It is clear that mere knowledge may not be a conclusive defence... The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, namely that the risk has been voluntarily encountered, the defence seems to me complete."
>
> A case very near the present on its facts is that of *Osborne v. L. & N.W.R.* (1888), 21 Q.B.D. 220, in which *Thomas v. Quartermaine*, *supra*, was carefully founded on. The plaintiff was injured by falling on the steps leading to the defendants' railway station. These steps the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other steps which he might have used (a direct analogy in fact with the present case), and he admitted that he knew the steps were dangerous and went down carefully holding the rail. The railway company was held responsible. Wills, J., at pp. 224-5, puts the matter thus:
>
> > "I should have thought it necessary that the plaintiff should be asked more questions than he has been asked in cross-examination. It is clear from his evidence that he knew there was some danger, but the contention on behalf of the defendants, that this circumstance is sufficient to entitle them to succeed, entirely gives the go-by to the observations of Lord Esher, M.R., in *Yarmouth v. France*, 19 Q.B.D. p. 657. In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow; I know quite enough about ice and snow to know how easy it is to make such a mistake and it is one that has cost many a man

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383 *Letang v. Ottawa Elec. R. Co*., [1926] A.C. 725, p. 730-732.

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> his life. In order to succeed the defendants should have gone further in cross-examination, for, unless the question of fact had been found in their favour, the application of the maxim on which they relied could not be established. The County Court Judge has not found the fact the defendants need; and upon the present materials I certainly am not prepared to supply the deficiency."

The law of Canada and England seems to be summed up in the leading proposition to the judgment of Wills, J., in *Osborne v. L. & N.W.R. Co.*, 21 Q.B.D., at pp. 223-4:

> "If the defendants desire to succeed on the ground that the maxim *volenti non fit injuria* is applicable, they must obtain a finding of fact 'that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran Impliedly agreed to incur it.'"

To apply these illustrations to the present case, there is no evidence whatsoever that the appellant's wife, holding on as best she could to the handrail, had a full knowledge of the nature and extent of the danger; or that, knowing this, she freely and voluntarily, with full knowledge of the nature and extent of the risk she ran, encountered the danger. As to this it is to be noted that she was merely traversing the same steps and under the very same circumstances as many hundreds of tramway passengers.

[Emphasis added.]

[336] The Supreme Court does not say otherwise in *Beauchamp v. Consolidated Paper Corporation Ltd.* In that case, a father and his three sons undertook to drive over a rather rudimentary bridge belonging to the respondent that was covered with light snow and ice. Aware of the situation but unfamiliar with the structure of the bridge, which he was taking for the first time, the driver drove onto the bridge at low speed, but his car slipped out of control and ended up in the water. The driver and one of his sons drowned. The Court of Appeal held that the respondent had no obligation to warn users of dangers which, according to the majority judges, [TRANSLATION] "were apparent, and, at any rate, a warning would not have done the travellers any good."[384] Quoting *Letang*, Fauteux J., quashing the Court of Appeal decision, wrote:[385]

> [TRANSLATION]
>
> In the case of *Letang v. Ottawa Electric Railway Co.*, *supra*, it was held, as we know, that the maxim *Volenti non fit injuria* does not provide a defence to an action in damages for bodily harm due to the dangerous conditions of premises to which the victim has been invited upon

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[384] *Beauchamp v. Consolidated Paper Corporation Ltd.*, [1961] S.C.R. 664 at 668.

[385] *Beauchamp v. Consolidated Paper Corporation Ltd.*, [1961] S.C.R. 664 at 669. The Supreme Court thus confirmed the decision of the Superior Court, finding the respondent liable while allocating 20% liability to the driver. In the opinion of the trial judge, the driver could have asked his sons to get out of the car to guide it over the bridge. The fact that he did not constituted culpable recklessness.

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> business, unless it is established that the victim freely and voluntarily, with full knowledge of the nature and extent of the risk incurred, expressly or implicitly agreed to incur it. Tassé's vigilance was betrayed by this invitation, as well as by the failure of the respondent's employees to warn them of the seriousness of the risks involved in crossing the bridge. They should have been asked to postpone their departure until the sanding operations were completed. These security measures were necessary; the respondent's employees had a duty toward the Tassés, and moreover, they had the facilities to do so. Under the circumstances, their conduct constitutes a fault of which the accident was the direct, natural and immediate consequence, and that fault makes the respondent liable.
>
> [Emphasis added.]

[337] Regardless whether the assumption of risk can be a ground for complete exoneration or simply the source of shared liability, we clearly see that mere general knowledge of the risk is not sufficient. It is also not sufficient to embark on a dangerous activity for assumption of risk to be inferred. The extent of required knowledge is that which allows for the conclusion of the *voluntary* assumption of risk,[386] and, accordingly, acceptance of the harm that may ensue, which is much more onerous. As authors Nadeau and Nadeau stated:[387]

> [TRANSLATION]
>
> The maxim applies when the victim has freely and knowingly, with full knowledge of the facts, consented to a risk or danger, of which he or she could fully appreciate the nature or scope, and thus tacitly agreed in advance to what followed. The defendant must prove this fact to escape liability.
>
> [References omitted.]

[338] An eloquent formulation of the rule is also found in *Doucet v. Canadian General*

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386 This is the case, for example, when the business is obviously dangerous, the potential injury is significant and the risk of it materializing is high (or unavoidable). See *Bernard v. Mattera*, [1991] R.R.A. 446, a case in which Vallerand, J., writing for the Court, described the appellants' plans as [TRANSLATION] "a business ... so crazy from the outset that it was inevitable that it would lead to an accident, for which the three accomplices would also be liable, the victim's fall being a necessary and unavoidable consequence of it" (at 447). Conversely, see for example *Ouellette v. Gagnon*, [1980] C.A. 606, a case in which the Court refused to apply the *volenti non fit injuria* rule and clearly explained that, although hunting is an activity that involves intrinsic risk, that does not mean that one should foresee *"the possibility (or even the likelihood) of being shot"* (at 610). See also *Centre d'expédition et de plein air Laurentien v. Légaré*, [1998] R.R.A. 40 (C.A., where it was held that neither the knowledge nor the manifestation of the assumption of risk was sufficient).

387 Nadeau & Nadeau, *supra* note 223 at 515, para. 551 (see generally at 515 to 518, paras. 551 to 554).

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Electric Co. Ltd.:[388]

> [TRANSLATION]
>
> The maxim *volenti non fit injuria* should not be applied with the same rigour it has under common law. In our law, the victim's mere knowledge of the danger is not sufficient to exonerate a third party unless the knowledge of the risk is such that free and knowing acceptance of the danger by the victim can be inferred. In most case, the victim's fault leads to a sharing of liability.
>
> [Emphasis added.]

[339] This is the standard which is reproduced in article 1477 C.C.Q.

[340] Undoubtedly, the case law has not always been faithful to the severity of the rule, and there are a few judgments that are too flexible in applying the theory of the assumption of risk. That occasional toning down of the rule is not in accordance with the law, however, and as Professor Karim notes, there can be assumption of the risk only on the following conditions:[389]

> [TRANSLATION]
>
> **3370.** There are three prerequisites to the application of the notion of "assumption of risk." First, one must be able to show the existence of a clear risk. ... Second, it must be proven that the victim had knowledge of the risk he or she was taking. That proof must show that the victim had received all information necessary not only to the practice of the activity, but also the risks inherent in it in order to allow him or her to make a free and informed choice. It is important to note that a person cannot be deemed to have agreed to run a risk if he or she was unaware of the extent of it. Last, one must be able to identify the victim's formal or tacit acceptance of the risk.

[341] It is understandable that these conditions are particularly onerous since the assumption of risk, as a means of exoneration, is the equivalent of the plaintiff's renunciation and releases the person sued from liability.

[342] This general framework must be taken into account when interpreting and applying the first paragraph of article 1473 par. 1 *C.C.Q.* (or the prior rule to the same effect). That provision provides for the exoneration of the manufacturer where the victim knew or is deemed to know of the safety defect of the product or the harm likely

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388 *Doucet v. Canadian General Electric Co. Ltd.,* [1975] R.L. 157 (P.C.) at 164. In that case, the purchaser, who bought a fryer with a defective thermostat from a merchant, sued the manufacturer for damage following a fire that broke out when the device overheated. His action was based on article 1053 C.C.L.C., in the absence of a contractual relationship between the parties (the Supreme Court had not yet rendered *Kravitz*).

389 Vincent Karim, *Les obligations*, 4th ed., vol. 1 "Articles 1371 to 1496" (Montreal: Wilson & Lafleur, 2015) at 1444–1445, para. 3370 [*Les obligations*, Vol. 1].

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to result from its use. A person who uses a product of which he knows or should know of the safety defect *accepts the risk* that the danger and harm will materialize. It is because the user has assumed the risk that the manufacturer can escape liability, and that is precisely the rule recognized by article 1477, of which the first paragraph of article 1473 is an illustration.

[343] One might object, however, that article 1477 C.C.Q. states that the assumption of risk, although it may constitute imprudence (and therefore a fault which could lead to a sharing of liability within the meaning of article 1478 C.C.Q.), does not lead to the victim's renunciation whereas, according to the wording of the first paragraph of article 1473, the victim's knowledge – and therefore the assumption of risk – fully exonerates the manufacturer. As authors Jobin and Cumyn noted, [TRANSLATION] "the victim's knowledge of the [security] defect or its apparent nature constitute complete grounds for exoneration."[390] In this sense, article 1473 would be an exception to article 1477 rather than an illustration of it (and similarly according to the former law, making the necessary adjustments).

[344] It should first be recalled that, despite its wording, article 1477 C.C.Q. does not exclude that assumption of a risk exonerates the author of the harm; the assumption of risk can be the equivalent of a renunciation of the right to sue, depending on the circumstances. In reality, the apparent discordance between articles 1473 and 1477 is resolved when one assigns to the "knowledge" to which the first one (or the prior rule) refers, a degree that makes it the functional equivalent of an assumption of risk leading to the renunciation of the right to sue within the meaning of the second. For a manufacturer to escape the liability that would otherwise be incumbent upon it, it must show that the victim had received all necessary information about the danger and risk relating to the product to allow him or her to make a free and informed choice in this regard, and the victim must in fact have expressed his or her wish to fully accept that risk as well as the harm that might ensue, thereby renouncing the right to sue.

[345] On this point, one can apply to article 1473 C.C.Q. the words of McLachlin J. in *Bow Valley Husky (Bermuda) v. Saint John Shipbuilding*:[391]

> 22 I agree with the Court of Appeal that knowledge that there may be a risk in some circumstances does not negate a duty to warn. Liability for failure to warn is based not merely on a knowledge imbalance. If that were so every person with knowledge would be under a duty to warn. It is based primarily on the manufacture or supply of products intended for the use of others and the reliance that consumers reasonably place on the manufacturer and supplier. Unless the consumer's knowledge negates reasonable reliance, the manufacturer or supplier remains liable. This occurs where the consumer has so much knowledge that a

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390 Jobin & Cumyn, *supra* note 203 at 326 *in fine*, para. 225.

391 *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. In that case, McLachlin, J., with whose reasons La Forest, J. concurred, dissented in part, although the majority of her colleagues agreed with her analysis apart from the issue of the contractual relational economic loss (see the reasons of Iacobucci J. at para. 112).

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> reasonable person would conclude that the consumer fully appreciated and willingly assumed the risk posed by use of the product, making the maxim *volenti non fit injuria* applicable: *Lambert, supra.*
>
> [Emphasis added.]

[346] In that case, McLachlin J. noted that the plaintiff was aware that the product in question was inflammable, but that the manufacturer (as well as the supplier) had "had much more detailed knowledge of the specific inflammability characteristics,"[392], which information was not the subject of a warning to users. McLachlin J. was of the opinion that the plaintiff did not know enough for one to conclude that it had "accepted the risk of using Thermaclad"[393] (the product in question, which was perfectly sound, had been properly installed).

[347] Laskin J. ruled in a similar manner in *Lambert v. Lastoplex Chemicals*, a case referred to by McLachlin J. involving a highly inflammable lacquer sealer with toxic vapours, which was indicated on the container, and of which the user was aware. Nonetheless, Laskin J., on behalf of the Supreme Court, stated that:[394]

> I do not think that the duty resting on the respondent in this case can be excluded as against the male appellant, or anyone else injured in like circumstances, unless it be shown that there was a voluntary assumption of the risk of injury. That can only be in this case if there was proof that the male appellant appreciated the risk involved in leaving the pilot lights on and willingly took it. The record here does not support the defence of *volenti.* On the evidence, there was no conscious choice to leave the pilot lights on; rather, it did not enter the male appellant's mind that there was a probable risk of fire when the pilot lights were in another room. There is thus no basis in the record for attributing an error of judgment to the male appellant. Nor do I think there is any warrant for finding—and this would go only to contributory negligence—that he ought to have known or foreseen that failure to turn off the pilot lights would probably result in harm to himself or his property from his use of the lacquer sealer in the adjoining area.
>
> [Emphasis added.]

[348] Quebec law is no different on this point. In *Mulco*, a decision of this Court, Gendreau J. noted that:[395]

> [TRANSLATION]
>
> In short, to be released from the consequences of its fault, Mulco had to

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392 *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 at para. 23.

393 *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 at para. 23.

394 *Lambert v. Lastoplex Chemicals*, [1972] S.C.R. 569 at 576.

395 *Mulco inc. c. Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68 (C.A.) at 72.

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> show that the user assumed the risks and committed a causal fault himself by using the product according to an incorrect procedure which he knew was dangerous since he had received instructions from the manufacturer or otherwise – or that he should have known to be dangerous because the manufacturer had given him the opportunity to know by indicating a warning according to the standards identified by the Supreme Court; the damage here is therefore the result of inadequate instructions for use and the actual inability to know what precautions to take due to the lack of relevant information.
>
> In this case, the appellant therefore cannot avoid its obligation to make good the damage.
>
> [Emphasis added.]

[349] The extent of the user's knowledge must therefore be that which allows one to conclude in the assumption of the risk. Of course, that case is prior to 1994, but it cannot be different under article 1473 C.C.Q., otherwise the manufacturer, even when it is at fault,[396] would be subject to a much more favourable liability regime than under common law, which was assuredly not the legislator's objective in adopting articles 1468, 1469 and 1473 C.C.Q., and which also cannot be the objective sought previously. It is unthinkable that, to use the words of *Letang*, the legislator wanted to provide the manufacturer with exoneration based on the victim's *scienti* ("knowledge") rather than his *volenti* ("willingness").

[350] For the manufacturer to be exonerated − i.e., completely released − from liability for the harm caused by the safety defect of the product, it must therefore first establish a clear danger and risk and, second, prove the victim's real or deemed knowledge to a greater degree than that of general knowledge. Without requiring a level of scientific knowledge or a level of knowledge equal to that of the manufacturer (who is nonetheless the one who best knows the product and all its characteristics), the victim must have freely made an informed choice to assume the risk, which presupposes a high degree of knowledge of the danger of harm and of the risk that harm will occur, as well as the willingness to assume them. Knowledge, both here and under article 1477 C.C.Q., is coupled with willingness, the burden of proof of which is on the manufacturer.

[351] In other words, knowing that a product is dangerous, like knowing that an activity may be dangerous, is not sufficient: the manufacturer must prove that the victim had a precise and complete idea of the danger and risk associated with it and, in the same way, that he or she was informed of the means to be taken to deal with or avoid

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[396] Although the regime established by articles 1468, 1469 and 1473 C.C.Q. is a regime of no-fault liability, in certain cases that does not prevent the manufacturer from being at fault, particularly when it deliberately breaches its duty to inform. That could also be the case if the danger stems from a defect in the product resulting from the manufacturer's negligence, or if the manufacturer markets a product knowing full well that it is defective.

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them, if any.[397] If there are no such means, the manufacturer must also establish that the victim was informed of that fact, allowing him or her to realistically assess the risk and accept it.

[352] The rigour of those requirements obviously does not prevent us from noting that certain security defects are evident, manifest and apparent, like the danger that is associated with them or the harm that could result, such that a victim will be deemed to have had sufficient knowledge, along with the willingness to assume the risk. Similarly, it does not prevent us from considering the circumstances of each situation. There is no need to repeat that what is required to arrive at the conclusion that the victim has knowledge constituting an assumption of risk and a renunciation of the right to sue may vary depending on the nature of the product, the danger it presents (including the seriousness of the harm which could result from it) and the probability of it (and therefore the risk) materializing, the type of customer for which the product is intended, the purposes for which it should normally be used, the context in which it is used, whether or not it is a widespread, commonly-used product, etc. One does not handle a kitchen knife, handsaw, antifreeze, laundry detergent, LEGO® bricks, chemistry set, bleach, Tylenol or hair dryer the same way one would handle a circular saw, gas stove, an explosive or combustible product, pesticide, opioid drug, sledgehammer, crane or airplane.

[353] In all these respects, however, the manufacturer has the burden of proving this.[398]

[354] In short, a manufacturer who claims an exemption from liability pursuant to the first paragraph of article 1473 C.C.Q. must establish that the victim had a degree of knowledge (real or deemed) equivalent to an assumption of risk leading to renunciation of the right to sue. It is only on this condition that we can reconcile this provision with the general rule set forth in article 1477 C.C.Q.

b.3. Sharing of liability between the user and the manufacturer (art. 1478 C.C.Q.)

[355] A few words are in order regarding the sharing of liability between the user and

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[397] Other than *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, there are some common law decisions along these lines. See e.g., *Cominco Ltd. v. Canadian General Electric Co.* (1983), 147 D.L.R. (3d) 279, [1983] B.C.J. No. 2339 (B.C.C.A) at paras. 50 and 51; *Siemens v. Pfizer C&G Inc.* (1988), 49 D.L.R. (4th) 481 (Man. C.A., reasons of Philp, J.A.). In general, see Theall, *supra* note 356 at L3-7, para. L3:10.20 (“the plaintiff's knowledge of some danger will not necessarily relieve the manufacturer of the duty to warn unless the plaintiff fairly can be said to have assumed the risk”).

[398] Knowledge is a question of fact in that it involves an assumption of risk. This was recalled by Mayrand, J. in *Lariviere v. Lagueux,* [1977] C.A. 245 at 247.

manufacturer in a situation covered by article 1468 C.C.Q., even though the respondents in this case are not appealing the apportionment ordered by the trial judge in the case of the Blais Class, which apportionment one might consider questionable.

[356] Article 1478 C.C.Q., which is a general provision, states:

1478. Where an injury has been caused by several persons, liability is shared between them in proportion to the seriousness of the fault of each.	**1478.** Lorsque le préjudice est causé par plusieurs personnes, la responsabilité se partage entre elles en proportion de la gravité de leur faute respective.
The victim is included in the apportionment when the injury is partly the effect of his own fault.	La faute de la victime, commune dans ses effets avec celle de l'auteur, entraîne également un tel partage.

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[357] Before examining how this provision, which reiterates a rule admitted by the former law, can lead to a sharing of liability between the manufacturer and the victim[399] for an injury caused by the safety defect of a product, it should first be pointed out that, in theory, the grounds of defence prescribed by article 1473 C.C.Q. entail the complete exoneration of the manufacturer. Thus, a manufacturer who, in accordance with the first paragraph of article 1473 "proves that the victim knew or could have known of the defect, or could have foreseen the injury," in the sense we have just seen, completely escapes the liability that would otherwise be incumbent upon it.

[358] In other words, even if it has breached the duty to inform incumbent upon it pursuant to article 1469 C.C.Q.,[400] leading to the safety defect that caused the injury, the manufacturer can clear itself pursuant to the first paragraph of article 1473 C.C.Q. if it establishes the victim's knowledge equivalent to a renunciation of any recourse resulting from the safety defect, indicating his or her wish to bear the entire risk. The only exoneration that can result from such a demonstration is complete, not a sharing of liability with the victim of the injury.

[359] That said, in the case where the manufacturer does not establish such a level of knowledge and therefore cannot escape liability under article 1473 C.C.Q., the sharing of liability between it and the victim is not excluded. The manufacturer's breach of its duty to inform, which constitutes a fault, may not be the sole cause of the harm, and it may also be found that the victim was at fault (for example: if he or she was imprudent or made mistakes in the use of the product, used it for another purpose, etc.) or that there was aggravation of the harm due to inappropriate conduct (e.g., the victim did not seek appropriate care after an injury). In such a case, according to article 1478 C.C.Q., there can be a sharing of liability (not to mention the victim's breach of the obligation to mitigate damages according to article 1479 C.C.Q.). There are a few examples of such a situation and, accordingly, such sharing of liability, in the case law, including in the case law of this Court.[401]

[360] Nevertheless, an important clarification should be made.

[361] It should be understood that a victim who does not have the required information the manufacturer should have provided him or her with cannot be blamed for failing to take the precautions that would have been necessary if he or she had been duly informed. The victim cannot be blamed for imprudence related to the lack of information. In such a case, there can be no sharing of liability, which is eloquently illustrated in *O.B. Canada Inc. v. Lapointe*.[402] In that case, the Court confirmed the conclusion of the trial judge, according to whom the victim had not

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399 As set out in its last paragraph, article 1478 C.C.Q. could also lead to a sharing of liability between the manufacturer and a third party, a hypothesis that is not at issue in this appeal and will not be discussed.

400 Which is the only hypothesis we will discuss, given the nature of this appeal.

401 See e.g., *Royal Industries Inc. v. Jones*, [1979] C.A. 561; *Provencher v. Addressograph-Multigraph du Canada Ltee,* J.E. 85-510, AZ-85011176 (C.A.); *J.E. Livernois Ltee v. Plamondon,* J.E. 85-619, AZ-85011206 (C.A., aff'g. *Plamondon v. J.E. Livernois Ltee,* [1982] C.S. 594); *Baldor Electric Company v. Delisle*, 2012 QCCA 1004, aff'g. *Camirand v. Baldor Electric Company*, 2010 QCCS 2621; *Bombardier inc. v. Imbeault*, 2009 QCCA 260. The hypothesis of injury caused jointly by the defect in the product (including in the case of a lack of information) and the victim's fault is also contemplated by para. 8(2) of the *European Directive* (para. 8(1) concerns the apportioning between the manufacturer and a third party).

402 *O.B. v. Lapointe*, [1987] R.J.Q. 101.

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committed any contributory fault as his conduct, which might have been imprudent in other circumstances, was fully justified given the incomplete instructions provided by the manufacturer. There is no fault where the user of a product uses it inadequately or does not take the steps that the safety defect would call for, when the manufacturer has breached its obligation to provide information and the victim is unaware of the danger to which he or she is exposed. This remark, however, is a matter of common sense

[362] In short, subject to the first paragraph of article 1473 C.C.Q., the application of which leads to complete exoneration, there may therefore, pursuant to the second paragraph of article 1478 C.C.Q., be a sharing of liability between the manufacturer, who must answer for a safety defect caused by the breach of its duty to inform, and the user who committed a fault in using a product subject to such a defect. The user does not commit a fault, however, if he or she fails to take the precautions that would have been required if the manufacturer had adequately informed him of her or, for the same reason, if he or she uses the product in an imprudent or inappropriate manner.[403] The courts must therefore be especially cautious when the safety defect stems from a breach of the manufacturer's duty to inform and the fault alleged against the user relates to the apparently inadequate use of the product, which use can be justified by the lack of the necessary information.

b.4. Burden of proof: a few clarifications

[363] What is the burden of proof incumbent on a person who sues the manufacturer due to harm he or she claims was caused by the safety defect of the product, which defect allegedly results from the lack of sufficient indications regarding the risks and dangers of the product and the means to avoid them? What is the burden of proof of a manufacturer wishing to defend itself against such an action?

[364] With respect to the regime established by the C.C.Q., the answer to these questions is found first in the first paragraph of article 1468 C.C.Q., which describes the conditions for a manufacturer's liability, and in articles 2803 and 2804, general provisions respecting civil evidence.

[365] In accordance with the first paragraph of article 2803 C.C.Q., the plaintiff must establish his or her right − in this case to obtain compensation pursuant to the first paragraph of article 1468 C.C.Q. − and prove on a balance of probabilities (art. 2804 C.C.Q.) the safety defect of the product, the injury suffered and the fact that the first caused the second.[404] It is therefore not necessary to prove the manufacturer's *fault* (although the plaintiff may do so) and, in this respect, the case law and the commentary are in agreement.[405] Other than its obligation to establish, where applicable, the facts which extinguish, modify or reduce its obligation, and to

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[403] Note that this case does not involve the inadequate use of cigarettes by the class members. Their alleged imprudence stems not from how they handled the product or the purposes for which they used it, but from the knowledge they had about the dangers of the product.

[404] The plaintiff must also establish that the thing in question is movable property (which will generally not be a problem) and that it was manufactured by the defendant.

[405] See Jobin & Cumyn, *supra* note 203 at 324, para. 225; Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 2, *supra* note 241 at 397, para. 2-385; Karim, *Les obligations*, vol. 1, *supra* note 389 at 1367−1368, paras. 3190 to 3193.

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adduce, if it considers it necessary, evidence contradicting or undermining that of the plaintiff, the manufacturer has the burden of establishing, where applicable, the grounds for exoneration prescribed by article 1473 C.C.Q. (not to mention superior force under article 1470 C.C.Q.), the whole in accordance with the second paragraph of article 2803C.C.Q.

[366] There is little to say about the proof of injury. However, a few remarks about the safety defect and causation are in order.

[367] What does proof of the safety defect comprise? In accordance with article 1469 C.C.Q., which sets out the defining elements of such a defect, the plaintiff has to show that the product did not afford "the safety which a person is normally entitled to expect" and, accordingly, establish the danger the product in question involves. This "normalcy," which is the applicable safety standard, is dependent on "having regard to all the circumstances," specified by article 1469, and is therefore assessed according to the criteria we have seen when determining the intensity of the manufacturer's duty to inform or the knowledge the user may have of the danger and risk (which is not a coincidence − it shows the consistency of the various aspects of the liability regime): the more or less common nature of the product, the purposes for which it must or may be used and the context of the use, target or potential customers,[406] seriousness and foreseeability of the injury, etc. Moreover, it is understood that a product cannot be considered to be affected by a safety defect due merely to the fact that another more sophisticated one came onto the market subsequently.[407]

[368] On this point, it is worth adding a detail. The fact that a product is dangerous and generally recognized as such is not in and of itself an obstacle to proving a safety defect within the meaning of article 1469 C.C.Q. However dangerous it may be, such a product no less affords the safety one can normally expect if the necessary precautions are taken. But a dangerous product may also, beyond the inherent risk in that type of object or product, create increased, excessive or abnormal danger for one reason or another. The user is of course allowed to prove that increased, excessive or abnormal danger and, in fact, has that burden: if the user establishes that the danger was greater than that which he or she would normally be entitled to expect in law, he or she will have proven the existence of a safety defect.

[369] That was the case, for example, in *Baldor Electric Company v. Delisle*,[408] discussed above, a case involving a grinding drum. The victim was well aware of the danger inherent in that machine, a danger that had been increased tenfold by a design flaw, of which he was unaware, and an incomplete instruction manual. The flaw caused excessive danger as well as the risk of significant injury, which the manufacturer's failure to provide adequate information had

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406 As Professor Karim writes: [translation] "Thus, if the thing can, *inter alia*,, be used by children or elderly people, we must give precedence to how they will use it and the dangers the thing represents for them, even though the item would not represent the same danger for an adult making the same use of it" (Karim, *Les obligations*, vol. 1, *supra* note 389 at 1368, para. 3193). We should also consider the distinctions to be made depending on whether the thing is intended for a specific type of customer or the general public, experts or neophytes, etc.

407 This was recognized as early as 1944 in *London & Lancashire Guarantee & Accident Co. of Canada v. La Compagnie F. X. Drolet*, [1944] S.C.R. 82 at 85−87, although the law has evolved since then. See also Article 6, para. 2 of the *European Directive*.

408 *Baldor Electric Company v. Delisle*, 2012 QCCA 1004, aff'g. *Camirand v. Baldor Electric Company*, 2010 QCCS 2621.

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exacerbated. Similarly, in *Livernois,*[409] it was proven that the product the victim had used had an abnormally high concentration of ammonia and that it was therefore much more corrosive than an ordinary household product, which the label on the container did not indicate.

[370] In short, the plaintiff has the burden of proving the safety defect of the product on a balance of probabilities, in that it "does not afford the safety which a person is normally entitled to expect / *n'offre pas la sécurité à laquelle on est normalement en droit de s'attendre*." However, does that require that he or she also prove the *source* of that safety defect, by establishing, for example, the defect in design or manufacture, poor preservation or presentation or other flaw affecting the product or the lack or insufficiency of indications about the inherent danger in the product and the means to avoid it?

[371] Let us set aside for the moment the issue of information and focus on the issue of the defect in design or manufacture or poor preservation or presentation (or other defect). Once it is established that the product did not afford the required safety (the pop bottle exploded for no reason when it was safely stored on a shelf, the can was contaminated by salmonella, the breast implant tore, etc.), must proof of the reason for that defect, i.e., the flaw, whatever it may be, that led to the safety defect, be added to the proof of the safety defect?

[372] A superficial reading of article 1469 C.C.Q. might suggest this[410]. The legislator could have ended the wording of that provision with the following sentence: "A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect". Is it not true that he added to that the words "particularly by reason of a defect...", because the user claiming to be a victim of the safety defect has to prove the reason for the defect affecting the product?

[373] The wording of article 1469 C.C.Q. can be compared to that of the first paragraph of Article 6 of the *European Directive*, on which it is based in part:

> *Article 6*
>
> 1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
>
> (a) the presentation of the product;
>
> (b) the use to which it could reasonably be expected that the product would be put;
>
> (c) the time when the product was put into circulation.
>
> 2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

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[409] *Plamondon v. J.E. Livernois Ltée*, [1982] C.S. 594, aff'd. *J.E. Livernois Ltée v. Plamondon*, J.E. 85619 (C.A.).

[410] This issue is also alluded to in Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 2, *supra* note 241 at 394, para. 2-383.

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[374] Article 1245-3 of the French *Civil Code* uses almost the same language:

> [TRANSLATION]
>
> **1245-3** A product is defective within the meaning of this Title where it does not provide the safety which a person is entitled to expect.
>
> In order to appraise the safety which a person is entitled to expect, regard shall be had to all the circumstances and in particular to the presentation of the product, the use to which one could reasonably expect that it would be put, and the time when the product was put into circulation.
>
> A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

[375] Neither of these provisions indicates the source of the safety defect. In contrast, article 1469 C.C.Q. seems to define the safety defect based not only on the product's lack of security but on the defect affecting it (among other things, the defect in design or manufacture or poor preservation or presentation). What meaning should be given to that addition?

[376] On reflection, the legislator cannot have intended to require that a party alleging the safety defect of a product prove its source or origin, which would give that party the burden the legislator wanted to remove by adopting articles 1468 and 1469 C.C.Q. This clearly appears from the Minister's comments. Speaking about article 1468 C.C.Q., the provision which sets out the bases for the new regime, the Minister stated that:[411]

> [TRANSLATION]
>
> This regime is based mainly on the *European Economic Community directive on liability for defective products*. It seemed necessary to make up for the shortfalls of the C.C.L.C. in this area, particularly with regard to the onerous burden of proof which prior solutions imposed on the victim with respect to establishing the fault of the manufacturer, distributor or supplier, and also with regard to the inherent costs of that proof, which very often requires consultation with and testimony of experts.

[377] The Minister continued further on, commenting on article 1469 C.C.Q. as follows:[412]

> [TRANSLATION]
>
> This article is the necessary complement of the previous one. It sets out the assessment criteria to determine when the defect of a product can be considered a safety defect which could lead to the manufacturer's liability.
>
> It appears from this article and article 1468 that the basis of the liability regime with regard to third parties involving unsafe products is the manufacture and release of a product that does not afford the safety which a person is normally

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411 *Commentaires du ministre de la Justice*, *supra* note 359 at 897.

412 *Commentaires du ministre de la Justice*, *supra* note 359 at 898.

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> entitled to expect. It is therefore not liability based solely on the defendant's fault, but liability based also on the mere observation of an objective fact: the insufficient safety of the product with regard to the public's legitimate expectations. It also appears from these two articles that the third party who is the victim of a safety defect will henceforth have a less onerous burden of proof than before since he or she will not have to prove the defendant's fault. Victims will thus have more effective protection of their rights.
>
> All the victim would have to do for the defendant to be liable would be to establish, in addition to the injury, the existence of a safety defect of the product and the causal connection between the injury and the defect; the defendant could then only escape liability by relying on superior force (art. 1470) or the grounds of exoneration prescribed by article 1473.
>
> This article is based on the European Economic Community directive on the subject.
>
> [Emphasis added.]

[378] The plaintiff is certainly not barred from proving, if possible, the existence of the defect of design or manufacture of the product or its poor preservation or presentation (or other reason), which will only strengthen his or her claims. But the plaintiff is not required to and, in most cases, would be unable to (the manufacturer itself does not always know the source of a safety defect, although its ignorance does not absolve it from liability in this regard, other than the exception in the second paragraph of article 1473 C.C.P.). If this burden were imposed on him, there would be nothing left of the legislator's clearly stated idea of liability based on "the mere observation of an objective fact", namely "the insufficient safety of the product with regard to the public's legitimate expectations." The history of the provision and its mutations since the first recommendations of the *Office de révision du Code civil du Québec* testify to this wish to make it easier for the user and, accordingly, enhance the protection the user enjoys.

[379] In short, a teleological and contextual interpretation of article 1469 C.C.Q. allows us to conclude that the meaning we should give to this provision is very similar to that of Article 6 of the *European Directive* (or article 1245-3 of the French *Civil Code*). The potential origins of the defect, as listed in article 1469 C.C.Q. (which, as mentioned, is not exhaustive in this regard), are only elements which, if proved (without having to be), are part of the circumstances which, where applicable, will allow one to conclude that the product does not afford the safety which a person is normally entitled to expect. However, the plaintiff's burden of proof ends at the demonstration that the product does not afford such safety and does not extend to the identification of the source of the problem.[413]

[380] In this sense, one can speak of the manufacturer's extracontractual liability pursuant to articles 1468 and 1469 C.C.Q. as no-fault liability, strict liability, subject only to the grounds of

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[413] See in this regard Jobin & Cumyn, *supra* note 203 at 324, para. 225; Edwards, *supra* note 239 at 146, para. 315. One French author also suggests that all the plaintiff has to prove in terms of the safety defect is the product's dangerousness (and the relationship between that danger and the injury), the burden of proof otherwise being fully on the manufacturer who put the dangerous product into circulation. See Jean-Claude Montanier with the collaboration of Patrick Canin, *Les produits défectueux* (Paris: Litec, 2000) at 99−100.

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exoneration of article 1473 C.C.Q. (or, potentially, article 1470 C.C.Q.). This was described as follows in *Desjardins Assurances générales inc. c. Venmar Ventilation inc.*:[414]

> [TRANSLATION]
>
> [5] This is a no-fault regime and the manufacturer can only escape liability if it meets the conditions of article 1473 C.C.Q.

[381] In this regard, it is interesting to compare the manufacturer's liability, stemming from articles 1468 and 1469 C.C.Q., with that stemming from articles 1465, 1466 and 1467 C.C.Q., the other provisions which, along with the first two, make up the section "Act of a thing" in the C.C.Q. They read as follows:

1465. The custodian of a thing is bound to make reparation for injury resulting from the autonomous act of the thing, unless he proves that he is not at fault.	**1465.** Le gardien d'un bien est tenu de réparer le préjudice causé par le fait autonome de celui-ci, à moins qu'il prouve n'avoir commis aucune faute.
1466. The owner of an animal is bound to make reparation for injury it has caused, whether the animal was under his custody or that of a third person, or had strayed or escaped. A person making use of the animal is also, during that time, liable therefor together with the owner.	**1466.** Le propriétaire d'un animal est tenu de réparer le préjudice que l'animal a causé, soit qu'il fût sous sa garde ou sous celle d'un tiers, soit qu'il fût égaré ou échappé. La personne qui se sert de l'animal en est aussi, pendant ce temps, responsable avec le propriétaire.
1467. The owner of an immovable, without prejudice to his liability as custodian, is bound to make reparation for injury caused by its ruin, even partial, whether the ruin has resulted from lack of repair or from a defect in construction.	**1467.** Le propriétaire, sans préjudice de sa responsabilité à titre de gardien, est tenu de réparer le préjudice causé par la ruine, même partielle, de son immeuble, qu'elle résulte d'un défaut d'entretien ou d'un vice de construction.

[382] The general regime of the act of a thing established by article 1465 C.C.Q., which entrenches the former law, creates a presumption of fault against the custodian of the thing for injury resulting from the autonomous act of the thing. The custodian can therefore escape liability by rebutting that presumption: he or she can prove that he did not commit any fault[415] by

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414 *Desjardins Assurances générales inc. c. Venmar Ventilation inc.*, 2016 QCCA 1911. See also Jobin & Cumyn, *supra* note 203 at 326, para. 225; Vézina & Maniet, *supra* note 232 at 92.

415 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 893–894, paras. 1-

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establishing that [TRANSLATION] "he or she took all reasonable means to prevent the act that caused the damage."[416] Article 1468 C.C.Q. does not contain this limitation, nor does article 1469 C.C.Q., which does not refer to either fault or lack of fault. In addition, as we can see from a reading of article 1473, the lack of fault does not form part of the grounds of defence open to a manufacturer sued under article 1468 C.C.Q.

[383] Clearly, one could say, like Anglin and Mignault JJ. in *Ross v. Dunstall*,[417] that even putting a defective or dangerous object on the market is a fault, but that is not the perspective from which articles 1468 and 1469 C.C.Q. approach it, unless we consider that these provisions establish an absolute presumption of fault, and thus of liability, where the manufacturer cannot be exonerated in the manner prescribed by article 1473 C.C.Q.

[384] According to scholarly commentary, contrary to article 1465 C.C.Q., articles 1466 (the act of an animal) and 1467 (ruin of a building) establish a presumption of liability, once the conditions for their implementation have been met, which the owner can escape by proving superior force, third party fault or the victim's fault.[418] As authors Baudouin, Deslauriers and Moore write in the case of the owner of a building, [TRANSLATION] "[n]either the owner's lack of knowledge of the defect, nor his or her lack of fault are sufficient to exonerate the owner, making this regime a presumption of liability,"[419] which is also the case for the owner of an animal (making the necessary adjustments).

[385] The wording of article 1468 C.C.Q. is fairly close to that of articles 1466 and 1467 C.C.Q. in that, firstly, it is not an issue of fault (nor is it in article 1469 C.C.Q.) and, secondly, liability is generated by the relationship between the injury and the act of the animal, the ruin of the building or the safety defect, respectively. In all three cases, liability is established "for injury it [the animal] has caused," "for injury caused by its ruin" and for "injury caused ... by reason of a safety defect," language which is consistent with the idea of a presumption of liability.

[386] Logic would suggest that, faced with all that, the same conclusion should be drawn from article 1468 C.C.Q. as that drawn from articles 1466 and 1467 C.C.Q., namely, the introduction of a presumption of liability attached to the existence of a safety defect.

[387] Of course, in addition to what is prescribed by article 1473 C.C.Q., the manufacturer can assert the ordinary grounds through which one can escape civil liability: there is no injury, the injury was caused by the victim's fault or the fault of a third party or by superior force. However, those are defences which can be set up against the plaintiff even within the framework of a strict liability regime. But otherwise, it cannot escape liability by relying on the lack of knowledge of the defect or danger (other than in the case of the second paragraph of article 1473 2 C.C.Q.), or the lack of fault.

[388] It should be acknowledged, however, that, with respect to a safety defect resulting from

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973 and 1-974.

416 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 898, para. 1-982.

417 *Ross v. Dunstall*, (1921) 62 S.C.R. 393.

418 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, at 911 and 921 *et seq.*, paras. 1-996 and 1-1015 *et seq.* (owner of a building), as well as at 926, 936 and 937–938, paras. 1-1020, 1-1040 and 1-1042 to 1-1046 (owner of an animal).

419 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1 at 911, para. 1-996.

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"the lack of sufficient indications as to the risks and dangers it involves or the means to avoid them," the example at the end of article 1469 C.C.Q., the thing otherwise being free of any defect whatsoever, it is more difficult, at least at first, to speak of no-fault liability to the extent that the manufacturer that does not provide sufficient indications as to the risks and dangers a thing involves or the means to avoid them breaches the duty to inform incumbent upon it and thereby commits a fault. Where the thing does not have any defect, deficiency or failing but nonetheless presents a danger that is not manifest, one might think that proof of the safety defect is part and parcel of the breach of the duty to inform and that the plaintiff must therefore demonstrate the second (i.e., the fault) in order to be able to establish the first.

[389] Upon reflection, however, the *burden* of that demonstration, i.e., the *burden of convincing* in the sense of article 2803 C.C.Q., cannot be on the plaintiff.

[390] Article 1473 C.C.Q. must be considered here. Although injury may result from a safety defect of the product, according to that provision, the manufacturer can escape liability by proving that the victim knew or could have known of the danger and risk or could have foreseen the injury. In other words, the manufacturer must show that the danger was apparent or that it was known or should have been known to the plaintiff. It has the entire burden and, on that point, article 1473 C.C.Q. is very clear.

[391] How can the victim have known of the danger or been able to foresee the injury? Firstly, of course, by the information the manufacturer provides in fulfilling its duty to inform. It quite naturally ensues that the burden of proving the presence and sufficiency of such information, which allow the user to be aware of the danger of the product and avoid it, is on the manufacturer, who is therefore responsible for convincing the court of it. This therefore means that the plaintiff does not have to prove that the safety defect of the product comes from a lack of information and does not bear the onus in this regard.

[392] In other words, article 1473 C.C.Q. allows us to conclude that, even with regard to a safety defect resulting from a lack of indications about the dangers or risks of the product and the means to avoid them, the plaintiff does not have to prove this breach, i.e., the fault (although he or she may do so). As mentioned above, the plaintiff's burden ends with the demonstration that the thing does not afford the security a person is entitled to expect and does not extend to the source of the problem, including when it is due to the lack or insufficiency of the required indications. Once that is demonstrated, the burden of proof is reversed and it is then up to the manufacturer to prove the knowledge the plaintiff had or should have had of the danger or injury, which can be done in particular by proving that it provided the user with all necessary information (and it should be recalled that, for the manufacturer to be exonerated, that information must reach the threshold which allows it to be inferred that the victim of the injury assumed the risk and renounced his or her right to recovery).

[393] But what about the burden of proof when the rules respecting the extracontractual liability of a manufacturer were based on article 1053 C.C.L.C.? Unlike the current regime, at the time, in theory one had to prove not only the danger of the product but also the fault of the manufacturer, a prerequisite for liability, i.e., the existence of some defect or a breach of the manufacturer's duty to inform. Due to the presumption of fact mechanism (see for example *Ross v. Dunstall,*[420]

[420] *Ross v. Dunstall*, (1921) 62 S.C.R. 393.

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Cohen v. Coca-Cola Ltd.[421], *Lambert v. Lastoplex Chemicals*[422] or *Mulco inc. c. La Garantie, compagnie d'assurance de l'Amérique du Nord*,[423]) the courts have gradually lessened the burden of proof of the victim of the harm but, as one author notes, this means of proof was not always used,[424] hence the legislative reform which resulted in articles 1468, 1469 and 1473 C.C.Q. But presumption or not, we can immediately say that in this case the respondents met the burden of proving on a balance of probabilities the fault of the respondents, namely the breach of the manufacturer's duty to inform. That is sufficient to end our discussion of this point.

[394] We will now turn to the issue of causation. What is the burden incumbent on the plaintiff who has proven both harm and a safety defect, as well as, before 1994, fault?

[395] Let us start with the current law.

[396] The wording of the first paragraph of article 1468 *C.C.Q.* is important:

> **1468.** The manufacturer of a movable thing is bound to make reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.
>
> **1468.** Le fabricant d'un bien meuble, même si ce bien est incorporé à un immeuble ou y est placé pour le service ou l'exploitation de celui-ci, est tenu de réparer le préjudice causé à un tiers par le défaut de sécurité du bien.
>
> [Emphasis added.]

[397] The legislator has clarified that what has to be established is that the injury was caused by a safety defect in the thing.

[398] Considering the burden of proof of the existence of a safety defect, which consists in demonstrating that the thing does not afford the expected safety and, therefore, poses an unexpected danger and risk, the plaintiff will have to demonstrate causation by establishing that the danger has materialized and that it is directly connected to the injury. To repeat the examples provided earlier: the explodable bottle exploded, and glass fragments embedded themselves in the user's face and arms; after ingesting the contents of the contaminated can, the consumer contracted severe salmonellosis causing Fiessinger-Leroy-Reiter syndrome; the breast prosthesis tore, causing a discharge that triggered severe inflammation as well as permanent pain and sequelae. The consequence, i.e., the injury, is, in all cases, related to the safety defect, in that there is a direct association between the danger posed by the thing and the type of damage suffered by the plaintiff: in short, it is the materialization of the risk associated with the danger inherent in the thing. Causation is therefore sufficiently established and consequently, the manufacturer is liable.[425]

[399] As noted earlier, the same type of causation is required under articles 1466 and 1467

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421 *Cohen v. Coca-Cola Ltd.*, [1967] S.C.R. 469. See also *Rolland v. Gauthier*, [1944] C.S. 25.

422 *Lambert v. Lastoplex Chemicals*. [1972] S.C.R. 569.

423 *Mulco inc. c. Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68 (C.A.), aff.'g *Garantie (La), Cie d'assurance de l'Amérique du Nord c. Mulco Inc.*, [1985] C.S. 315.

424 Masse, *La responsabilité civile*, *supra* note 313 at 292, para. 70.

425 See Vézina & Maniet, *supra* note 232 at 92.

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C.C.Q.: the owner is bound to make reparation for “injury [the animal] has caused” or “injury caused by [the] ruin [of an immovable],” that is to say, the injury that is the immediate and direct consequence of the animal or the ruin of the immovable (immediate and direct consequence within the meaning of article 1607 C.C.Q., whereby, according to this provision, the “debtor’s default” in itself gives rise to liability). The same applies to the manufacturer.

[400] This is not to say, however, that proof of injury and proof of fault automatically establish causation. Admittedly, that will often be the case, even if only because of a strong presumption of fact, in situations such as the ones described above, where injury is in the nature of trauma that appears at the same time as the danger or closely thereafter. In contrast, it may be more difficult to establish the connection between fault and injury if the injury appears only after a long latency period or requires prolonged use of the thing or when competing factors may just as easily be the cause. Thus, in an action against the manufacturer, consumers of a food product that contained [TRANSLATION] “trans fats” (now banned in Canada) or a highly processed, high-sugar product will not necessarily be able to establish the causal connection between the (assumed) safety defect of the thing and the development of a cardiovascular disease or type 2 diabetes, the causes of which are known to be multifactorial.

[401] Nevertheless, the principle remains the same: to establish causation as required by article 1468 C.C.Q., the plaintiff must prove that the injury constitutes the materialization of the risk associated with the danger inherent in the thing (regardless of the origin of the danger). Nothing more can be required in terms of proof of causation. As stated earlier, given that proof of a safety defect does not require the plaintiff to establish the source of the safety defect, quite logically, he or she cannot be required to establish a connection between the said source and the injury.

[402] This proposition seems obvious, but has enormous significance when the safety defect is not due to a defect, damage or alteration of the thing, but to a lack of sufficient indications as to the danger, risk and means to avoid them. It is between this danger and the injury that the causal connection must be established, rather than between the manufacturer’s breach of the duty to inform and the injury. In other words, the injury must simply be the expression of the materialization of the danger to which the user ran the risk of being exposed by using the product. To take the example of the case at hand, the respondents therefore had to establish a cause and effect relationship between the safety defect (the pathogenic or addictive nature of cigarettes) and the injury (the diseases and addiction caused by smoking cigarettes). That is what is meant by medical causation, which the respondents had to demonstrate.

[403] This assertion is particularly significant in the case at hand, given that one of the main grounds of defence and appeal is that the respondents failed to establish what the appellants have described as “conduct causation”.

[404] Because the appellants have not merely pleaded insufficient medical causation, that is, the cause and effect relationship between smoking cigarettes and the onset, among class members, of various diseases that are generally related to smoking cigarettes (cancer, emphysema, drug addiction). As noted earlier, they have further argued that the respondents have neither collectively nor individually discharged their burden of proving that the class members started or continued to smoke owing to the alleged breach (i.e., not informing and even misleading). They have argued that, in the absence of such evidence, the actions should have

failed.

[405] In the Court's view, article 1468 C.C.Q. did not require the respondents to prove such conduct causation. In fact, given the structure of articles 1468, 1469 and 1473 C.C.Q., the issue of conduct causation, as defined by the appellants, is irrelevant to the issue of the manufacturer's extracontractual civil liability. Let us examine why.

[406] As we have just seen, in order to establish the manufacturer's liability under article 1468 C.C.Q., the plaintiff must demonstrate the safety defect, the injury and the causal relationship between the two. The wording used in the provision is crucial here: the manufacturer is bound to make reparation for injury "caused by reason of a safety defect / *causé [...] par le défaut de sécurité*," which differs from the usual rule, enshrined in the second paragraph of article 1457 C.C.Q., according to which every person is "liable for any injury he causes to another by such fault / *responsable du préjudice qu'elle cause par sa faute à autrui*." We also know that the safety defect lies in the fact that the thing does not offer the degree of safety that one would normally expect, and it is to this, as stated above, that the burden of proof of the plaintiff, who does not have to identify the origin of the safety defect (even though he or she is free to do so), is limited.

[407] That being said, in terms of causation, the only thing that can be required is proof of the causal relationship between the safety defect, i.e., the danger of the thing or of the use thereof, and the injury. What needs to be proved is thus not the causal connection between the injury and the fact (a defect or a breach of the duty to inform) giving rise to the safety defect, but the causal connection between the injury and the safety defect.

[408] In the case at bar, the respondents have demonstrated the safety defect inherent in cigarettes: the product is pathogenic and addictive, with addiction aggravating the danger and increasing the risk of disease. The respondents have also established the injury: cancer (lung, throat) and emphysema in the case of the members of the Blais Class, addiction in the case of the members of the Létourneau Class. According to the trial judge, they have also established, on a balance of probabilities, the cause and effect relationship, medically speaking, between smoking cigarettes and the onset of disease or addiction. While other factors could have caused the occurrence of such pathologies (in particular disease), the judge was of the view that the respondents had duly submitted sufficient evidence of this relationship from a medical point of view. In section IV.1.3.D, the Court will thoroughly examine the issue of whether the judge erred in reaching that conclusion, but that is another matter.

[409] According to the appellants, however, the evidence of such medical causation, assuming it was made (which they dispute), would not have been sufficient. The respondents should also have established that the faults alleged against the appellants (insufficient and deliberately misleading information) are the cause or at least a probable and significant factor in the class members' decision to start or continue smoking (conduct causation). They argue that there are many reasons for an individual's decision in that respect: peer pressure, the example set by other family members, friends, acquaintances or, on the contrary, the desire to defy a social or parental ban, etc. There is no evidence that the class members started or continued to smoke as a result of appellants' advertising, their media interventions or, more generally, their actions, or because they believed, for that reason, that smoking is harmless. Moreover, even if an individual is informed of the dangers of smoking (by his or her doctor, for example, or otherwise), that individual may possibly not give up smoking, in which case the decision could no longer be

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attributed to the appellants' failure.

[410] All of this is quite possible, but it was not for the respondents to demonstrate that this was not the case. At the stage of demonstrating causation between the safety defect and the injury, the appellants' fault, in that they breached their duty to inform, is not necessary: in fact, such fault serves to establish not their liability, but, at best, the safety defect. It is the very existence of this safety defect, insofar as it causes the injury, however, that is the source of the appellants' liability. Bear in mind that, in establishing the defect, the person who suffered injury does not have to prove that he was unaware of the danger associated with the product;[426] instead, the onus is on the manufacturer to prove that he or she was aware of it. This resolves the appellants' allegation that several of the class members were informed by their doctors of the harmfulness of their nicotine addiction (or were aware of it because they themselves were doctors): the burden of proof in this respect rested with the appellants, in accordance with the first paragraph of article 1473 C.C.Q.

[411] Similarly, the respondents did not have to prove that, if the class members had known the danger associated with smoking, they would have decided not to smoke or to quit smoking; they also did not have to demonstrate that it was because of the appellants' actions that the members made these decisions.

[412] Let us take the hypothetical example of an individual who, without having seen any of the appellants' advertisements or without having been influenced by their marketing strategies, started smoking as a teenager because his parents, who were themselves smokers, invited him to do so or, on the contrary, because they forbade him to do so or owing to peer pressure. The fact is that this individual consumes a product that is dangerous and does not provide the safety that one would normally expect: no reasonable person would normally expect the consumption of a product available over the counter (or almost) to cause cancer, emphysema or drug addiction. If that person does indeed develop such a condition, he will have to prove that it is related to his smoking cigarettes and that it is caused by it (medical causation). Of course, the appellants could try to challenge the evidence in that respect by demonstrating, for example, that the lung cancer from which he suffers can be attributed to the fact that he worked all his adult life in an asbestos mine or that his emphysema is of genetic origin.[427] However, their demonstration that this person's decision to smoke and to continue smoking is not in any way attributable to their advertising or their campaign of disinformation would not in any way change their liability, unless, of course, they were able to establish, on a balance of probabilities, one of the grounds of exoneration provided for in article 1473 C.C.Q.

[413] In other words, under the strict liability regime established by article 1468 C.C.Q., the appellants are in principle liable for the injury caused by the cigarettes they marketed, on account of the mere fact that the product did not offer the safety that the user had the right to expect. This is what article 1468 C.C.Q. imposes, and this would be true for any other manufacturer for any other product. Without including the usual grounds of general law (the safety defect is not the cause of the injury; the injury is due to superior force or the fault of a third

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[426] Once again, the plaintiff can, of course, establish that he or she was unaware of the dangers of the product he or she consumed, but is not required to do so.

[427] Panlobular emphysema can indeed result from a genetic predisposition associated with α1-antitrypsin (a protein) deficiency.

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party; there is no injury), their only grounds of exoneration are those of article 1473 C.C.Q. and, in particular, that of the first paragraph of this provision, which would have allowed them to be released by demonstrating that the members were aware of the safety defect, i.e., the danger or injury to which they exposed themselves by smoking cigarettes. There is no room for conduct causation in this situation.

[414] But what about the law applicable prior to 1994? At that time, what was the burden of proof of a person suing a manufacturer owing to the danger posed by a thing?

[415] Under article 1053 C.C.L.C., in principle, it was necessary, as we have seen, to demonstrate the existence and source of the danger, which could be either a defect, giving rise to a presumption of fault on the part of the manufacturer, or a breach of the duty to inform, which, in itself, constituted a fault. Furthermore, it was necessary to establish causation between the fault (in this case, breach of the duty to inform) and the injury. However, the case law at the time indicated that the materialization of the risk associated with the dangerous defect (if any) or the undisclosed danger allowed the court to infer, by presumption of fact, causation between the manufacturer's fault (marketing a product affected by a defect or danger of which the user was not informed) and the injury. This was the case, for example, in *Mulco*,[428] *O.B. c. Lapointe*,[429] *Royal Industries Inc. c. Jones*,[430] and *Cohen v. Coca-Cola Ltd.*[431]

[416] By failing to satisfy its duty to inform, the nature and intensity of which we saw earlier, the manufacturer in fact committed a fault that caused it to be liable in the event that the hidden danger materialized and caused injury. The causation between the fault and the injury was presumed based on the very fact that the danger thus hidden by the manufacturer materialized. In other words, within the meaning of article 1053 C.C.L.C., the materialization of the danger inherent in the thing into injury sufficiently established the cause and effect relationship between the two and, by transitivity, the causation between the injury and the fault (causation that is then necessarily inferred).

[417] That is true not only when the danger resulted from a defect in the thing (as in *Cohen*), but also when the danger arose from the manufacturer's failure to provide the necessary information or instructions. This becomes clear in *Ross v. Dunstall*,[432] *Royal Industries inc. c.*

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428 *Mulco inc. c. Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68 (C.A.), aff'g. *Garantie (La), Cie d'assurance de l'Amérique du Nord c. Mulco Inc.*, [1985] C.S. 315.

429 *O.B. c. Lapointe*, [1987] R.J.Q. 101.

430 *Royal Industries Inc. c. Jones*, [1979] C.A. 561.

431 *Cohen v. Coca-Cola Ltd.*, [1967] S.C.R. 469. This delictual liability case concerned the presumed defect of a thing, but its findings are applicable *mutatis mutandis* to the danger created by a lack of information. Faced with the unexplained explosion of a soft drink bottle, the Supreme Court found that "evidence which was accepted by the learned trial judge created a presumption of fact under art. 1238 of the *Civil Code*, that the explosion of the bottle which caused injury to appellant was due to a defect for which respondent was responsible and that the latter failed to rebut that presumption" (at 473–474). The trial judge had found from this evidence that the victim had handled the bottle properly. There is therefore a double presumption here: that of the existence of a defect and, consequently, of the manufacturer's fault, and that, which results from it, of the causation between the fault and the injury. In the same vein, and perhaps going even further, see *Rolland c. Gauthier*, [1944] C.S. 25.

432 *Ross v. Dunstall*, (1921) 62 S.C.R. 393.

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Jones,[433] *O.B. Canada Inc. c. Lapointe*,[434] *Mulco*[435] and other cases cited above, including the Supreme Court's common law judgment in *Lambert,*[436] which proved to be a seminal case in Quebec. Nowhere in these judgments were the victims required to *positively* prove that the failure to inform explained their behaviour: in fact, that goes without saying. Quite naturally, where the fault consists in a breach of the duty to inform, it will be inferred that 1) if the person had received the information that was to be transmitted to him or her, such person would normally have behaved in such a way as to avoid the danger and protect himself or herself from the injury, and that 2) therefore, the injury, when it is the very manifestation of the hidden danger, is linked to the lack of information, i.e., to the fault.

[418] In the end, whether before or after 1994, the appellants' argument on "conduct causation," borrowed from the field of medical liability, is a red herring. This alleged causation is irrelevant to the extracontractual liability regime established by articles 1468, 1469 and 1473 C.C.Q. and, at the very least, it is not part of the plaintiff's burden of proof. Nor was it under the manufacturer's liability regime as developed on the basis of article 1053 C.C.L.C. in the event of a breach of the manufacturer's duty to inform. There is no need to import into the field of the manufacturer's liability this behavioural dimension specific to the liability of physicians, whose duty to inform is governed by rules that are very different from those imposed on the manufacturer and do not reflect the same dynamic.

[419] In any event, assuming that conduct causation must be taken into account, the onus was on the appellants to show that, even if the members of both classes had known the dangers of smoking, they would nevertheless have decided to start or continue smoking. In a way, this would demonstrate the respondents' fault, or, if one prefers, their acceptance of the risk and injury (articles 1477, 1478 C.C.Q. or previous rule).[437] The respondents therefore did not in any way have the burden of proving that they would not have smoked had they known the dangers of smoking or that it was the appellants' failure that made them decide to smoke or not to stop smoking.

[420] That being said, however, and as will be shown in section IV.1.3.D.vi.b of this judgment, even though they did not have to do so, the respondents have nevertheless established such conduct causation and proven, on a balance of probabilities, that the appellants' actions determined the behaviour of the members of both classes, including at the individual level.

iv. Section 53 C.P.A.

[421] As mentioned above, the respondents did not base their actions on section 53 C.P.A., the provision applicable to this portion of the period in dispute starting April 30, 1980. At the appeal hearing, they explained this by pointing out that they had invoked it during the authorization proceedings, but had not raised it again when they brought their actions, for reasons of

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433 *Royal Industries Inc. c. Jones*, [1979] C.A. 561.

434 *O.B. c. Lapointe*, [1987] R.J.Q. 101.

435 *Mulco inc. c. Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68 (C.A.), aff'g. *Garantie (La), Cie d'assurance de l'Amérique du Nord c. Mulco Inc.*, [1985] C.S. 315, and *Lambert v. Lastoplex Chemicals*, [1972] S.C.R. 569.

436 *Lambert v. Lastoplex Chemicals*, [1972] S.C.R. 569.

437 Considering that the regime of Article 1473 C.C.Q. is not an exception to Article 1477 C.C.Q., but an illustration of it, and considering the second paragraph of Article 1478 C.C.Q.

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prescription that subsequently disappeared with the T.R.D.A., adopted in 2009, the constitutional validity of which was subsequently recognized. They nevertheless stated that, in their opinion, the outcome of the dispute would be the same, given that the trial judge's conclusions are just as justified under section 53 C.P.A. as they are under the articles of the C.C.Q.[438] On their part, while arguing that a judicial contract cannot be changed on appeal and pointing to the difficulty of applying a law that came into force 30 years after the beginning of the Class Period, the appellants maintained that the respondents' claims, examined under section 53 C.P.A., show the same weaknesses, in particular with respect to causation (which has not been established, either medically or with respect to conduct) and members' knowledge of the toxic and addictive effects of smoking.[439]

[422] It must be understood from these remarks that, according to the parties, applying the analytical framework of section 53 C.P.A. to the case, in fact or in law, would not in any way change the debate.

[423] In the Court's view, it is necessary to examine the case from the perspective of this provision, which is of public order and cannot therefore be dismissed on account of the judicial contract between the parties,[440] and which the trial judge should have raised. Moreover, to the extent that the parties seem to recognize that the issues in dispute remain fundamentally the same, there is no obstacle to such consideration, especially since those concerned were able to present their points of view to the Court.

[424] That being said, it should first be noted that the remedy provided for in section 53 C.P.A., which is a contractual remedy,[441] is outside the scope of the second paragraph of article 1458 C.C.Q., by the sole effect of section 270 C.P.A. In fact, as Profs. Jobin and Cumyn have written, [TRANSLATION] "there is no reason to deny such an option between the contractual remedy of the C.P.A. and the extracontractual remedy of the *Civil Code* – consistency requires it,"[442] concluding that [TRANSLATION] "the consumer therefore has a clear option here."[443] Consumers may also base their claims on *both* articles 1468 and 1469 C.C.Q. and on section 53 C.P.A., just as they could concurrently invoke articles 1726 *et seq*. C.C.Q. and section 53 C.P.A., if the situation lends itself to it (the second paragraph of article 1458 C.C.Q. does not prohibit multiple contractual remedies).[444] The same is true with respect to the former law, which permitted

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438 Stenographic notes of November 24, 2016 (SténoFac) at 155.

439 Stenographic notes of November 21, 2016 (SténoFac) at 151 *et seq*.

440 In the same manner as the parties to a proceeding, if they were subject to the second paragraph of Article 1458 C.C.Q., could not circumvent the prohibition against the option and choose the extracontractual route if they have a contractual remedy.

441 See also section 2 C.P.A., which delimits the scope of application of the Act.

442 Jobin & Cumyn, *supra* note 203 at 359 *in fine*, para. 243.

443 Jobin & Cumyn, *supra* note 203 at 359 *in fine*, para. 243.

444 The case law has noted the similarity between the remedy introduced by the first paragraph of section 53 C.P.A. and the remedy based on Articles 1726 *et seq.* C.C.Q., given that in both cases the actions are based on a latent defect. See e.g., *Fortin c. Mazda Canada inc.*, 2016 QCCA 31 at paras. 57 to 60 (citing *Martin c. Pierre St-Cyr Auto caravanes ltée*, 2010 QCCA 420). In light of section 54 C.P.A., however, it seems that the remedy provided for in the first paragraph of section 53 would go beyond the obligations guaranteed by sections 37 (normal use) and 38 (durability) of the C.P.A. and would include defects that are not covered by either of these provisions. In this regard, see Edwards, *supra* note 239 at 183–184, para. 387; Thibaudeau, *supra* note 250 at 280, para. 577, and at 316, para. 645;

accumulation.

[425] The following was the wording of section 53 when the C.P.A. was adopted (1978) and came into force (1980):

53. A consumer who has entered into a contract with a merchant is entitled to exercise directly against the merchant or the manufacturer a recourse based on a latent defect in the goods forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination.	**53.** Le consommateur qui a contracté avec un commerçant a le droit d'exercer directement contre le commerçant ou contre le manufacturier un recours fondé sur un vice caché du bien qui a fait l'objet du contrat, sauf si le consommateur pouvait déceler ce vice par un examen ordinaire.
The same rule applies where there is a lack of instructions necessary for the protection of the user against a risk or danger of which he would otherwise be unaware.	Il en est ainsi pour le défaut d'indications nécessaires à la protection de l'utilisateur contre un risque ou un danger dont il ne pouvait lui-même se rendre compte.
The merchant or the manufacturer shall not plead that he was unaware of the defect or lack of instructions.	Ni le commerçant, ni le manufacturier ne peuvent alléguer le fait qu'ils ignoraient ce vice ou ce défaut.
The rights of action against the manufacturer may be exercised by any consumer who is a subsequent purchaser of the goods.	Le recours contre le manufacturier peut être exercé par un consommateur acquéreur subséquent du bien.

Pierre-Claude Lafond, *Droit de la protection du consommateur : théorie et pratique* (Montreal: Yvon Blais, 2015) at 185–186, para. 436. The case law seems to see it as the different facets of the same remedy. There is no need to examine this issue, as the remedy in this case can be based only on the second paragraph of section 53 C.P.A.

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[426] The following is the current wording, which came into force in October 1999 and which differs from the previous version only in that the legislator has replaced "*manufacturier*" with "*fabricant*" in the French version, while the English version has remained unchanged:

53. A consumer who has entered into a contract with a merchant is entitled to exercise directly against the merchant or the manufacturer a recourse based on a latent defect in the goods forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination.	**53.** Le consommateur qui a contracté avec un commerçant a le droit d'exercer directement contre le commerçant ou contre le fabricant un recours fondé sur un vice caché du bien qui a fait l'objet du contrat, sauf si le consommateur pouvait déceler ce vice par un examen ordinaire.
The same rule applies where there is a lack of instructions necessary for the protection of the user against a risk or danger of which he would otherwise be unaware.	Il en est ainsi pour le défaut d'indications nécessaires à la protection de l'utilisateur contre un risque ou un danger dont il ne pouvait lui-même se rendre compte.
The merchant or the manufacturer shall not plead that he was unaware of the defect or lack of instructions.	Ni le commerçant, ni le fabricant ne peuvent alléguer le fait qu'ils ignoraient ce vice ou ce défaut.
The rights of action against the manufacturer may be exercised by any consumer who is a subsequent purchaser of the goods.	Le recours contre le fabricant peut être exercé par un consommateur acquéreur subséquent du bien.

[427] This provision, like all the provisions of the C.P.A., must be given a broad and generous interpretation to ensure the achievement of the objectives pursued by a legislator concerned with correcting an economic and information imbalance between consumers and merchants or manufacturers, from a perspective of social justice.[445]

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[445] See in general section 41 of the *Interpretation Act*, CQLR, c I-16. On the principle of interpretation applicable to the C.P.A., in light of its objectives, a principle that is not the subject of any controversy, see e.g., *Richard v. Time Inc.*, 2012 SCC 8; *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333; *Nichols c. Toyota Drummondville (1982) inc.,* [1995] R.J.Q. 746 (C.A.). Lafond, *supra* note 444 in particular at 3, paras. 1 *et seq*.; Nicole L'Heureux and Marc Lacoursière, *Droit de la consommation*, 6th ed (Cowansville, Qc.: Yvon Blais, 2011) in particular at 21 *et seq.*, para. 15; Patricia Galindo da Fonseca, "Principes directeurs du droit de la consommation", in *Droit de la consommation et de la concurrence*, fasc. 1, JurisClasseur Québec

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[428] With respect to the manufacturer, the first and fourth paragraphs of this provision offer the consumer, who is either the purchaser or subsequent purchaser of the goods, a *warranty* against latent defects,[446] which is both comparable and superior to that of articles 1522 *et seq.* C.C.L.C. or 1726 *et seq.* C.C.Q.; they also offer the consumer a direct remedy against the manufacturer. The same rule applies where there is a lack of instructions necessary for the user's protection against a risk or danger of which the user would otherwise be unaware: just as in the first paragraph, a consumer, whether the purchaser or subsequent purchaser, who exercises a right specific to him or her,[447] may sue the manufacturer of the dangerous goods (even if they are not otherwise defective). In this respect, the manufacturer is bound by an obligation of the same kind as that of the first paragraph: it *warrants* that the goods purchased are free from a hidden danger or risk, of which it had the obligation to inform the consumer.[448]

[429] This obligation and this right of action of a consumer who has acquired dangerous goods remind us of articles 1468 and 1469 C.C.Q.*,* which are, in a way, the extracontractual counterpart,[449] and there is not only a semantic coincidence in the similarity between the "lack of instructions necessary for the protection of the user against a risk or danger of which he would otherwise be unaware", which triggers the application of the second paragraph of section 53 C.P.A.*,* and the safety defect resulting from "the lack of sufficient indications as to the risks and dangers it involves or as to the means to avoid them" (article 1469 *in fine* C.C.Q.), which triggers that of article 1468 C.C.Q. Instead, it is a deliberate convergence, intended to strengthen the protection of users against dangerous goods, given that the legislator has introduced into the C.C.Q. extracontractual liability that reflects the regime of the second paragraph of section 53 C.P.A. From this perspective, just like articles 1468 and 1469 C.C.Q., section 53 C.P.A. imposes on the manufacturer the obligation to ensure the safety of the user (a consumer) of the goods it markets, by providing adequate information. It should be stressed here that the intensity of this obligation to inform is not any less than that of the general law: like the latter, its precise content varies depending on the circumstances (type of goods and danger and other factors already mentioned), but it imposes, in all cases, the duty to provide accurate, comprehensible and complete information, which enables the consumer to correctly measure and accept the danger and the risk of injury to which he or she is exposed.[450]

[430] The third paragraph of section 53 C.P.A. adds that the manufacturer cannot plead that it

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(Montreal: LexisNexis Canada, 2014, looseleaf, update no. 7, August 2018) at 1/3 *et seq.*, paras. 1 *et seq.*; Claude Masse, *Loi sur la protection du consommateur : analyse et commentaires* (Cowansville, Qc., Yvon Blais, 1999) at 94.

446 On the qualification of warranty, see in particular Thibaudeau, *supra* note 250 at 309 *et seq.*, paras. 635 *et seq.*.

447 In its first and second paragraphs, section 53 C.P.A. confers on the consumer a direct, personal right of action arising from the law rather than from a transfer of the warranty from the first or last purchaser. In this regard, see in particular Jobin & Cumyn, *supra* note 230 at 349 *in fine* and 350, para. 238; Lafond, *supra* note 444 at para. 432.

448 On the characterization of the warranty attached to the second paragraph of section 53 C.P.A.., see in particular Thibaudeau, *supra* note 250 at 429–431, paras. 852 and 854 and at 434, para. 861.

449 On the extension of this warranty to the safety defect, see also Vezina & Maniet, *supra* note 232 at 77. Along with the *European Directive*, section 53 C.P.A. is in fact one of the sources of Articles 1468, 1469 and 1473 C.C.Q.

450 See *supra*, in particular at paras. [301] and [326] *et seq*.. With respect to section 53 C.P.A., see also Vézina, *Droit de la consommation*, *supra* note 244 at 4/18 to 4/20, para. 27.

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was unaware of the defect or danger to avoid liability for its breach of the duty to ensure the safety of consumers. The manufacturer is irrefutably deemed to have known of the defects or dangers in question,[451] which it therefore has an absolute obligation to disclose. The manufacturer is therefore subject to a very strict rule (which is also part of the characterization of "warranty" under section 53 C.P.A.) and, unlike under the general law, it cannot excuse itself for its ignorance by arguing that scientific or technical knowledge at the time of marketing (or even subsequent thereto) did not allow it to detect the danger in question (or the defect, as the same rule applies in this case): the [TRANSLATION] "development risk" defence contemplated in the second paragraph of article 1473 and, possibly, the prior case law cannot be raised in objection to an action based on section 53 C.P.A.[452] In the Court's view, this has an immediate, albeit implicit, impact on the extent of the manufacturer's duty to inform: the manufacturer has the obligation to inform users of the goods it markets of the dangers discovered after the goods were initially marketed, which dangers the manufacturer is deemed to have always known. The third paragraph of section 53 C.P.A. therefore has a similar effect in this respect to that of the second paragraph *in fine* of article 1473 C.C.Q., which clearly imposes this obligation.

[431] What type of recourse does the consumer have against the manufacturer in the event of a safety defect under the second paragraph of section 53 C.P.A.? Section 272 C.P.A. provides a range of options:[453] specific performance of the opposing party's obligation, the reduction of his or her own obligation, the rescission, setting aside or annulment of the contract, compensatory damages (in the event that the use of the goods has caused him injury) and punitive damages.[454] It is also understood that, when the consumer is a subsequent purchaser who suffers injury and sues the manufacturer (with whom he has not entered into a contract), the appropriate remedy is an action for damages (with or without punitive damages).[455] If there is no injury, only punitive damages may be claimed from the manufacturer.[456]

[432] In short, section 53 C.P.A. establishes a true warranty in favour of the consumer, which applies not only to the latent defects contemplated in the first paragraph, but also to the safety defect contemplated in the second paragraph, which is caused by a breach of the manufacturer's duty to inform.[457]

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451 On this absolute presumption of knowledge, see *Véranda Industries inc. c. Beaver Lumber Co.*, [1992] R.J.Q. 1763 (C.A.) at 1768–1769.

452 In this regard, see Jobin & Cumyn, *supra* note 203 at 159–160, para. 124, at 300–301, para. 212, at 350, para. 238, and at 358, para. 243; Vézina, *Droit de la consommation*, *supra* note 244 at 4/23, para. 31; Vézina, *Mélanges Claude Masse*, *supra* note 359 at 448–449. See also *Fédération, compagnie d'assurances du Canada c. Joseph Élie ltée*, 2008 QCCA 582 at paras. 39 to 42 (on the absolute nature of the third paragraph of section 53 C.P.A.).

453 On the application of section 272 C.P.A. and the various forms that may be taken, as applicable, by the right of action created by section 53 C.P.A., see *Véranda Industries inc. c. Beaver Lumber Co.*, [1992] R.J.Q. 1763 (C.A.) at 1769.

454 Referred to as "exemplary / *exemplaires*" in the original version of section 272 C.P.A. In the wake of Article 1621 C.C.Q., such damages became "punitive / *punitifs*" in 1999.

455 *Véranda Industries inc. c. Beaver Lumber Co.*, [1992] R.J.Q. 1763 (C.A.) at 1769.

456 See Vézina, *Droit de la consommation*, *supra* note 244 at 4/22, para. 30.

457 On the warranty provided by the second paragraph of section 53 C.P.A. in the event of a safety defect resulting from insufficient or non-existent information, see in general Lafond, *supra* note 447, at 195–196, paras. 466 to 468; Jobin & Cumyn, *supra* note 203 at 293, para. 207, and at 358, para. 243; L.

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[433] Let us now take a closer look at the requirements for the consumer's remedy under this warranty and the burden of proof incumbent on both parties. Given the subject matter of the appeals before the Court, this review will focus on the second paragraph of section 53 C.P.A., within the context of an action for damages brought against the manufacturer owing to injury resulting from the use of the goods.

[434] In principle, the plaintiff first has to establish that his claim falls within the scope of the C.P.A. Section 53 protects only a "consumer / *consommateur*" (a natural person, according to para. 1(*e*) C.P.A.) who, for personal use (para. 1(*e*) C.P.A. *a contrario*),[458] purchases the "goods / *bien*" – movable in this case (para. 1(*d*) C.P.A.) – marketed by a manufacturer (para. 1(*g*) C.P.A.)[459] from a merchant[460] (a natural or legal person acting for commercial purposes).[461] The person who claims to be entitled to invoke it must, of course, establish the various parameters,[462] which is usually not problematic. It is this person who has the burden of proof in this respect, which the manufacturer can, of course, try to contradict. It appears from the evidence in this case that the members of both classes are consumers within the meaning of section 53 C.P.A.

[435] A consumer who bases his or her action for damages on the second paragraph of section 53 C.P.A. must also establish the danger relating to the goods, without having to identify the source, as well as the injury resulting from the use of the goods, which injury must be the materialization of the danger in question.

[436] Apart from contradicting the consumer's evidence of the existence of the danger or injury, or the causal connection between the danger and the injury,[463] the manufacturer has only one ground of defence, related to the knowledge the consumer had or could have had of the danger in question: on the one hand, and this emerges *a contrario* from the wording of the second paragraph of section 53 C.P.A., the manufacturer can establish that the danger was apparent

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Thibaudeau, *supra* note 250 at 428 *et seq*., paras. 850 *et seq*..

458 Regarding the "consumer / *consommateur*" for the purposes of the C.P.A., see in general P.-C. Lafond, *supra* note 444 at paras. 118 *et seq*.

459 According to *Véranda Industries inc. c. Beaver Lumber Co.*, [1992] R.J.Q. 1763 (C.A.) at 1769 *in fine*, the third party to a contract of sale (for example, the spouse or child of a consumer who purchased the goods) cannot act on the authority of section 53 C.P.A. to sue the manufacturer for redress for the injury caused by the goods (which seems logical, especially since articles 1468 and 1469 C.C.Q. henceforth provide a remedy for such third parties). However, the controversy seems to persist. See Lafond, *supra* note 444 at 195–196, para. 468

460 Interestingly enough, the French version of section 1 C.P.A. does not define "merchant", while the English version includes an additional paragraph that defines "merchant" as "any person doing business or extending credit in the course of his business" (this is an inconsistency noted by Prof. Lafond in the above-mentioned book, *supra* note 444 at para. 133). With respect to the notion of "merchant / *commerçant*", see L'Heureux & Lacoursière, *supra* note 445 at 47–51, para. 37; L. Thibaudeau, *supra* note 250 at 289 *in fine et seq*., paras. 597 *et seq.*; Lafond, *supra* note 445 at 64 *et seq*., paras 133 *et seq*.

461 Such a contract of purchase/sale is a "consumer contract / *contrat de consommation*" within the meaning of article 1384 C.C.Q.

462 See, for example, *Richard v. Time Inc.*, 2012 SCC 8 at paras. 104 and 105.

463 Therefore (and these are the usual grounds in such a matter, according to the general law), the manufacturer can establish that it is not the materialization of the danger relating to the object that caused the injury, but rather that the injury resulted from superior force, the action of a third party or the fault of the consumer himself or herself.

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and that the consumer should have been aware of it; on the other hand, and even though the provision does not expressly say so, the manufacturer can show that, even though it may not be apparent, the danger was, in fact, known or should have been known to the consumer. The burden of establishing one or the other rests with the manufacturer, as is the case under the general law.

[437] This burden arises from the very nature of section 53 C.P.A., which, as we know, establishes an obligation of warranty: warranty of quality, in the first paragraph and, by extension ("the same rule applies / *il en est ainsi*," as set out in the second paragraph), warranty of safety. In principle, the creditor of an obligation of warranty has to establish only a lack of result (evidence that the debtor can, of course, try to contradict), without having to establish the source or origin. In addition, once the lack of result has been proved (i.e., the conditions that trigger the warranty have been established), the debtor of the obligation has a single ground of defence, which consists in demonstrating that the [TRANSLATION] "breach of obligation is not such a breach, that it [TRANSLATION] 'falls completely outside the scope of the obligation assumed.'"[464] When transposed to the second paragraph of section 53 C.P.A., this principle means that a consumer who sues a manufacturer must prove the existence of the danger posed by the goods, which the manufacturer can obviously contradict.[465] When the safety defect (i.e., the danger or risk) is established, however, the burden of proof is, of course, reversed. The onus is then on the manufacturer to demonstrate that the danger was apparent or that it was known to the consumer or that it should have been known.

[438] One can approach things from a different angle, but doing so leads to the same result. Therefore, according to the first paragraph of section 53 C.P.A. (reproduced again below for convenience):

53. A consumer who has entered into a contract with a merchant is entitled to exercise directly against the merchant or the manufacturer a recourse based on a latent defect in the goods forming the object of the contract, unless the consumer could have discovered the defect by an ordinary examination.	**53.** Le consommateur qui a contracté avec un commerçant a le droit d'exercer directement contre le commerçant ou contre le fabricant un recours fondé sur un vice caché du bien qui a fait l'objet du contrat, sauf si le consommateur pouvait déceler ce vice par un examen ordinaire.

[439] Here, the legislator has expressed a principle, namely the consumer's right to sue the merchant or the manufacturer if the goods are defective, and an exception, namely that this right does not exist if the defect could have been discovered by an ordinary examination (in other words, if the defect was apparent and not latent). According to the usual rules of interpretation and proof, a consumer who wishes to rely on this principle must prove the facts on which the

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[464] Lluelles & Moore, *supra* note 215 at 55, para. 114.

[465] We can draw an analogy here with *Martin c. Pierre St-Cyr Auto caravanes ltee,* 2010 QCCA 420, where, in an action based on the first paragraph of section 53 C.P.A. and articles 1726 and 1730 C.C.Q., the seller and the manufacturer succeeded, with their rebuttal evidence, in refuting the evidence presented by the appellants, who were trying to demonstrate a loss of use of their motorhome to obtain the rescission of the sale. The trial judge concluded that, at the time they brought their action, there was no such defect, as all the defects identified in the past had been repaired and did not reflect the required degree of seriousness. The Court confirmed this finding.

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right he alleges is based by establishing the defect in the goods (article 2803, para. 1 C.C.Q.), and it will be up to the manufacturer being sued to prove the non-existence or extinction of such right by proving that the consumer should have discovered the defect, given that it was apparent, or that the consumer was aware of the defect (article 2803, para. 2 C.C.Q.).

[440] The warranty of section 53 extends to the safety defect, as indicated in the second paragraph:

> The same rule applies where there is a lack of instructions necessary for the protection of the user against a risk or danger of which he would otherwise be unaware.
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> Il en est ainsi pour le défaut d'indications nécessaires à la protection de l'utilisateur contre un risque ou un danger dont il ne pouvait lui-même se rendre compte.

[441] If "[t]he same rule applies" (if "*[i]l en est ainsi*") to goods that pose a danger, it can therefore be concluded that, once again, once the consumer has proved the danger, it is up to the manufacturer to demonstrate that the consumer could have become aware of it himself or herself, in particular owing to the instructions he or she was given or otherwise, or that the consumer actually knew of the defect. In short, the principle relied upon by the consumer and the exception claimed by the manufacturer are the same as under the first paragraph of section 53: the consumer has the burden of proving the basis of his or her right (the existence of the danger), and the manufacturer that of the exception (the danger was apparent or the consumer knew of it).

[442] In short, whether owing to the nature of the obligation imposed on the manufacturer by section 53 C.P.A. (obligation of warranty) or to the very wording of the provision, the burden of establishing that the defect was apparent or that the consumer knew of it rests on the manufacturer.

[443] If would be surprising if section 53 C.P.A., which creates a more generous regime than the general law,[466] imposed on a consumer who sues a manufacturer a heavier burden than that of articles 1468, 1469 and 1473 or 1726 and 1730 C.C.Q. The case law clearly shows the connections between the three regimes (despite the extracontractual nature of one and the contractual nature of the others) and their consistency in principle, despite their few differences. As a result, the manufacturer has the burden of proving that the safety defect was apparent or that the consumer knew about it or should have known about it.[467]

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[466] See, in particular Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 2, *supra* note 241 at 376, paras. 2-359.

[467] It is true that in *Fortin c. Mazda Canada Inc.*, 2016 QCCA 31 at paras. 70, 73 and 74, where the Court was asked to dispose of a case involving sections 37 and 53, para. 1, C.P.A., the Court suggested that it would be for the consumer to prove that he or she had been unaware of the defect in the goods. However, a careful reading of the judgment puts this impression into perspective, given that para. 73 refers to a passage from scholarly commentary indicating that it is for the seller or manufacturer to prove that the defect was known to the purchaser at the time of purchase (Rousseau-Houle, *supra* note 373 at 134). Moreover, in this case, the lack of knowledge of the defect in the goods (a door lock problem in a certain model of motor vehicle) was evident from all of the evidence, regardless of the burden of proof.

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[444] But let us return to the practical examination of the twofold defence (apparent danger, known danger) available to the manufacturer. If the manufacturer intends to demonstrate that the danger was apparent, how should it proceed?

[445] The first paragraph of section 53 C.P.A. provides that the consumer has no recourse if he or she could have discovered the defect by an "ordinary examination / *examen ordinaire*" of the goods. The same rule applies to the second paragraph: a consumer who purchases dangerous, albeit non-defective, goods has no recourse against the manufacturer (or the merchant more generally) if he or she could have become aware of such danger by an ordinary examination.[468] The manufacturer can therefore defend itself against the consumer's action by establishing that such an examination would have revealed the danger, which was therefore apparent.

[446] And what is an ordinary examination?

[447] According to the case law developed pursuant to the second paragraph of article 1726 C.C.Q., a reasonable purchaser, normally prudent or diligent, will pay attention to the object he or she purchases and will therefore examine it before purchasing it. However, the examination the purchaser will carry out is not a thorough inspection of the goods, but rather a basic, quick and, on the whole, superficial inspection, the exact extent of which varies according to the nature of the goods and their presentation (one does not inspect a house one purchases in the same manner as a pre-packaged meal, and prescription drugs are not inspected in the same manner as a toothbrush or a computer in the same manner as a bicycle), taking into account the claims made by the seller (or manufacturer), which, as we will recall, may cover up what would otherwise have been apparent.[469] The presence of an expert, at least for movable property, is usually unnecessary, which is perfectly in line with the idea that the seller, in particular in the case of a professional seller or the manufacturer, knows the goods much better than the purchaser and has a duty to inform the purchaser of any inherent defect, which he is presumed to know: the purpose or result of the purchaser's obligation to examine the goods cannot be to release the seller or the manufacturer from his own obligation to inform. In short, the issue of whether or not the defect is apparent is resolved by applying an objective standard, *in abstracto*, i.e., that of the average purchaser, a reasonably prudent and diligent person, in the same circumstances.

[448] The same standard applies to the first paragraph of article 1473 C.C.Q. and to the demonstration that the user could have been fully aware of the danger or foreseen the injury by a basic examination of the object.

[449] By analogy, the same kind of objective standard should guide the interpretation of section 53 C.P.A.: an ordinary examination under this provision is the *superficial examination* conducted by the *average consumer* in the same circumstances. The defect (para. 1) or the danger (para.

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[468] Jobin & Cumyn, *supra* note 203 at 159– 60, para. 124: [TRANSLATION] "For the sake of consistency, the test of 'ordinary examination' of the goods by the purchaser, set out in the preceding paragraph of the same section 53, also applies here."

[469] With respect to the normal examination to be carried out by a purchaser and the effect of false information provided by the seller, see *Placements Jacpar inc. c. Benzakour*, *Placement Jacpar Inc. c. Benzakour*, [1989] R.J.Q. 2309 (C.A.) at 2315–2316, the teachings of which apply to article 1726 C.C.Q.

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2) that such an examination (whether or not it took place) would have revealed will therefore be apparent.

[450] However, in contrast with the general law, the standard here refers not to the ordinary and reasonable purchaser or user, but to a *credulous and inexperienced* purchaser: this is the definition of the *average consumer*, who will certainly miss defects or dangers that the buyer of article 1726 C.C.Q. (or article 1522 C.C.L.C.) or the user of article 1473 C.C.Q. (or the previously applicable law) would have detected.

[451] The Supreme Court endorsed the credulous and inexperienced consumer standard in *Richard v. Time Inc.*[470] Granted, in that case, the Court was concern with Title II ("Business Practices") of the C.P.A., rather than section 53 C.P.A., which was not at issue in this case. More specifically, it examined what constitutes a "general impression" within the meaning of section 218 C.P.A., which determines whether or not a representation constitutes a prohibited practice. There is no reason, however, to define the average or ordinary consumer differently depending on whether one is dealing with Title II of the C.P.A. or Title I (which includes section 53 C.P.A.) or another title. Whether the issue is to assess the nature of a representation, conduct or, as in this case, an examination, it must be done with the average consumer in mind, who is a credulous and inexperienced person.[471] In *Time*, LeBel and Cromwell JJ., for the Court, wrote as follows in this regard:

> [65] The *C.P.A.* is one of a number of statutes enacted to protect Canadian consumers. The courts that have applied these statutes have often used the average consumer test. In conformity with the objective of protection that underlies such legislation, the courts have assumed that the average consumer is not very sophisticated.
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> [66] This Court's decisions relating to trade-marks provide a good example of this interpretive approach. In *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772, the Court was asked to clarify the standard to be used by the courts to determine whether a trade-mark causes confusion with a registered trade-mark. Binnie J., writing for the Court, concluded that the average consumers protected by the *Trade-marks Act* are "ordinary hurried purchasers" (para. 56). He explained that "[t]he standard is not that of people 'who never notice anything' but of persons who take no more than 'ordinary care to observe that which is staring them in the face'" (para. 58).
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> [67] The general impression test provided for in s. 218 *C.P.A.* must be applied from a perspective similar to that of "ordinary hurried purchasers", that is, consumers who take no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement. The courts must not conduct their analysis from the perspective of a careful and diligent consumer.

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[470] *Richard v. Time Inc.*, 2012 SCC 8.

[471] According to Thibaudeau, the standard of the credulous and inexperienced person applies to the examination conducted under the first paragraph of section 53 C.P.A.: Thibaudeau, *supra* note 250 at 337–338, para. 682. It cannot be any other way for the purposes of the second paragraph of this provision.

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> [68] Obviously, the adjectives used to describe the average consumer may vary from one statute to another. Such variations reflect the diversity of economic realities to which different statutes apply and of their objectives. The most important thing is not the adjectives used, but the level of sophistication expected of the consumer.
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> [71] Thus, in Quebec consumer law, the expression "average consumer" does not refer to a reasonably prudent and diligent person, let alone a well-informed person. To meet the objectives of the *C.P.A.,* the courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations.
>
> [72] The words "credulous and inexperienced" therefore describe the average consumer for the purposes of the *C.P.A.* This description of the average consumer is consistent with the legislature's intention to protect vulnerable persons from the dangers of certain advertising techniques. The word "credulous" reflects the fact that the average consumer is prepared to trust merchants on the basis of the general impression conveyed to him or her by their advertisements. However, it does not suggest that the average consumer is incapable of understanding the literal meaning of the words used in an advertisement if the general layout of the advertisement does not render those words unintelligible.

[452] The standard is clear: "The words 'credulous and inexperienced' therefore describe the average consumer for the purposes of the *C.P.A.*," a person "who is not very sophisticated," who observes only "that which is staring [him or her] in the face."

[453] After a cursory examination of the goods, the credulous and inexperienced consumer will not necessarily notice what the prudent and diligent buyer or user of the *Civil Code* would have discovered. This further increases the burden on the manufacturer who, in accordance with the second paragraph of section 53 C.P.A., wishes to demonstrate that the danger is apparent: we are dealing here with what is clear and blatant, what is obvious even to a person who is not very sophisticated and allows such person to accurately assess the risk and injury awaiting him or her – and which the person therefore accepts – if he or she fails to take the necessary precautions.

[454] If the manufacturer fails to demonstrate that the danger is apparent, according to this standard, the manufacturer can still demonstrate that the consumer was aware of it at the time of purchase. It is true that section 53 C.P.A. does not expressly provide for this defence; it is, however, self-evident: the legislator cannot have intended to extend the protection of this provision to anyone who is aware of the danger (or defect), even if it is not apparent upon examination of the goods. To be covered by the second paragraph of section 53 C.P.A., the danger must [TRANSLATION] "be both hidden [that is to say, not be apparent] and unknown to the purchaser:"[472] if the danger is known, it is no longer covered by the legislative provision. The wording of the provision can hardly be interpreted otherwise: in fact, a danger known to the consumer or that the consumer should have known cannot be considered a danger, whether or not the goods were examined. In this regard, section 53 C.P.A. is consistent with the rules of the general law regarding safety defects and latent defects.

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[472] L'Heureux & Lacoursière, *supra* note 445 at 109, para. 92.

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[455] Unlike the objective standard of the average consumer, the evidence required here is that of subjective knowledge: the danger was not apparent, but the consumer was nevertheless aware of it (the degree of knowledge required is always that which makes it possible to be fully aware of the danger and to accept the risk of injury to which one is exposed). There are various reasons for such knowledge of the danger, for example (and the following list is by no means exhaustive):

> - the necessary instructions have been affixed to the goods and the consumer has read and understood them;
>
> - even if, hypothetically, the manufacturer has not made the information available to users, the seller has explained the danger and how to protect oneself against it to the consumer before he or she purchased the goods;
>
> - even if the consumer has purchased the goods for personal use, he or she regularly uses goods of the same kind in his or her professional life and has a clear idea of their characteristics.

[456] A final issue arises with respect to the apparent nature of the danger or the consumer's subjective knowledge of the danger at the time of purchase: what about generally known danger, danger that is well known, i.e., [TRANSLATION] "known in a sure and certain manner by a large number of people"?[473] Should such a danger be classified as one of which the consumer could have become aware by himself or herself by ordinary examination? Or is it instead a fact giving rise to a presumption of subjective knowledge by the consumer, meaning that a fact that is common knowledge is presumed to be known to everyone?

[457] In fact, both answers are possible, depending on the nature of the danger and the goods (and the same comment applies *mutatis mutandis* to article 1473 C.C.Q. or the prior case law equivalent). The average consumer, even if credulous and inexperienced, should be aware of the danger associated with certain visible characteristics of goods, and the fact that, after a brief examination, he or she can observe such characteristics logically implies knowledge of the danger associated with them as well as knowledge of how to protect himself or herself from it (the logical implication itself constitutes a form of presumption within the meaning of articles 2846 and 2849 C.C.Q., which is part of the objective test here).[474] Moreover, it is possible that the danger associated with the goods cannot be detected by a cursory examination of the goods, but is nevertheless widely known and generally known to consumers:[475] in accordance with articles 2846 and 2849 C.C.Q., one can draw the inference from such general knowledge that the danger, as well as the means to protect oneself from it, are subjectively known – or more accurately, are presumed to be known – to a consumer who sues a manufacturer, an inference

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[473] *Le Grand Robert de la langue française* (Paris: Dictionnaires Le Robert, 2017), online edition, 4.1, sub verbo "notoire."

[474] One might think of certain kitchen items (meat knife, mandoline) or gardening tools (pruning shears) with a sharp blade: a brief visual examination is generally sufficient to determine the sharpness of the item and, logically, the knowledge of the danger associated with this characteristic, even with normal use of the goods.

[475] That is what the appellants have claimed: the toxicity of smoking is not apparent, but it is common knowledge and is therefore presumed to be known to everyone; everyone should have known it.

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that is in line with what is normal.[476]

[458] Finally, and on another note, let us reiterate that, just as in the context of articles 1468, 1479 and 1473 C.C.Q. (themselves modelled in this respect on articles 1726 C.C.Q. and previously 1522 C.C.L.C.), the manufacturer's or the merchant's representations and warranties may cause a danger (or a defect) that would otherwise have been apparent to be legally hidden or neutralize the knowledge that the consumer could have had of it. Therefore, to take this example, a breach under sections 215 and following C.P.A. (consider sections 218, 219 or 221) may defeat the knowledge defence a manufacturer may have wanted to raise against the consumer.

[459] In short, if it is up to the consumer to demonstrate the danger posed by the goods, it is for the manufacturer (or merchant) to establish that it was apparent after ordinary examination[477] or that it was known to the consumer or should have been known. This is the only ground of exoneration that the manufacturer can raise against the consumer's claim, given that, as we have seen, the manufacturer cannot assert the development risk enshrined, under the extracontractual liability regime, in the second paragraph of article 1473 C.C.Q.

[460] As for the rest, as is the case under article 1468 C.C.Q., a consumer who claims compensatory damages must establish the injury resulting from the danger in question and the causal connection between the two. The manufacturer can defend itself by trying to establish that the injury is due to another cause and, more specifically, that it is due to the fault of the consumer, the intervention of a third party or superior force. It should be noted that, as in the case of extracontractual liability, the manufacturer cannot blame the consumer for not having used the goods properly if such inappropriate use is due to a lack of instructions necessary for safe use. In that case, since the manufacturer has created the conditions for misuse and the resulting injury through its failure to inform, the manufacturer remains liable for the injury.

[461] One final observation: the "conduct causation" argument put forward by the appellants must be addressed here, *a fortiori*, in the same manner it was addressed for the purposes of the extracontractual liability regime discussed above.

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[476] On the presumption of normality, see Jean-Claude Royer, *La preuve civile*, 5th ed. by Catherine Piché (Montreal: Yvon Blais, 2016) at paras. 156 *et seq*.; Léo Ducharme, *Précis de la preuve,* 6th ed. (Montreal, Wilson & Lafleur, 2005) at paras. 120 *et seq*.

[477] On the application of the standard of "ordinary examination" in the second paragraph of section 53 C.P.A., see Jobin & Cumyn, *supra* note 203 at 159 *in fine* and 160, para. 124.

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D. Summary of the applicable regimes

[462] A brief summary of the applicable regimes is in order at this stage for a proper understanding of the next chapter.

[463] First, with respect to the period prior to 1994, the appellants' liability could be sought under article 1053 C.C.L.C., on the basis of a fault (the appellants concealed and then minimized the dangers of smoking and misled users and potential users as to the toxic and addictive effects of smoking, thus failing to satisfy their obligation to inform and thereby committing a fault), injury (lung or throat cancer, emphysema, addiction among the class members) and a causal connection between such fault and the injury, which is inferred from the cause and effect relationship between the use of the dangerous product and the injury, thus sanctioning the safety defect resulting from the failure to inform.

[464] Even if it had been possible at that time to sue the appellants on a contractual basis (in particular, on the basis of the warranty against latent defects, articles 1522 and following C.C.L.C.), the respondents could have chosen the extracontractual route, given that the choice between contractual and extracontractual was permitted at the time.

[465] However, as of January 1, 1994, with the coming into force of the C.C.Q. and the second paragraph of article 1458, the contracting parties lost the right to choose between contractual and extra-contractual, when the choice arises, and now have to go the contractual route even if the extracontractual route would be more beneficial for them (assuming that this provision applies to subsequent purchasers). However, the respondents retained the right to resort to the appellants' extracontractual liability and, more specifically, to articles 1468, 1469 and 1473 C.C.Q., on the basis of the safety defect of the goods (i.e., a danger), the injury and the causal connection between the two.

[466] On the one hand, neither articles 1726 and following C.C.Q. (whether by virtue of article 1730 or article 1442 C.C.Q.), nor articles 1522 *et seq*. C.C.L.C. can provide a basis for the respondents' actions, given that the dangers of smoking are not the result of a defect within the meaning of these provisions, i.e., a material or functional defect, but of a danger inherent in the product, which did not form the subject of adequate information. If the respondents had a contractual remedy, it is not included in these provisions.

[467] On the other hand, it is also not part of the remedy potentially based on the obligation to inform that would be incorporated into any contract pursuant to article 1434 C.C.Q. and for which the manufacturer would be liable to the subsequent purchaser under article 1442 C.C.Q., as an accessory to the goods (think of a contract of service or a contract of lease, for example). In the event of a breach of this obligation, the person is contractually liable for the injury he or she causes to the [TRANSLATION] "other

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contracting party," in this case a subsequent purchaser (article 1458 para. 2, first part, C.C.Q.). The appellants' alleged breach in this respect instead relates to their pre-contractual obligations and therefore justifies only an extracontractual remedy.

[468] Moreover, in addition to the C.C.L.C. and the C.C.Q. for the period beginning April 30, 1980, the respondents could have based their actions on section 53 C.P.A., a public order provision, the second paragraph of which imposes a warranty of safety on manufacturers, a warranty for which the appellants were liable to consumers who purchased their products. It should be noted that, for the purposes of section 53 C.P.A., the rights and obligations of each party are based on the standard of the average consumer, who is a credulous and inexperienced person, which reduces the plaintiff's burden and increases the burden of the manufacturer.

[469] It should be added that, in general, whether we are dealing with article 1468 C.C.Q. or section 53 C.P.A., the causation required to establish the manufacturer's liability is derived from the cause and effect relationship between the safety defect or other defect and the injury. In accordance with article 1053 C.C.L.C., even though causation between the manufacturer's fault (breach of the duty to inform) and the injury must be established, a presumption of fact arises in this respect from the evidence of causation between the safety defect and the injury. The onus is then on the manufacturer to rebut this fault-injury presumption.

[470] Similarly, whether one resorts to article 1053 C.C.L.C., articles 1468, 1469 and 1473 C.C.Q. or section 53 C.P.A., it is up to the manufacturer to demonstrate, where applicable, that the danger was apparent or known to the user or the average consumer (depending on the basis of the action), and sufficiently so to infer an acceptance of the risk and injury.

[471] In all these cases, the manufacturer can attempt to refute the plaintiff's evidence by submitting evidence to establish that there is no safety defect, that there is no injury or that the injury is due to the plaintiff's own fault, the act of a third party or superior force.

[472] Since all of these regimes have points in common and are based on the same major principles, we will analyze the judgment in first instance as well as the appellants' and the respondents' allegations mainly from this perspective. The other bases for the remedies, namely articles 219 and 228 C.P.A. and sections 1 and 49 of the *Charter*, are discussed below.[478]

1.3. Application of the law to the facts: civil liability of the manufacturer under common law and s. 53 C.P.A.

[473] The judge faulted the Appellants for a failing to fulfill their duty to inform under the C.C.L.C. (art. 1053), the C.C.Q. (articles 1468, 1469 and 1473) and the C.P.A. (articles 219, 228 and 272). He also faulted the appellants for having misled the public through a sustained policy of disinformation, featuring omission and deception (art. 1053 C.C.L.C. and 1457 C.C.Q.). Although the appellants do not necessarily find these conclusions to their satisfaction and do put forward certain arguments on the subject, these conclusions are not the core of their appeals.

[474] Instead the appellants target 1) the public's knowledge of the dangers of smoking, which they claim should have led to their complete exoneration, and 2) the causation between the

[478] See below at paras. [841] *et seq.* (C.P.A.) and [957] *et seq.* (*Charter*).

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faults identified by the judge and the harm suffered by the class members, which causation, whether conduct causation or medical causation, they believe was not sufficiently demonstrated, certainly not on the level of individual members. These two main issues are at the heart of the briefs and arguments the appellants submitted to the Court and will be discussed in detail in the following pages in light of the rules discussed above. Conversely, nothing will be said regarding the harm to the class members, as recognized by the trial judge and which is not disputed by the appellants (the only issue at stake in this regard being that of causation).

[475] It is nevertheless necessary to first of all examine the appellants' failure to fulfill the duty to inform incumbent on them under common law throughout the period in question, which failures cannot be dissociated from the above questions, the boundaries of which they define.

A. Appellants' failure to fulfill their duty to inform

[476] As a preamble, it is worth noting the particularly high intensity of the duty to inform incumbent on the appellants here. Throughout the period in question, the appellants in effect marketed cigarettes to the general public, a product of no particular use and one that is intended to be inhaled (and therefore introduced into the bodies of users), that is potentially fatal and presents pernicious danger, because it develops over the duration of use, which duration is precisely encouraged by its addictive nature.

[477] Did the appellants fail to fulfill their duty to inform? This question can only be answered in the affirmative. Not only did they intentionally conceal the pathological and addictive effects of the cigarettes they marketed from the public and users, they collectively developed and implemented at the same time a disinformation program aimed at undermining any information contrary to their interests; they maintained false scientific controversies, they hijacked debates, lied to the public (and even to public authorities), topping it all off with misleading advertising strategies contrary to their own Codes of conduct (and, as of 1980, contrary to the C.P.A.).

[478] Everyone can agree that this situation is out of the ordinary. Because we are not dealing here with a manufacturer who, like in *Lambert*[479] or *Mulco Inc.*, [480] has omitted an important detail from an otherwise generally adequate informational package, and the Courts held that omission against them. Nor is it like a case of a manufacturer who, such as the defendant in *Hollis,*[481] did not disclose a problem of which they were aware without being able to explain it or relate it with certainty to their product, which the Supreme Court also held against the defendant. In contrast, the appellants deliberately concealed the information they had about the toxicity of their product for decades, even though they conspired and maneuvered, in a concerted manner, to confuse or delay knowledge that could be acquired by the public and users. *A fortiori*, we must conclude that the appellants have indeed failed in their duty to inform.

[479] It is not, however, these findings that the appellants are directly attacking, and their arguments on this point can be summarized as follows:

- relying particularly on *Inmont Canada Ltd. c. Canadian National Insurance*

[479] *Lambert v. Lastoplex Chemicals,* [1972] S.C.R. 569.

[480] *Mulco Inc. c. Garantie (La), North American Insurance Co.*,[1990] R.R.A. 68 (C.A.).

[481] *Hollis v. Dow Corning Corp.,*[1995] 4 S.C.R. 634.

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> *Co.*,[482] they criticize the judge for having used a contemporary standard of assessment in evaluating their conduct. This standard, however, and more generally, standards regarding product warnings have evolved over the almost 50-year period in question, and the appellants cannot be blamed for conduct that may no longer be appropriate today, but which met the relevant requirements throughout the period. In short, and to quote one of the lawyers from ITL: "A defendant cannot be held ex post [facto] to a higher standard with the benefit of hindsight."[483]
>
> - the judge erred in failing to take into account the major role played by the federal government in regulating tobacco products and their advertising, as well as in the appearance and development of product warnings for the public.

[480] These grounds, which overlap in part, are ill-founded.

[481] First, it should be recalled that, while the terms and manner of describing the manufacturers' duty to inform have changed over the years, the substance of the obligation has remained essentially the same since *Ross v. Dunstall,*[484] rendered in 1921: the manufacturer must disclose to its customers or potential customers, through understandable and complete information, the dangers of the product it is putting on the market and the means to prevent the danger or protect against it, an obligation the intensity of which is directly proportional to the severity of the risk posed by the product in question (i.e., the probability of its materialization) and the seriousness of the harm it is likely to cause. The intensity of the obligation may be less when the target clientele is specialized or professional (as in *Inmont Canada Ltd. c. Canadian National Insurance Company*,[485] or *Trudel v. Clairol Inc. of Canada*,[486]) but it is particularly high when the product, as in the case at bar, is intended for the general public, for ordinary users.

[482] On this last point, it should also be noted that in *Ross v. Dunstall*, the victims were hunting enthusiasts and therefore firearms enthusiasts, which did not prevent the Supreme Court from holding he manufacturer liable for failing to warn its clients of the particular danger of a certain model of rifle. Similarly, in *Lambert v. Lastoplex Chemicals*,[487] (which dates from 1971 and applies to events that occurred in 1967), the victim was an engineer who had purchased the dangerous product for personal use, and knew of its flammability and had read the labels on the container, while in *Mulco Inc. c. La Garantie, compagnie d'assurance de l'Amérique du Nord,*[488] the victim, "an experienced handyman,"[489] did not read the labels, which indicated the product's very high flammability and the harmful nature of its fumes. In neither case, however, did the manufacturer disclose or draw the attention of users to the specific danger that materialized in both cases. In both cases, the Supreme Court and the Court of Appeal refused to find whether the victim was aware of the danger and instead considered the manufacturer's failure to fulfill the

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482 *Inmont Canada Ltd. c. Canadian National Insurance Company,* J.E. 84-884 (C.A.).
483 Stenographic notes of November 23, 2016 (SténoFac) at 62.
484 *Ross v. Dunstall*, (1921) 62 S.C.R. 393.
485 *Inmont Canada Ltd. c. Canadian National Insurance Company*, J.E. 84-884 (C.A.).
486 *Trudel v. Clairol Inc. of Canada*, [1975] 2 SCC 236.
487 *Lambert v. Lastoplex Chemicals,[1972] SCC 569*.
488 *Mulco Inc. c. Garantie (La), North American Insurance Co.*,[1990] R.R.A. 68 (C.A.). The Court's decision dates back to 1990 and the incident that gave rise to the legal action occurred in 1981.
489 *Mulco Inc. c. Garantie (La), North American Insurance Co.*,[1990] R.R.A. 68 (C.A.) at 71.

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duty to inform, and therefore found the manufacturer liable. This is a good illustration of the intensity of the duty to inform incumbent on the manufacturer under the law throughout the period in question.[490]

[483] With respect to the standards applicable to affixing product warnings or providing instructions, two observations are in order.

[484] On the one hand, industry standards or best practices themselves, while they may be considered, are not the determining factors. They are even less so in a situation such as in the case at bar where the standards in question are those of the appellants, who dominate the Canadian and Quebec markets and adopt the rules of conduct they wish, without necessarily meeting their duty to inform under the law. And that is what we are dealing with here, where the standards and rules adopted by the appellants and to which they voluntarily submitted are far below what the law (extracontractual or contractual, including section 53 C.P.A.) required at all times during the period in question. Whether they were adopted following discussions with the government authorities or at their suggestion or with their collaboration are also not determining factors.

[485] On the other hand, the fact that the appellants had complied with the government standards (legislative, regulatory or administrative) put in place since 1989 did not in any way relieve them of their duty to provide useful information to the public after that date, nor did it relieve them of the liability that might fall to them in the event of failure to comply with that duty. This is a principle[491] enshrined in the *Tobacco Products Control Act*[492] and the *Tobacco Act*,[493] sections 9 and 16 of which respectively state the following:

> *Tobacco Products Control Act* (1988)
>
> N.B. For the purposes of this Act, the "distributor / *négociant*" includes the "manufacturer / *fabricant*" (s. 2, para. 1)
>
> | | |
> |---|---|
> | **9.** (1) No distributor shall sell or offer for sale a tobacco product unless | **9.** (1) Il est interdit aux négociants de vendre ou mettre en vente un produit du tabac qui ne comporte pas, sur ou dans l'emballage respectivement, les éléments suivants : |

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490 See also the judgment of the Court of Appeal in *National Drying Machinery Co. c. Wabasso Ltd.*, [1979] C.A. 279, and in particular the reasons of Judge Mayrand. As we know, that decision was subsequently overturned by the Supreme Court, but not on this point. See also, rendered at the same time and for comparison, *Rivtow Marine Ltd. v. Washington Iron Works and Walkem Machinery & Equipment Ltd.*, [1974] S.C.R. 1189, a 1974 Supreme Court decision relating to an incident in 1966 that refers in particular to *Ross v. Dunstall* and article 1053 C.C.L.C. for the purpose of establishing the law applicable in the common law provinces (British Columbia in that case).

491 On this principle, see e.g., Leroux & Giroux, supra note 313 at 329: [TRANSLATION] "[T]he statutory obligation to inform is not the same as the equivalent obligation in civil law." The authors discuss the requirements of the *Food and Drugs Act* in regard to medication, but their observation is of general value.

492 *Tobacco Act,* S.C. 1997, c. 13.

493 *Tobacco Act,* S.C. 1997, c. 13

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(a) the package containing the product displays, in accordance with the regulations, message pertaining to the health effects of the product and a list of toxic constituents of the product, and, where applicable, of the smoke produced from its combustion indicating the quantities of those constituents present therein; and	*a)* les messages soulignant, conformément aux règlements, les effets du produit sur la santé, ainsi que la liste et la quantité des substances toxiques, que celui-ci contient et, le cas échant, qui sont dégagées par sa combustion;
(b) if and as required by the regulations, a leaflet furnishing information relative to the health effects of the product has been placed inside the package containing the product	*b)* s'il y a lieu, le prospectus réglementaire contenant l'information sur les effets du produit sur la santé.
(2) No distributor shall sell or offer for sale a tobacco product if the package in which it is contained displays any writing other than the name, brand name and any trade marks of the tobacco product, the messages and list referred to in subsection (1), the label required by the *Consumer Packaging and Labelling Act* and the stamp and information required by sections 203 and 204 of the *Excise Act*.	(2) Les seules autres mentions que peut comporter l'emballage d'un produit du tabac sont la désignation, le nom et toute marque de celui-ci, ainsi que les indications exigées par a *Loi sur l'emballage et l'étiquetage des produits de consommation*, et le timbre et les renseignements prévus aux articles 203 et 204 de la *Loi sur l'accise*.
(3) This section does not affect any of the obligation of a distributor at common law or under any act of Parliament or of a provincial legislature, to warn purchasers of tobacco products of the health effects of those products.	(3) Le present article n'a pas pour effet de libérer le négociant de toute obligation qu'il aurait, aux termes d'une loi fédérale ou provincial ou en common law, d'avertir les acheteurs de produits du tabac des effets de ceux-ci sur la santé.

Tobacco Act (1997)

16. This Part does not affect an obligation of a manufacturer or retailer at law or under and Act of Parliament or of a provincial legislature to warn consumers of the health hazards, and health effects arising from the use of	**16.** La présente partie n'a pas pour effet de libérer le fabricant ou le détaillant de toute obligation – qu'il peut avoir au titre de toute règle de droit, notamment aux termes d'une loi fédérale ou provinciale – d'avertir les

tobacco products or from their emissions	consommateurs des dangers pour la santé et des effets sur celle-ci liés à l'usage du produit et à ses émissions.

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[486] We know that in a close decision,[494] the Supreme Court invalidated several of the prohibitions of the 1988 Act, including section 9, in part because it required that the mandatory information not be attributed to the government, thereby infringing on the manufacturer's freedom of expression. As such, paragraph 9(3) above, which sets out a common rule is not unconstitutional, even though its fate is related to the two previous paragraphs.

[487] The 1997 Act, for its part, was deemed constitutional,[495] and section 16 of the Act has always had effect.

[488] In short, with one reservation, compliance with federal labelling and advertising standards in no way relieves the appellants of their duty to inform under the law, and in particular under Quebec law, including the C.C.L.C., the C.C.Q. and the C.P.A., nor does it relieve them of their liability in the event of a failure to fulfill that obligation (leading to harm and causation). This conclusion is particularly relevant given that the labelling requirements made mandatory under laws and regulations since 1989 long remained not very informative, as we will see. The appellants could not simply be satisfied with this and claim that they had thus fulfilled their obligation to inform.

[489] The reservation regarding this principle was discussed above. It may be possible for a manufacturer who complies with government labelling or advertising standards to avoid liability by proving that they reflect the state of scientific or technical knowledge of the time, under which the danger was not known. But in truth, this is not a true exception because the determining factor in such cases is not whether standards were met, but the state of scientific or technical knowledge. However, the appellants never claimed that it was impossible to know the dangers and risks of smoking, and rightly so, since throughout the period in question, 1950 – 1998, they were well informed and even had a significant head start in this regard.

[490] This is not to say that the existence of legislative or regulatory standards for labelling or advertising is irrelevant to a debate on product liability. Certainly, a party, who, for example, markets a product but fails to comply with labelling requirements prescribed by law commits a fault giving rise to liability (subject of course to the existence of harm and causation).[496] This fault may aggravate that party's failure to fulfill the duty to inform. Failure to meet such standards may also facilitate arguments for the victim of harm, seeking to demonstrate the fault of the manufacturer, particularly in terms of causation.[497]

[491] But a person who complies with standards is not thereby released from or considered to have fulfilled their duty to inform, nor is that person released from liability if the information

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494 *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 SCR 199.
495 *Canada (Attorney General) v. JTI-Macdonald Corp.,* 2007 SCC 30.
496 See by analogy, *Morin v. Blais*, [1977] 1 S.C.R. 570.
497 *Morin v. Blais*, [1977] 1 S.C.R. 570, in particular at 579 *in fine* and 580.

provided, although complying with standards, does not accurately, understandably and completely reveal the inherent danger produced. As Professors Jobin and Cumyn stated:[498]

> [TRANSLATION]
>
> [C]ompliance with administrative or penal requirements does not ensure immunity from liability where the court considers that in the case being tried, the civil standard of prudence exceeds that set by administrative law; this is a sound understanding of civil liability.

[492] This principle is recognized under sections 9 of the *Tobacco Products Control Act*[499] and 16 of the *Tobacco Act*.[500]

[493] This leads us to the Appellant's second ground of appeal. They allege that the trial judge ignored the fundamental role played by the federal government in the marketing of tobacco products, and specifically, cigarettes.

[494] It is true that the federal government has been involved in the commercialization of this product in various ways, both in terms of what it has done and what it has not done. Thus, the government was a privileged and regular partner of the appellants when they decided to adopt a voluntary code of conduct; the government encouraged them to market so called, mild or light cigarettes and use certain strains of tobacco, which in reality were no more beneficial; the government promoted the consumption of this type of cigarette to the public.[501] It maintained a close relationship with their lobbyist, the CTMC, and so forth. Perhaps the government could even be accused of giving the impression, through this accredited collaboration, that tobacco was not really harmful or that it was not as harmful as some claimed, which was an impression that the appellants themselves were busy spreading, maintaining and building. Perhaps the government actually knew as much as the appellants about the dangers of cigarettes and should have banned the product or more severely restricted its distribution and above all should have done so sooner (the government didn't start until 1988, with the *Tobacco Products Control Act*,[502] which came into force in 1989). Perhaps the government failed to inform the public and displayed reprehensible inaction. The appellants also argue that the government officials knew the dangers of tobacco as well as they did,[503] contrary to what the trial judge found.[504]

[495] But whether the government erred or committed a fault through its action or inaction, and may, hypothetically, incur some civil liability in this respect[505] is immaterial and does not relieve

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498 Jobin & Cumyn, supra note 203 at 330–331, para. 227.

499 *Tobacco Act*, S.C. 1997, c. 13.

500 *Tobacco Act*, S.C. 1997, c. 13.

501 On federal involvement in the development and promotion of these tobacco strains, see in particular the Report of Dr. Robert John Perrins, Exhibit 40346 at paras. 2.10 *et seq*. and 7.126 *et seq*. In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 49, the Supreme Court even referred to "Canada's statements to the general public that low tar cigarettes are less dangerous to the public's health."

502 *Tobacco Act,* S.C. 1997, c. 13.

503 See stenographic notes of November 23, 2018 (SténoFac) at 84 *et seq*.

504 Judgment *a quo* at para. 235.

505 This seems unlikely in view of the *Crown Liability and Proceedings Act*, R.S.C. (1985), v. C-50, and the Supreme Court's teachings in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42. See also

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the appellants of their own liability, nor does it mitigate the faults alleged against them. Nothing in the government's action or inaction would alter, modify or weaken the appellants duty to inform regarding the dangers of the products they marketed during the period in question, or excuse them for having failed in that duty. ITL's and JTM's briefs contain an allusion to the fact that the federal government played the role of the "learned intermediary" here, which, assuming this doctrine is applicable in Quebec law,[506] is obviously not the case.[507]

[496] The evidence on this point is more than compelling: the appellants failed throughout the period in question to fulfill their duty to inform, which was of a high intensity given the danger presented by cigarettes, a toxic and addictive product. Their failure was twofold, on the one hand, they either did not inform the public or users or only provided insufficient information; on the other hand, they actively disinformed the public and users, using various means to attack the credibility of warnings, advice and explanations given and circulated by others (governments, medical professionals, anti-tobacco groups, etc.) about the harmful effects of smoking, and by using various misleading advertising stratagems.

[497] The Court does not intend to review this evidence in fine detail. Moreover, the following lines will focus mainly on the first aspect of the appellants fault while occasionally referring to the counter discourse they maintained during the period in question. This is not to say that the second aspect of the fault is less significant than the first; it is just as significant. The most striking elements of this counter discourse, however, have been recalled in second 1.2 and are obviously part of the relevant factual framework, without the need to repeat them here. The specific issue concerning the appellants' conduct in advertising, which is part of their counter discourse, is examined in section IV.2.2.B.i in relation to sections 219 and 228 C.P.A. Suffice to say here that the appellants' conduct in terms of advertising as described in section 1.2 violated ss. 219 and 228 C.P.A. and also violated the requirements regarding the duty to inform under the general law as well as those arising under s. 53 C.P.A.

[498] But now let us look in broad terms at what the appellants did or did not do from 1950 to

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Canada (Attorney General) v. Imperial Tobacco Ltd., 2012 QCCA 2034.

506 This is not certain, particularly in light of article 1473 C.C.Q. See *Desjardins General Insurance Inc. c. Venmar Ventilation Inc.*, 2016 QCCA 1911 at para. 20; however, Profs. Jobin and Cumyn succinctly express the view that [TRANSLATION] "nothing prevents it [the doctrine of the learned intermediary] from also being implemented in civil law" (Jobin & Cumyn, supra note 203 at 317, para. 220).

507 The rule of the learned intermediary (applied especially to the field of medicine, without being limited thereto) is well described by the Supreme Court of Canada in *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at paras. 27 *et seq*. Paragraphs 28 ("Generally, the rule is applicable either where a product is highly technical in nature and is intended to be used only under the supervision of experts, or where the nature of the product is such that the consumer will not realistically receive a direct warning from the manufacturer before using the product"") and 29 ("However, it is important to keep in mind that the " learned intermediary" rule is merely an exception to the general manufacturer's duty to warn the consumer") are particularly enlightening and clearly show the inapplicability of this theory to this case: cigarettes are not a product that is highly technical in nature and, in any case, it is perfectly realistic to expect the appellants to have informed users of their product directly. In the same vein, see *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, in particular at paras. 36 and 37; *Desjardins General Insurance Inc. c. Venmar Ventilation Inc.*, 2016 QCCA 1911 at para. 20. See also *Pfizer Inc. v. Sifneos*, 2017 QCCA 1050 (single judge); *Thibault c. St. Jude Medical Inc.*, J.E. 2004-1924 (Sup. Ct.).

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1988, the year the *Tobacco Products Control Act*[508] was passed.

[499] It can be said that between 1950 and 1972, there was near silence apart from a momentary bout of honesty at Rothmans International and Rothmans of Pall Mall Canada Limited (predecessors of the appellant RBH), whose president, Patrick O'Neill-Dunne, publicly acknowledged the link between smoking and lung cancer before quickly backtracking backwards.[509] As the Trial Judge wrote:

> [611] Although it is not clear what happened to Mr. O'Neill-Dunne as a result of his campaign of candour, the proof indicates that for the rest of the Class Period Rothmans, and later RBH, never reiterated the position Rothmans so famously took in 1958. Thereafter, it toed the industry line, crouching behind the Carcassonnesque double wall of the Warnings, backed up by the "scientific controversy" of no proven biological link and the need for more research.

[500] This moment of candour is all the more striking because it did not last. Statements made by Rothmans in 1958, while having some impact, did not enter into public knowledge and quickly sank into oblivion from which they were retrieved by the trial court ruling.[510]

[501] In any event the appellants (or the companies they replaced) subsequently remained silent, but in 1964 adopted a *Cigarette Advertising Code*. This was not the first time these competitors acted in a coordinated manner to defend their common interests and avoid government interference. As we have seen, their "friendly agreement" began in 1953, when they agreed on a strategy to which they would remain loyal for decades and certainly during the period covered by the Respondents' actions. This strategy would guide all sorts of actions that they would or would not take, as well as generally guiding their public actions and advertising efforts and the focus of their relations with the government.

[502] In short, a first self-regulatory Code was created in 1964. It set out in twelve points the main principles that the appellants agreed to respect. For example, their cigarette advertising

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508 *Tobacco Act*, S.C. 1997, c. 13.

509 See the judgment *a quo* at paras. 606 to 611; see also *supra*, para. [26].

510 It is interesting to note that, during his cross-examination, Mr. Steve George Chapman, representative of the appellant RBH, put forward the thesis that the 1958 statement reflected reality, a reality that the appellant did not need to repeat since it was known to all:

> 257Q. - And what you're saying is that this advertisement or this publication was sufficient to inform smokers of the risks associated with smoking?
> A. - I think it was... it was a statement of what he [Mr. O'Neill-Dunne] understood to be the circumstances at that time. And for smokers who had questions… any question in their mind about whether there were any risks associated with smoking, I think he indicated in that document that there are risks associated with smoking, it's been proven.
> 258Q - Why didn't you repeat such exercise over time to inform smokes of the risks?
> A - Because it was our belief that smokers understood that there were risks and that the Government, public health, doctors, parents, were telling everybody all the time about the fact that if you smoke, you could get certain diseases, diseases that could kill you. As far back… and I was born in sixty-four (64), as far back as I could remember, I always knew that cigarette smoking was dangerous. I had a grandfather who died when I was in Grade 4, of lung cancer, and the first thing my parents said was, "Because grandpa was a smoker, he died." And I think everybody knew.
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> (Testimony of Steve George Chapman, October 22, 2013, p. 97)

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would be directed at adults and not people under age 18,[511] the advertising would not claim that "the use of the advertised brand promotes physical health or that one particular brand of cigarettes is better for health than another,"[512] the advertising would also not "suggest that smoking is essential to romance, prominence, success or personal advancement"[513] (a commitment that would be repeated in subsequent Codes and from which, however, the appellants would systematically deviate in their "lifestyle advertising."[514])

[503] The Code in question is not very restrictive and while it states that the appellants would not claim that cigarettes have beneficial health affects (a rule that they also repeatedly violated), it does not in any way provide that they must inform the public or users of their brands of the dangers and risks associated with tobacco consumption, which dangers and risks they themselves already knew, at least in large part and certainly enough to warn smokers.

[504] In 1972, still concerned about avoiding government intervention, (in 1971, the Minister of Health and Welfare introduced a bill to, among other things, limit tobacco advertising and require a warning on the packaging,[515]) the appellants decided to place a warning on their cigarette packages. Their advertising Code of January 1, 1972 states:[516]

> Rule 2 - All cigarettes manufactured after April 1, 1972 will bear, clearly and prominently displayed on one side thereof, the following words: "WARNING: EXCESSIVE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH" - "AVIS: FUMER À L'EXCÈS PEUT NUIRE À VOTRE SANTÉ."

[505] The warning is as vague as it is ambiguous: what is excessive smoking, which may – the verb "may" being used here as a semi-auxiliary[517] – be hazardous to your health? This is certainly not true, understandable and complete information in accordance with the requirements that were imposed at that time[518] on the appellants who knew much more about the toxic nature of their product and were careful not to reveal it.[519] In addition, the message underlying this warning is also that smoking, other than excessive smoking, is not harmful, which is not true, as the appellants knew.

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511 Exhibit 40005B-1964FR.

512 Exhibit 40005B-1964FR.

513 Exhibit 40005B-1964FR.

514 The Supreme Court found this to be the case in *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, in particular at paras. 99 *et seq*. (including at paras. 114–116). The 1997 *Tobacco Act*, moreover, prohibited it.

515 Bill C-248, June 10, 1971.

516 Exhibit 40005C-1972; Exhibit 40005D-1972.

517 That is, it is used "to express the modality of the possible", *Le Grand Robert de la langue française*, supra note 473, sub verbo "pouvoir".

518 It should be remembered that it was in 1971 that the Supreme Court of Canada rendered its decision in *Lambert v. Lastoplex Chemicals*,[1972] S.C.R. 569, and that it affirmed in unequivocal terms the heavy duty of the manufacturer of a dangerous product intended for the public to provide accurate information, a general warning not being sufficient.

519 It is not certain that this reference was ever affixed to cigarette packages in practice, since a new code was adopted in May 1972. Experts Young, Flaherty and Viscusi (retained by the appellants) do not mention this in their reports or testimony but instead refer to the following code warning (see Exhibit 21316 at 21; Exhibit 20063 at para. 49; Exhibit 40494 at para. 41).

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[506] In this first version of their 1972 code, the appellants also reiterated some of their previous commitments, including the one limiting advertising to adults 18 years of age and over (rule 10). Rule 11 of the 1972 Code requires that:[520]

> Rule 11 - No advertisement shall state or imply that the use of the advertised brand promotes physical health or that a particular brand of cigarettes is better than another from a health perspective or is essential for romance, prominence, success or personal advancement.

[507] A similar rule was included in subsequent versions of the Appellant's Code of conduct.

[508] As of May 1972, however, the appellants changed the wording of the warning appearing on their cigarette packaging:[521]

> Rule 2 – All cigarette packages manufactured after April 1, 1972, will bear, clearly and prominently displayed on one side thereof, the following words: "WARNING: THE DEPARTMENT OF NATIONAL HEALTH AND WELFARE ADVISES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED" – "AVIS: LE MINISTÈRE DE LA SANTÉ NATIONALE ET DU BIEN-ÊTRE SOCIAL CONSIDÈRE QUE LE DANGER POUR LA SANTÉ CROÎT AVEC L'USAGE".

[509] This apparently minor change is nevertheless significant in that the warning is no longer attributed to the appellants themselves, as their previous version suggested, but to the Department of Health and Welfare Canada, as it was then known. The appellants thus established a distance between themselves and the message: it is not they who consider the product they are marketing to be dangerous, but the government, which does not prevent them from selling it. The implication is clear and the message weakened accordingly. This warning, which remained unchanged until 1975, is in fact just as evasive as the previous one and hardly likely to inform the public, in particular the smoking public, of the real dangers associated with cigarette smoking. Danger increases with use: what danger is that? And what use, quantitatively speaking, are we being warned about?

[510] While the user – often an adult, but frequently a teenager – who becomes aware of the government's warning may be inclined to give it some weight,[522] the information does not allow the user to make an informed decision as to whether to smoke or continue smoking.

[511] It should also be noted that neither of the two Codes provides for indicating the level of nicotine or tar in the cigarettes or the composition of the smoke produced. As early as 1962, the appellants (or their predecessors) agreed that they would refrain from using the terms nicotine and tar or disclosing this information,[523] although their 1972 Codes provide for the maximum amount of these substances in cigarette smoke (Rule 4).

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520 Exhibit 40005C-1972FR.

521 Exhibit 40005D-1972.

522 This was stated by expert W.K. Viscusi in his report, Exhibit 40494 at para. 42.

523 See above at para. [28].

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[512] In 1975, a new version of the Code was adopted. This time, while continuing to regulate the advertising practices of the appellants, the Code included the following warning:[524]

> Rule 12. All cigarette packages will bear, clearly and prominently displayed on one side thereof, the following words:
>
> WARNING: Health and Welfare Canada advises that danger to health increases with amount smoked – avoid inhaling.
>
> AVIS: Santé et Bien-être social Canada considère que le danger pour la santé croît avec l'usage – éviter d'inhaler.
>
> Rule 13. The foregoing words will also be used in cigarette print advertising but only in the language of the advertising message.

[513] The warning, once again, does not stand out, despite the advice to avoid inhaling. However, they did add a new rule:

> Rule 15. The average tar and nicotine content of smoke per cigarette will be shown on all packages and in print media advertising.

[514] This information, in itself, is not particularly informative: while a prudent smoker may be concerned, *a priori,* when learning that a cigarette contains tar, which is a substance that no one would normally think of ingesting or inhaling, it is unlikely that that smoker will understand the scope of the information or be able to draw useful inferences from it. And even if the smoker were inclined to get informed, at a time when nearly 52–55% of fellow citizens were smokers,[525] he or she would mostly discover the dissonant information that was circulating at the time.

[515] Various presentation standards were in place to govern the display of the warning provided for under rule 12 (which in principle were only to be used "in connection with brand advertising and not in connection with the advertising of sponsorship events"[526]). It was further provided that rule 15 would apply "as soon as possible after January 1, 1975 in print media advertising and on packages, but in any event not later than April 1, 1975 in print media advertising and July 1, 1975 on packages."[527]

[516] In October 1975, the Code was amended or, more specifically, items were added to clarify the Appellant's advertising practices and establish a "Board of Arbitration" to deal with any breaches of the rules.[528] Rules 12 and 13 were somewhat changed, but the text of the

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524 Exhibit 40005G-1975.

525 According to a study conducted by the Department of Health and Welfare, this is the rate of smokers in the Quebec population between 1965 and 1974. During the same period, the proportion of smokers in the Canadian population ranged from 45% to 50%, including 38% to 42% of regular smokers (see Exhibit 20005).

526 Exhibit 40005G-1975, "Warning notice – Instructions for Use in Print Media."

527 Exhibit 40005G-1975 at 4, para. 8.

528 Exhibit 4005K.1-1975.

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warning was not:[529]

> Rule 12. All cigarette packages, cigarette tobacco packages and containers will bear, clearly and prominently displayed on one side thereof, the following words:
>
> "WARNING: Health and Welfare Canada advises that danger to health increases with amount smoked – avoid inhaling.
>
> AVIS: Santé et Bien-être social Canada considère que le danger pour la santé croît avec l'usage – éviter d'inhaler."
>
> Rule 13. The foregoing words will also be used in cigarette and cigarette tobacco print advertising (see appendix I for size and location.) Furthermore, it will be prominently displayed on all transit advertising (interior and exterior), airport signs. Subway advertising and market place advertising (interior and exterior) and point of sale material over 144 square inches in size but only in the language of the advertising message.

[517] Rule 15 remained.

[518] The January 1, 1976, Code repeated Rule 12, with some additions:[530]

> Rule 12. All cigarette packages and cartons, cigarette tobacco packages and containers imported or manufactured for use in Canada will bear, clearly and prominently displayed on one side thereof, the following words:
>
> "WARNING: Health and Welfare Canada advises that danger to health increases with amount smoked – avoid inhaling.
>
> AVIS: Santé et Bien-être social Canada considère que le danger pour la santé croît avec l'usage – éviter d'inhaler."

[519] The new Code included a minor change to Rule 13 (addition of "billboards" and changing the 144 square inches of the previous version to "930 square centimeters.") Rule 15 remained the same, except for a slight change (the word "cigarette" was added in front of the word "packages"):

> Rule 15. The average tar and nicotine content of smoke per cigarette will be shown on all cigarette packages and in print media advertising.

[520] Rule 8, a descendant of Rule 11 of the first Code in 1972, and which is reproduced in more or less the same terms in all the Codes adopted since that date, states the following:

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529 Exhibit 4005K-1975 at 4.

530 Exhibit 40005L-1976, Section II.

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> Rule 8. No advertising will state or imply that smoking the brand advertised promotes physical health or that smoking a particular brand is better for health than smoking any other brand of cigarette, or is essential to romance, prominence, success or personal advancement.

[521] Detailed regulations round out the code, one of which concerns Rule 8:[531]

> REGULATION E. With reference to Rule 8.
>
> No reference will be made to yields of smoke constituents or to their pseudonyms (e.g. "tar", nicotine, gaseous phases, etc.) in the body copy of advertising materials nor on packages, in brochures, or other information prepared for mass or limited distribution, nor will comparison of such yield with any other brand or brands, specifically be used. The sole exception to the foregoing is the information required on packages and in advertising in accordance with Rules 12, 13, and 15 of the Code.
>
> [Emphasis in original]

[522] On January 1, 1984, the *Cigarette & Cigarette Tobacco Advertising and Promotion Code of the Canadian Tobacco Manufacturers Council* (or *Code de publicité et de promotion du Conseil canadien des fabricants des produits du tabac relativement à la cigarette et au tabac à cigarette*)[532] came into force, reaffirming the same Rules 8, 12, 13 and 15. A new update followed on January 1, 1985.[533] The text of the rules contained some minor adjustments, but the general meaning did not change, and the warning remained identical (Rule 12):

> "WARNING: Health and Welfare Canada advises that danger to health increases with amount smoked – avoid inhaling.
>
> AVIS: Santé et Bien-être social Canada considère que le danger pour la santé croît avec l'usage – éviter d'inhaler."

[523] This is the warning that appeared on the appellants' cigarette packages and written advertising until the coming into force of the *Tobacco Products Control Act*[534] and the first regulations specifically governing the warnings now imposed on the appellants.[535]

[524] In short, it must therefore be noted that after having ignored, from 1950 to 1972, the dangers of cigarettes, presented at that time as an entirely desirable product, without reservation,[536] the appellants, during the period from 1972 to 1988, voluntarily placed a warning on cigarette packages; however, they dissociated themselves from that warning, which was

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531 Exhibit 40005L-1976 at III.5.
532 Exhibit 40005M-1984.
533 Exhibit 40005N-1985.
534 *Tobacco Products Control Act,* S.C. 1988, c. 20.
535 *Tobacco Products Control Regulations,* SOR/89-21.
536 Except for the fleeting 1958 statement by the president of the company from which the appellant RBH originated.

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characterized by general insignificance: “The Department of National Health and Welfare advises that danger to health increases with amount smoked” (from 1972 to 1975),[537] then “Health and Welfare Canada advises that danger to health increases with amount smoke – avoid inhaling” (from 1975 to 1988). At the risk of repeating what has already been said, this is far from accurate, understandable and complete information that would allow the users to know what danger they are in and how to protect themselves from it.

[525] The current or future user is indeed warned of a danger that is not defined and that may (therefore hypothetically[538]) increase (To what extent? How much?) with equally ill-defined use. However, from 1975 on, the user was advised to avoid inhaling, advice intended – and this is what we must understand – to minimize the risk of this unexplained danger becoming a reality. However, this is a suggestion that contradicts the very function of cigarettes: the reason they are smoked is to inhale what they produce. This advice for its use is diametrically opposed to the function of the object. Therefore, the advice is of little use and does nothing to contribute to the clarity of the message or to informing the user.

[526] All of this is to say that, at least until 1988, the following conclusion clearly arises from the evidence: the appellants provided no real information about the dangers of smoking (dangers that they do not claim not to have known and that, they did in fact know,[539]) thus failing to fulfill their duty to inform as required by law under art. 1053 C.C.L.C. and, as of 1980, under s. 53 C.P.A., and it would be difficult to justify any other finding given the minimalist and imprecise warning that they placed on their products. As explained above, when dealing with a dangerous product, intended to be ingested into the human body, “it will rarely be sufficient for manufacturers to give general warnings” and “the warnings must be sufficiently detailed to give the customer a full indication of each of the specific dangers arising from the use of the product.” These excerpts from Justice La Forest’s reasons in *Hollis v. Dow Corning Corp.,*[540] cited above, coincided with Quebec law on the subject during the period in question. The appellants’ voluntary warnings clearly did not meet this requirement.

[527] Moreover, their fault is exacerbated by the fact that, at the same time, they continued, through their advertising and various concerted manoeuvres, to promote cigarette consumption, to actively try to counter the negative information circulating about their products and to minimize the dangers and risks, thus undermining the warnings they placed on their packaging, which they refused to make their own by assigning them to the Department of Health and Welfare. The paradox is untenable.

[528] What about the period beginning in 1988 with the arrival of the *Tobacco Products Control Act*?[541] Although, several of the provisions of the Act were subsequently declared unconstitutional, including those relating to mandatory warnings, they were still in effect until 1995,[542] when the Supreme Court rendered its decision in *RJR-MacDonald Inc. v. Canada*

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[537] Not to mention the warning from the first 1972 code, which was to be affixed as of April 1, 1972, but was changed at the beginning of the following May ("Notice: Excessive smoking can harm your health").

[538] See supra note 517.

[539] As noted in the judgment *a quo* at para. 70.

[540] *Hollis v. Dow Corning Corp.,* [1995] 4 S.C.R. 634 at para. 22.

[541] *Tobacco Act,* S.C. 1997, c. 13.

[542] The Supreme Court refused to suspend the *Tobacco Products Control Regulations*, which prescribed

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(Attorney General).[543] It therefore warrants our attention.

[529] Without banning cigarettes or tobacco products, the Act, which came into force on January 1, 1989, largely prohibited advertising them, and section 9 prohibited selling them unless their packaging contained a message, determined by Regulation, outlining the "health effects of the product," and the list and quantity of toxic substances it contained and that are released in its smoke.

[530] Section 11 of the *Tobacco Products Control Regulations*,[544] in its initial version, provided for the following warnings to be placed on all cigarette packages:

> (i) Smoking reduces life expectancy. L'usage du tabac réduit l'espérance de vie.
>
> (ii) Smoking is the major cause of lung cancer. L'usage du tabac est la principale cause du cancer du poumon.
>
> (iii) Smoking is a major cause of heart disease. L'usage du tabac est une cause importante de la cardiopathie.
>
> (iv) Smoking during pregnancy can harm the baby. L'usage du tabac durant la grossesse peut être dommageable pour le bébé.

[531] Any sign used to advertise cigarettes or cigarette tobacco also had to carry the following warning (s. 4):

> Smoking causes lung cancer, emphysema and heart disease. L'usage du tabac cause le cancer du poumon, l'emphysème et la cardiopathie.

[532] Some warnings were also provided for cigars and pipe tobacco (ss. 4 and 12) and smokeless tobacco (ss. 4 and 13). The Regulation also prescribed all the details regarding the placement of the warning (location, size, appearance, font, font size, etc.).

[533] We can easily agree that these warnings, which, although they do not allude to the addictive nature of cigarettes, are more informative that the previous warnings (although not as informative as later warnings that appeared in 1993 or those adopted under the *Tobacco Act*[545] of 1997, which replaced the 1988 Act following the Supreme Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General).*[546] However, they remain fairly general, and the appellants did not add anything to them from 1988 to 1995. During that period, the advertising they were authorized to do by law was also significantly reduced by section 4 of the 1988 Act, while promotional activities were still permitted, although well defined (s. 6).

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the text and format of the warnings provided for in section 9 of the Act: *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

543 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

544 *Tobacco Products Control Regulations,* SOR/89-21.

545 *Tobacco Act,* S.C. 1997, c. 13.

546 *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199.

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[534] It should also be noted that, during the ministerial consultation process prior to the adoption of the *Tobacco Products Control Regulations*, the appellants, through the CTMC, indicated that they objected to the above warnings being attributed to them:[547]

> - We cannot accept your proposal that health warnings should be attributable to the tobacco manufacturers. As stated in our letter to you of June 30, 1986, the current health warning is adequate, but, in view of the concerns you have expressed, the tobacco manufacturers are prepared to adopt additional health warnings provided they are attributable to the Minister of National Health and Welfare. More specifically, we do not agree that your proposed health warnings are "scientifically correct" as stated in Appendix I to your letter of October 9, 1986. Such a proposal not only amounts to asking us to condemn our own product, but also would require us to accept responsibility for statements the accuracy of which we simply do not accept. Any admission, express or implied, that the tobacco manufacturers condone the health warnings would be inconsistent with our position. In this regard, Canadian manufacturers cannot accept a position different from present international usage, particularly in the U.S. and U.K., where health warnings are attributed respectively to the Surgeon General and the Health Department's Chief Medical Officers.

[535] These remarks are noteworthy in more than one respect. First, they reveal that despite what they knew for a fact, the appellants were not prepared to recognize the dangers and risks of the product they were marketing: they were undoubtedly resigned to the fact that the Department had mandatory warnings on cigarette packaging, but they disputed the accuracy of the warnings, which they claimed were not "scientifically correct." In this respect, the appellants continued their strategy of disinformation and counter discourse that they agreed on and practised for a long time.

[536] For example, they always denied the direct association of tobacco with lung cancer or tobacco with other lung diseases, repeatedly asserting that the statistical or epidemiological link that could be established in this regard did not mean that each person individually would contract any of these diseases (which may also, they argued, result from other conditions) and that science had not yet discovered the mechanism, if any, leading to the development of cancer or lung disease. Even if that were true, however, it would not alter their duty to inform on this point. Commenting on *Hollis v. Dow Corning Corp*.,[548] authors Baudouin, Deslauriers and Moore stated:[549]

> [TRANSLATION]
>
> The Court also rejected the manufacturer's arguments that the duty to warn only arises when the manufacturer draws definitive conclusions on the cause and effect of unexplained ruptures. On the contrary, the very existence of these

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[547] Exhibit 841-2m, Letter dated November 28, 1988, from Norman J. McDonald, President of the Canadian Tobacco Manufacturers' Council, to the Minister of Health and Welfare at 5.

[548] *Hollis v. Dow Corning Corp.,* [1995] 4 S.C.R. 634.

[549] Baudouin, Deslauriers & Moore, La responsabilité civile, vol. 2, supra note 241 at 372–373, para. 2,355.

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> unexplained ruptures should have alerted the manufacturer and made it easy for it to include information on them and their effects on the human organism. This is a matter of applying the precautionary principle.

[537] These comments are (*a fortiori)* applicable to the case at bar: the very existence of the statistical relationship, which was long known to the appellants, could not be withheld and fell within the scope of their obligation to inform users.

[538] At the same time, their representative's comments in 1988, set out in the excerpt of the letter that appears above, also reveals the appellants' astonishing conception of the manufacturer's duty to inform, since they claim that acknowledging the accuracy of those statements, and therefore the existence of the danger and potential harm, would force them to condemn their own product. Seeing the manufacturer's obligation to disclose the danger inherent in the product it is marketing as a form of self-denigration or self-sabotage, however, shows a poor understanding of the law and the manufacturer's duty to inform. And even if disclosing the danger could in fact adversely affect the marketing of the product, the law long since solved that dilemma in favor of the user, who must be informed by the manufacturer, as the appellants did − and only in part − only under the constraint of a particular law.

[539] Despite the appellants'' reluctance, s. 11 of the *Tobacco Products Control Regulations* came into force in 1989.

[540] In 1993, the Regulations were substantially amended, in particular with respect to cigarette warnings, for which a new version was proposed:[550]

> (i) Cigarettes are addictive. La cigarette crée une dépendance.
>
> (ii) Tobacco smoke can harm your children. La fumée du tabac peut nuire à vos enfants.
>
> (iii) Cigarettes cause fatal lung disease. La cigarette cause des maladies pulmonaires mortelles.
>
> (iv) Cigarettes cause cancer. La cigarette cause le cancer.
>
> (v) Cigarettes cause strokes and heart disease. La cigarette cause des maladies du cœur.
>
> (vi) Smoking during pregnancy can harm your baby. Fumer durant la grossesse peut nuire à votre bébé.
>
> (vii) Smoking can kill you. Fumer peut vous tuer.
>
> (viii) Tobacco smoke causes fatal disease in non-smokers. La fumée du tabac cause chez les non-fumeurs des maladies pulmonaires mortelles.

[541] These warnings, which were placed on packages as of September 1994, differ from the

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[550] *Tobacco Products Control Regulations − Amendment,* SOR/93-389.

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previous ones in two ways. First, they are more precise, more informative, and more affirmative: tobacco use is no longer just the main cause of lung cancer or a major cause of heart disease, it *causes* fatal lung disease and heart disease, it "can kill you". Second, for the first time, they include a reference to the addictive nature of cigarettes. Let us consider this for a few moments.

[542] Recall that the appellants long refused to recognize this characteristic and that they strongly opposed − successfully for many years − the cigarette/addiction association, and that they vigorously fought against the use of the term "addiction" and the mention of any form of dependence whatsoever. For example, in April 1990, when the federal government announced its plan to tighten the *Tobacco Products Control Regulations*, the President of the CTMC sent a letter to the Department of Health and Welfare explaining its members' opposition to the proposed changes, particularly with regard to the addictive nature of cigarettes:[551]

> 2. While we do not endorse any of the existing or proposed messages, we take particular exception to the proposal to add new messages stating "Smoking is addictive" and "Tobacco smoke can harm non-smokers".
>
> Our views on the issue of tobacco and addiction and the recent report by a panel of the Royal Society of Canada were conveyed in some detail to the Minister in our letter and enclosures of December 20, 1989. Suffice it to say here that we regard the Royal Society report as a political document, not a credible scientific review, and we look upon any attempt to brand six millions Canadians who choose to smoke as "addicts" as insulting and irresponsible.
>
> While we do not and would not support any health message on this subject, we would note that the proposed message on addiction misstates and exaggerates even the Royal Society panel conclusion which was:
>
> > "Cigarette smoking is and frequently does meet the criteria for the definition of drug addiction. When it does so, it should be described as nicotine addiction."

[543] However, it should also be recalled that, as of the early 1960s, if not earlier, the appellants knew about this property of cigarettes, which they discussed among themselves, and which they did their best to sweep under the rug while challenging this reality in public.

[544] Take for example the *Spokesperson's Guide − June 1990* by the Philip Morris Company,[552] which is a manual on, among other things, how to discredit the assertion of the addictive nature of cigarettes:[553]

SECTION II.0: "ADDICTION"

FRAMEWORK - "ADDICTION"

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551 Exhibit 845 at 5-6.

552 Who controls RBH since 2008 and to which it was previously affiliated, with Philip Morris holding 40%. of its shares.

553 Exhibit 846-AUTH at 35-39.

THEIR AIM: 1. To label smoking as an addiction and nicotine as the addictive agent in tobacco.

a. By redefining addiction so that it excludes objective physiological criteria such as intoxication, physical dependence, withdrawal and tolerance.

b. By suggesting that the vast majority of smokers wish to quit but are unable to do so.

c. By focusing on and quoting pharmacological research on nicotine, as well as the positions of authorities such as the U.S. Surgeon General.

YOUR GOAL: 1. To discredit the use of the word addiction in relation to tobacco use.

a. Point out that any scientific definition of the word addiction must include objective physiological criteria.

b. Emphasize the distinction between addiction and habituation.

c. Dramatize the misuse of the word addiction.

d. Emphasize that smoking addiction claims from government and even "scientific" sources are often politically motivated attempts to ostracize smokers and malign cigarettes.

e. Point out the number of people who have quit smoking.

f. Emphasize that the reported research findings on the role of nicotine in smoking behavior are unclear.

g. Emphasize that research on nicotine ignores the complexity of smoking behavior and its possible motivations.

h. Underline that smoking is a practice, a custom — at most, it can be termed a habit as with many everyday acquired behaviors — but it is not scientifically

established to be an "addiction." Many people, obviously, can and do give up smoking.

...

CLAIM: SMOKERS CAN'T QUIT BECAUSE THEY'RE ADDICTED TO NICOTINE.

RESPONSES:

— "Addiction" is a frequently misused term that has become a catch phrase for many habits. The term has been used in so many different ways and so broadly that it has become almost meaningless. After all, people say they are addicted to all sorts of things — to foods like

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sweets, to work, even to video games.

— The political underpinning of calling smoking an addiction is sometimes quite explicit. For example, Dr. Morris A. Lipton was one of several scientists who reviewed the evidence of “cigarette addiction” for the United States government. He admitted that the word addiction was chosen because “it's sort of a dirty word.”

— Despite the emotional claims about smoking addiction, objective analyses continue to challenge this view. For example, a staff member of the United Kingdom's Office on Population Censuses and Surveys described decisions to quit or continue smoking as reflecting a rational and reasoned choice “that smokers make and periodically renew.” Similarly, an analysis by the West German federal government concluded that “no major dependence, in the sense of addiction, has been proven to be caused by the consumption of tobacco products.”

— Just because some people say it is difficult to stop doing something does not make that behavior an “addiction.” Many people have quit smoking, most without any formal treatment. Even the most recent U.S. Surgeon General's Report observed that nearly half of all living adults in the United States who ever smoked have quit. In view of such comments, it is difficult to consider smoking addiction claims as anything other than emotional attacks on tobacco products and the people who enjoy them.

CAUTIONS:

— Counter any suggestions that smokers are not in control of their own behavior by pointing out:

— This is an insult to smokers — a judgment that antismokers make simply because they disagree with a smoker's decision to smoke.

— Smokers who say this about themselves may not really want to give up smoking.

— References to a tobacco “habit” should be put in perspective with other everyday activities also called habits - these are not addictions.

...

“ADDICTION” - NICOTINE - DRUG COMPARISON

CLAIM: TOBACCO ADDICTION IS SIMILAR TO ADDICTION TO ILLEGAL DRUGS LIKE HEROIN AND COCAINE.

RESPONSE:

— The 1988 United States Surgeon General's Report gained press

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> attention with its pronouncement that cigarette smoking was an addiction, and nicotine an addictive substance akin to heroin or cocaine. However, this conclusion has been strongly criticized. In the United Kingdom, for example, Dr. David M. Warburton, of Reading University, argued that there were major differences between cigarette smoking and addictive illegal drug use. He contends that the Surgeon General "ignored the discrepancies in his enthusiasm to find criteria to compare nicotine use with heroin and cocaine use." After a detailed review of the Surgeon General's criteria, he stated that he was forced to conclude that the Surgeon General's addiction claim was "political."
>
> [Emphasis in original; references omitted]

[545] These instructions − like all those contained elsewhere in that guide[554] − are a good illustration of the way the appellants generally addressed the claims relating to the toxicity of cigarettes: denial, minimization, recourse to fragmented science making it possible to affirm the existence of scientific controversy or varying points of view, insistence on the weaknesses of the statistical links between cigarette smoking and disease or dependence, transformation of facts into opinions, etc.

[546] Nevertheless, despite the appellants' opposition, the new warnings promoted by Health Canada and by the 1993 version of the *Tobacco Products Control Regulations*, including the one related to addiction, were placed on cigarette packages starting on September 12, 1994.

[547] In 1995, sections 4, 5, 6, 8 and 9 of the 1988 Act were declared inoperative because they infringed the *Canadian Charter*, and the appellants, once again through the CTMC, indicated that:[555]

> Since the judgment of the Supreme Court of Canada struck down the provision which mandated health messages on packages, on the ground that it was a violation of freedom of expression to insist that those messages not be attributed

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[554] For example, on the association between smoking and lung cancer, the guide, which, it should be recalled, is from 1990, stated the following on pages 20 and 21:

> **CLAIM: SMOKING CAUSES LUNG CANCER**
> **RESPONSES:**
> - This is a misstatement. How can people claim that it has been proven that smoking causes lung cancer when science has not determined the mechanism by which a normal lung cell becomes cancerous? Without this scientific understanding, this claim must be viewed as just that, a claim or conjecture − not an established fact.
> - There is a statistical association between smoking and lung cancer, but statistical associations, alone, can never prove cause-and effect. Yet, the majority of existing evidence cited in support of a causal link between smoking and lung cancer is, in fact, based on statistical studies.
> - Even the statistical evidence on smoking and lung cancer has been questioned because of its many inconsistencies and its failure to answer such basic questions as:
>   - Why do the vast majority of "heavy" smokers in any study never get lung cancer? On the other hand, why do a significant percentage of nonsmokers develop lung cancer? For example, although only about 4 percent of Chinese women in Hong Kong smoke, they have one of the highest rates of lung cancer in the world?

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to their true source, this Code reimposes the messages most recently mandated by Health Canada, in a prominent and clearly legible form, with an attribution to Health Canada as the author of the message.

The Code also imposes a clearly legible health message on advertisement for tobacco.

[548] The messages in question were the following:[556]

6.1 Every package containing cigarettes or cigarette tobacco manufactured for sale in Canada shall display, in accordance with the Regulations, a clearly legible health message, in one of the following forms:

(i) "Health Canada advises that cigarettes are addictive."
"Santé Canada considère que la cigarette crée une dépendance."

(ii) "Health Canada advises that tobacco smoke can harm your children."
"Santé Canada considère que la fumée du tabac peut nuire à vos enfants."

(iii) "Health Canada advises that cigarettes cause fatal lung disease."
"Santé Canada considère que la cigarette cause des maladies pulmonaires mortelles."

(iv) "Health Canada advises that cigarettes cause cancer."
"Santé Canada considère que la cigarette cause le cancer."

(v) "Health Canada advises that cigarettes cause strokes and heart disease."
"Santé Canada considère que la cigarette cause des maladies du cœur."

(vi) "Health Canada advises that smoking during pregnancy can harm your baby." "Santé Canada considère que fumer durant la grossesse peut nuire à votre bébé."

(vii) "Health Canada advises that smoking can kill you."
"Santé Canada considère que fumer peut vous tuer."

(viii) "Health Canada advises that tobacco smoke causes fatal lung disease in non-smokers." "Santé Canada considère que la fumée du tabac cause chez les non-fumeurs des maladies pulmonaires mortelles."

7.1 Tobacco product advertising shall contain, on each advertisement, a clearly legible health message, in English or in French, as follows:

In the case of all tobacco products save smokeless tobacco products:

> "Health Canada advises that smoking is addictive and causes lung cancer, emphysema and heart disease."

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555 Exhibit 40005O-1995, Cigarette Advertising Code of the Tobacco Manufacturers at 1 and 2.

556 Exhibit 40005O-1995 at 4-7. Additional warnings were provided for cigars and pipe tobacco or tobacco that is not intended for smoking (sections 6.2 and 6.3 of the Code).

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or

> "Santé Canada considère que l'usage du tabac crée une dépendance et cause le cancer du poumon, l'emphysème et la cardiopathie."

In the case of smokeless tobacco products:

> "Health Canada advises that this product can cause cancer."

or

> "Santé Canada considère que ce produit peut causer le cancer."

8.1 Every carton sold in Canada shall display, in accordance with the Regulations, a clearly legible health message, in the following form:

> "Health Canada advises that cigarettes are addictive and cause lung cancer, emphysema and heart disease."

or

> "Santé Canada considère que l'usage de la cigarette crée une dépendance et cause le cancer du poumon, l'emphysème et la cardiopathie."

9.1 Under the heading "Toxic Constituents (Average) / Substances toxiques (Moyenne)", every package containing cigarettes or cigarette tobacco products manufactured for sale in Canada shall display, in English and in French, on one side panel, in 10-point type, and in the same colours as those used for the health message, a list of the toxic constituents in accordance with the Regulations.

[549] These provisions, which were repeated in the 1996 code, with the exception of a few minor details,[557] were accompanied by various rules relating to the positioning, format, size, etc. of the messages in question.

[550] Advertising, which was largely prohibited from 1988 to 1995, was resumed in a slightly attenuated form in 1995 after the Supreme Court decision, as the appellants did not abandon their disinformation strategy.[558]

[551] A new *Tobacco Act*[559] was passed in 1997, followed, in 2000, after extensive consultation, by the *Tobacco Products Information Regulations*,[560] which required even more explicit warnings, with graphic elements and informative messages. Since then, these warnings have become particularly clear and descriptive and can hardly leave anyone in doubt about the toxicity of tobacco and all its effects, as well as ways for consumers to protect themselves against the dangers of smoking: these messages encourage users to quit smoking, and indicate

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557 Exhibit 40005S-1996 at 7 and 8, ss. 7.1 and 8.1.

558 See also paras. [845], [893] and [903] *et seq*. below

559 *Tobacco Act*, S.C. 1997, c. 13.

560 *Tobacco Products Information Regulations,* SOR/2000-272.

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the symptoms to consider, while giving certain advice, etc.

[552] What can be said about the conduct of the appellants during the years 1988 to 1994 or even 1988 to 1998? The Court's observation will be brief: the trial judge was not mistaken in concluding that the appellants never fulfilled the duty to inform that was incumbent on them (whether under articles 1053 C.C.L.C., 1468 and 1469 C.C.Q. or section 53 paragraph 2 C.P.A.). Although they did display the information prescribed by the 1988 Act and the 1989 *Tobacco Products Control Regulations*[561] on cigarette packaging, until 1994, however, that information, although more specific than the previous voluntary information, remained too general to be considered sufficient information under the applicable standard, which called for accurate, understandable, and complete information on the dangers inherent to the normal use of the product they were placing on the market. As the Trial Judge noted:

> [287] Throughout essentially all of the Class Period, the Warnings were incomplete and insufficient to the knowledge of the Companies and, worse still, they actively lobbied to keep them that way. This is a most serious fault where the product in question is a toxic one, like cigarettes. It also has a direct effect on the assessment of punitive damages.

[553] To fulfill the duty to inform under the general law (and, as of 1980, the C.P.A.), it was not sufficient for the appellants − and this is recognized in subsection 9(3) of the 1988 Act, discussed earlier − to comply with the legislative and regulatory requirements.

[554] From 1988 to 1994, the appellants, who continued to stick with the disinformation strategies and tactics in place since the 1950s, also failed in their duty to provide information by continuing to suppress information on the addictive nature of cigarettes and fight information on the tobacco addiction association by all means at their disposal. This is no small omission, given the toxicity of cigarettes, which is expressed over a long period of time, and is largely a function of the dependence it creates: the smoker who, because of this dependence, cannot quit smoking, runs a higher risk. However, it was not until September 1994 that this characteristic of cigarettes was officially recognized, or at least displayed, due to the 1993 regulation.[562] And, it should be repeated, it was not the appellants who disclosed this on their own, although they did not remove the reference to it from their packaging while under the Voluntary Codes of 1995 and 1996.

[555] Moreover, in order to fully understand the way in which the appellants, at that time, understood their duty to inform, it is useful to refer to the following exchange between the Court and one of the appellants' lawyers at the appeal hearing:[563]

> THE COURT (YVES-MARIE MORISSETTE):
>
> If everybody knew that smoking caused serious diseases and cigarettes were addictive, why were the tobacco companies publicly denying it?
>
> Mtre THOMAS CRAIG LOCKWOOD:

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561 *Tobacco Products Control Regulations,* SOR/89-21.

562 *Tobacco Products Control Regulations - Amendment,* SOR/93-389.

563 Stenographic notes of November 25, 2016 (SténoFac) at 186–187.

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> Well ... and that's ... first of all, it's a complex question, but the first question is we have to remember there's been this suggestion of public denial. There's a difference between public denial and not actively stating things. There was the suggestion that because we didn't publish it on our website until two thousand and two (2002), it couldn't have been known. The fact of the matter is the evidence in the record shows that the companies effectively left the issue of warnings to the purview of Health Canada and they left it to them to communicate.
>
> [Emphasis added.]

[556] And a little further on:[564]

> THE COURT (MARIE-FRANCE BICH):
>
> You're saying that the companies actually left the issues of ... health issues to the government.
>
> Mtre THOMAS CRAIG LOCKWOOD:
>
> Yes.
>
> THE COURT (MARIE-FRANCE BICH):
>
> But the manufacturers didn't have a duty?
>
> Mtre THOMAS CRAIG LOCKWOOD:
>
> Well, that's ...
>
> THE COURT (MARIE-FRANCE BICH):
>
> Whatever the government might do or not do?
>
> Mtre THOMAS CRAIG LOCKWOOD:
>
> I'm not suggesting that that absolved us of any duty, but the question... the evidence in the record from the witnesses who came and testified, from both the government and the companies, was that there was a dialogue between the two (2) and that Health Canada, which was regulating this product, was responsible for communication ... risk communication to the public. And I'm not at all suggesting that absolves the companies of any harm and civil responsibility, but the factual question of why didn't they more actively communicate, the evidence in the record shows that that was something that they had agreed with the government or... and I don't want to put agreement too strongly because I don't want to suggest there was some binding agreement, but there was ... there was a dialogue at the end of which the companies took the view that it was the mandate of Health Canada to warn of the risk.

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564 Stenographic notes of November 25, 2016 (SténoFac) at 187–189.

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> And the fact of the matter is, they did warn of the risk. That's ... the evidence is very clear that all throughout this Class period, Health Canada was out there and that is why we see the results we see here.
>
> [Emphasis added.]

[557] These remarks indeed reflect the evidence, and we can refer to the following excerpt from the testimony of Mr. Steve George Chapman, representative of the appellant RBH and a witness at the trial, as an example:[565]

> Mtre SIMON V. POTTER:
>
> So that's in terms of internal statements, the company telling you or other employees what to think. What about statements made outside the company, has RBH, to your knowledge, made statements outside the company, to the general public, about these issues, as far as you know?
>
> MR. STEVE GEORGE CHAPMAN:
>
> But for an advertisement run by the president of the ... of Rothmans Pall Mall in nineteen fifty eight (1958), which talked about and categorically linked smoking with increased risk of disease, the company, to my knowledge, has not made public statements about the risks associated with smoking. We deferred to Health Canada to communicate the information; it was apparent very early on, in the sixties (60s), that this was the mean that they felt was theirs in terms of what they need to communicate about the risks. We accepted that, we didn't want to communicate anything that would muddy the waters. It was an area of communication that we relied on Health Canada to do, and we never interfered with what was being said about the risks associated with smoking.
>
> [Emphasis added.]

[558] All this can only be seen as an admission that the appellants did not fulfil their duty to inform, not only with respect to the addictive effect of cigarettes, but more generally with respect to all the dangers and risks associated with smoking. However, the appellants could not simply defer to the federal government to fulfil this obligation and keep to themselves everything they did not disclose. “To rely on Health Canada” did not allow it, in the circumstances, to meet the requirements of Quebec law in this regard and, to close this chapter as we started it, this is what section 9 of the *Tobacco Products Control Act*[566] and section 16 of the *Tobacco Act*[567] clearly indicate.

[559] As for the period from 1994 to 1998, even if we considered the information on cigarette packages to be sufficiently explicit, we must take into account the continued efforts by the appellants in other regards to undermine its effects. As we have seen on a number of occasions,

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565 The judgment *a quo* at para. 605, so describes this witness: « Steve Chapman, who started with RBH in 1988 and remains there today, was the designated spokesperson for the company in these files. »

566 *Tobacco Act,* S.C. 1997, c. 13.

567 *Tobacco Act,* S.C. 1997, c. 13.

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the misleading information provided by a manufacturer can defeat and will most often defeat any finding that the user would have or should have known about the dangers of the product. This is the situation here, and this subject will be examined in detail below.

[560] In summary, manufacturers are required to openly disclose the dangers inherent in the use of their product, even if that can make it difficult to market or can even put off users or future users, which is an irrelevant consideration. The obligation of the manufacturer of a product that is inherently toxic and dangerous to human health is of particularly high intensity and requires complete transparency.

[561] However, from 1950 to 1972, the appellants, despite their knowledge of the dangers and risks of smoking, including its addictive nature, essentially withheld this information. From 1972 to 1988, they slightly lifted the veil through voluntary disclosures of information that was not accurate, understandable, and complete as required by law. From 1989 to 1994 (and more precisely to September 1994 when the new statements prescribed by the 1993 regulatory amendments came into force), they unduly deferred to government statements that were in fact insufficient, to which they added nothing and with which they applied only because they were forced and constrained to do so. From 1995 to 2000, they continued to defer to regulatory requirements, including on a voluntary basis, until new government standards were adopted, which now fill the space that would have been left up to their duty to inform.

[562] But although the appellants complied with all these standards because they could not avoid it, using information that remained incomplete and unsatisfactory until at least September 1994, they nevertheless undid with their right hand what they were doing with their left. Throughout the period in question (i.e., 1950 to 1998), they set up and implemented a concerted policy and strategies (including advertising) that varied over time and depending on the legislative or regulatory framework, but which were intended to undermine any information contrary to their interests, including information resulting from regulatory statements to maintain a controversy and confusion about the effects of smoking, and generally to disinform the public.

[563] Therefore, between 1950 and 1998, the appellants deliberately violated their duty to inform as cigarette manufacturers, both by what they concealed until 1994, and by what they falsely conveyed and propagated, regardless of the angle from which it is viewed: a general duty not to harm others, arts. 1053 C.C.L.C. and 1457 C.C.Q.; a duty to inform users of the dangers of a product that is not otherwise affected by any defect in design, manufacture, preservation, or presentation, arts. 1468 and 1469 C.C.Q. and the prior case law; the guarantee against safety defects, s. 53 C.P.A. (from 1980 onwards). This failure, in all its forms, constitutes a fault within the meaning of art. 1053 C.C.L.C. and, even if it is not necessary to qualify the appellant's conduct as faults under arts. 1468 and 1469 C.C.Q. or s. 53 C.P.A., we can, however, without hesitation, find that it is within the meaning art. 1457 C.C.Q.

[564] What is more, we can speak of behaviour in bad faith resulting from a deliberate concealment of the effects of cigarettes on the health of users followed by the systematic negation, minimization, and trivialization of those effects based, in particular, on the cleverly but artificially maintained idea of a scientific controversy and on the alleged weakness of the relationship between cigarettes and diseases or dependence, all wrapped up in a strategy of misleading advertising.

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[565] The Trial Judge found as follows:

> [485] On the second question, we found that the Companies not only knowingly withheld critical information from their customers, but also lulled them into a sense of non-urgency about the dangers. That unacceptable behaviour does not necessarily mean that they malevolently desired that their customers fall victim to the Diseases or to tobacco dependence. They were undoubtedly just trying to maximize profits. In fact, the Companies, especially ITL, were spending significant sums trying to develop a cigarette that was less harmful to their customers
>
> [486] Pending that Eureka moment, however, they remained silent about the dangers to which they knew they were exposing the public yet voluble about the scientific uncertainty of any such dangers. In doing so, each of them acted "with full knowledge of the immediate and natural or at least extremely probable consequences that (its) conduct will cause" [Reference omitted]. That constitutes intentionality for the purposes of section 49 of the Quebec Charter.

[566] That is the least one could say.

[567] The question now arises as to whether the appellants, who failed in their duty to inform during the period in question, can, nevertheless, be exonerated from liability because the users knew or were in a position to know the dangers of smoking or could foresee the harm resulting from its use.

B. Victims' knowledge of the dangers

i. General

[568] The appellants' position could be summarized by this shocking phrase from the appellant JTM's brief: "the manufacturer ... does not have to warn the warned."[568] The knowledge of the user is, in fact, at the heart of the regimes established by art. 1473 C.C.Q. and by s. 53 C.P.A.: a person who is aware of the danger or could have foreseen the damage, cannot complain that the manufacturer has failed to fulfill its duty to inform. As we have seen, it is up to the manufacturer to establish this knowledge.

[569] Have the appellants discharged their burden of establishing the knowledge that the class members had concerning the dangers of smoking or the predictability of harm associated with its use?

[570] As we have also seen, the judge answered this question as follows:

> - The links between cigarette smoking and diseases such as lung or throat cancer and emphysema could be considered to have become known on January 1, 1980, such that they were known to the members of the Blais Class or, failing that,

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[568] Argument of the appellant JTM at para. 96.

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should have been and are presumed to have been known;

- The addictive effect of cigarettes can be considered to have been known as of March 1, 1996, and therefore known or presumed to have been known to all [and therefore to the members of both Classes] some 18 months after the introduction of the first regulatory warning on the subject on September 1, 1994;

- In accordance with art. 1468 and the first paragraph of 1473 C.C.Q., as well as the corresponding prior law, the appellants cannot be held liable for damages caused by the smoking of class members as of January 1, 1980, with respect to diseases, and as of March 1, 1996, with respect to dependence. They, nevertheless, remain liable for such damages under articles 1053 C.C.L.C. and 1457 C.C.Q.;

- The members of the Blais Class who began smoking on or after January 1, 1980, however, bear 20% of the responsibility for the damage they suffered as a result.

[571] We have examined above the errors of law committed by the trial judge – (1) by superimposing to the appellants' liability as manufacturers, a separate and additional liability arising from articles 1053 C.C.L.C. and 1457 C.C.Q. (liability that is not relevant in the circumstances), and (2) by holding that the knowledge that the members of the Class had or were presumed to have, of the danger or prejudice exonerated the appellants from their liability as manufacturers, but not from their general liability. Indeed, if the appellants establish this knowledge according to the required degree throughout the entire period in question, they will be entirely exonerated from their liability pursuant to the first paragraph of art. 1473 C.C.Q. or the previous rule established by the case law under art. 1053 C.C.L.C. or (for the period following its coming into force) pursuant to s. 53 C.P.A.

[572] We can summarize the essence of this means of exoneration in the following terms, according to the clause in question:

- In the case of the first paragraph of art. 1473 C.C.Q., the manufacturer must demonstrate that the victim is a reasonable person and knew the danger associated with the product (i.e., actually knew it) or was able to know it (in which event he or she is presumed to have known it) or that he or she could foresee the harm, which is another way of saying the same thing since knowing that using a product can cause harm of this or that nature, is equivalent to knowing the danger; the equivalent of this rule is also found in the law prior to 1994;

- In the case of s. 53 C.P.A., the manufacturer must prove that the consumer, as a credulous and inexperienced person, was aware of the danger or could have become aware of it.

[573] If we were to summarize the elements underlying these two proposals, it could be said that, in all cases, the manufacturer would escape liability resulting from the lack of safety of the product:

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- when the danger was apparent, i.e., visible or easily identifiable by a reasonable person or, as the case may be, by a credulous and inexperienced person after a summary examination of the product (objective knowledge);

or

- the danger was not apparent but was nevertheless known to the user, which knowledge can be established by direct evidence or by presumption (subjective knowledge).

[574] The standard of assessment applicable to this objective or subjective knowledge is, we repeat, that of risk acceptance. To be apparent, the danger must be one that "appears immediately and clearly to the eyes, to the mind"[569] and allows the user to fully comprehend its nature. Similarly, it would be found that the user is *de facto* aware of a hidden danger when it is established that the user knows enough about it to grasp its true measure. Without requiring a level of scientific knowledge or a level of knowledge equal to that of the manufacturer, the user, in fact, still has to have made a free and informed choice to accept the danger, which presupposes a high level of knowledge of the danger in question and the risk of its occurrence as well as the willingness to assume them.

[575] What is the situation in this case?

ii. Apparent danger

[576] Let us first deal with the argument of apparent danger. The trial judgment does not expressly mention this but is implicitly based on finding a hidden danger. One thing is for sure, and that is that even a careful examination of a cigarette, whether it be by a reasonable (or prudent and diligent) person under the *Civil Code* or by a credulous and inexperienced person under the C.P.A., is not likely to reveal its dangers, all the less so since these dangers only become apparent after prolonged use. Perhaps a scientist who took apart a cigarette and analyzed its components could come to another conclusion, but this is not the nature of examination required by a purchaser, consumer or user of a mass product and is obviously not this type of in-depth examination that defines apparent danger, regardless of the liability regime we are referring to.

iii. Actual knowledge of the danger by each Class Member

[577] Let us also deal with the argument of actual knowledge of the dangers or potential harm: the appellants did not, in fact, prove that the members of the Blais and Létourneau Classes had *de facto* knowledge of the harmful nature of cigarettes or the risk of harm likely to result from using this product. They did not even attempt to prove it. Obviously, given their number, there

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[569] Antidote 9 (Software), Montreal, Druide informatique, sub verbo "apparent". *Le Grand Robert de la langue française*, *supra* note 473, defines the French word "apparent" as follows: [TRANSLATION] "That which appears, is clear to the eyes" or that is "obvious." *Le Trésor de la langue française informatisé* defines it as follows: "That which appears clearly. 1. Visible, perceptible to the eye or understanding."

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was no question of examining each of the members. But a representative sample could have been examined, and their answers might have made it possible to infer the knowledge of all the members through serious, precise and concordant presumptive elements (art. 2849 C.C.Q.). However, the appellants did not question any of the members at trial.

[578] In 2014, however, the Court, referring on this point to an earlier interlocutory decision of the trial judge, upheld the appellants ITL's right to examine the successors of Mr. Blais (then deceased), Ms. Létourneau herself, and various class members at trial, on a variety of subjects, including the knowledge that the members had of the pathogenic or addictive effects of smoking.[570]

[579] The Court recalled in its decision that:

> [TRANSLATION]
>
> [49] The Appellant, as we know, now wishes to summon certain members in addition to the Respondent Létourneau herself and the successors of the Respondent Blais (the latter having in fact passed away). As we have seen, the appellant plans to examine them on the following subjects in particular, in order to establish on the one hand, the absence of a causal link between the fault (if any) and damage, and on the other hand, to demonstrate that the situations of each class member are so different that collective recovery is not appropriate:
>
> (i) The class members knowledge of the risks and dangers of smoking (Blais' proceedings) or the addictive nature of smoking (Létourneau's proceedings) before they started smoking and chose to smoke nonetheless (causation);
>
> (ii) Whether the class members in fact suffer from one of the qualifying illnesses states or from addiction (causation);
>
> (iii) Whether some class members have any number of confounding factors in their medical history (causation);
>
> (iv) The negative impacts resulting from the disease or addiction (damages).
>
> [50] It is up to the appellant to establish the factual basis for the following: the faults it is accused of have not caused any harm, the members of the Class contributed to this harm, their conduct constitutes a kind of *novus actus interveniens,* there is no reason to award moral damages, and collective recovery is not a suitable mode of redress here.
>
> ...
>
> [73] It may come as a surprise, of course, that the judge prohibited the production or use of the medical records of individuals who he is allowing the appellant to question. Is that not a contradiction? At first sight, when one considers the

[570] *Imperial Tobacco Canada Ltée c. Létourneau,* 2014 QCCA 944.

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> reasons for the judgment *a quo*, one might wonder why the judge authorized, in defence, the examination of members whose personal situation is not particularly significant and whose testimony could have the effect of a mere drop of water in the ocean. If the judge had refused these examinations, there would of course be no question of producing the medical records the appellant wished to obtain. But the fact is he authorized the appellant to call certain member in support of its defence. We know that the appellant intends to examine them on subjects such as their state of health, their alleged dependence on cigarettes, the reasons for it, the efforts they made or did not make to free themselves from it, the information they may have received or required in that regard, their knowledge about the harmfulness of smoking, the presence of carcinogens other than tobacco in their environment, [reference omitted], the moral or other damages they suffered, etc. Given that the appellant has been authorized to conduct the examinations of these persons, is access to their medical records not a kind of natural accessory to this type of questioning?
>
> [Emphasis added; references omitted.]

[580] However, in the context of the administration of evidence at trial, the appellant ITL did not avail itself of this opportunity and did not examine Mr. Blais's successors, or Ms. Létourneau, or any of the 150 members that had been chosen for this purpose. The appellants JTM and RBH did not conduct any examinations either. The file therefore contains no proof of the personal and actual knowledge that these individuals may have had of the dangers of tobacco or of the harm that the consumption of this product is likely to cause. The appeal file, as constituted, contains sparse information on the particular situation of the two designated members, Mr. Blais and Ms. Létourneau.[571]

[581] In the case of Mr. Blais, we know he started smoking in 1954 at age 10. In 1987, following an episode of heart palpitations, a doctor, although he concluded that [TRANSLATION] "his heart was good,"[572] first suggested that he quit smoking, which he tried to do several times without success. Was he told more? We do not know. In 1997, he was diagnosed with lung cancer, which according to his doctor, was due to cigarette smoking.[573]

[582] In the case of Ms. Létourneau, we know a little more. She began smoking in 1964 at age 19, apparently unaware that smoking was addictive. In about 1977, having learned that cigarettes are a health hazard (no further details are provided as to the extent of this information), she opted for a lighter tar and nicotine brand. At the same time, her doctor told her that smoking and taking birth control pills increased the risk of heart problems (if the doctor told her more, the record does not show it). She tried unsuccessfully to reduce her smoking and even stop completely. In 1980, her doctor again warned her about the dangers of combining cigarettes and birth control pills resulting in another failed attempt to stop smoking. Fifteen years later, in

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571 See also paras. [724] *et seq*. below.

572 Re-amended motion for authorization to institute a class action and to act as representative, November 8, 2004, at para. 2.9.

573 These facts, referred to more or less in the same terms in the motion to institute proceedings, were also alleged in the successive versions of the motions for authorization to institute a class action and supported in this case by affidavits from the relevant party.

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1995, a doctor explained to her the mechanism of nicotine addiction, which she did not know before then (although she had seen its effects), and informed her of the possibility of replacement therapy (nicotine patches). A new attempt to stop smoking subsequently ended in another failure and Ms. Létourneau could not overcome her addiction.[574]

[583] We have no other information, so it is impossible to rule on Mr. Blais's and Ms. Létourneau's actual knowledge of the harmfulness of cigarettes and verify whether this knowledge meets the threshold required to exonerate the appellants. And since we know nothing about the other members of either Class, it is impossible to conclude that there is actual knowledge on their part.

[584] We can assume that there are likely to be members within these Classes who were well aware of the harm of smoking, at the required level, and who were sufficiently informed such that they could be deemed to have accepted the risk and the harm and to have waived any recourse. But assumption is not proof, and proof has not been established.

iv. Presumed knowledge of class members

[585] There remains, therefore, only the following hypothesis, which is that of the appellants: that the toxic and addictive effects of cigarettes were, for most if not all of the period in question, well-known facts, that is, generally known in a reliable and certain manner. These were facts that the class members could not ignore, unless they failed in their own obligation to inform themselves − notoriety leading to the presumption of knowledge under articles 2846 and 2849 C.C.Q.

[586] It is therefore necessary in this case to establish a fact, the notoriety of the danger and the risk related to smoking, and to infer by presumption another fact, which is that the members of the Class knew or were in a position to know the harmful effects of this product. Thus, even if the appellants did not fulfill their duty to inform, they would be exonerated from their liability by the fact that the dangers and risks of smoking were notorious, and consequently presumed to be known to all. The debate at trial focused on this issue, and we saw earlier how the judge decided it.

[587] Before the Court, the appellants reiterated the argument and pointed to the general knowledge of the harmful effects of cigarettes and the dangers or risks associated with smoking,

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[574] These facts, as set out in the proceedings, also correspond to the framework adopted by the Small Claims Division of the Court of Quebec, in a judgment rendered in 1998. Ms. Létourneau sued the appellant ITL for damages, claiming the cost of the transdermal nicotine patches she used to quit smoking. Her action was dismissed: *Létourneau v. Imperial Tobacco ltée*, [1998] R.J.Q. 1660 (C.Q.); the judge found that, on the basis of the scientific knowledge at the time Ms. Létourneau began smoking, ITL had not breached its duty to inform by not informing its clients about the dependence created by nicotine. The judge also found that the plaintiff knew that cigarettes were harmful to her health and that she should have sought information before starting to smoke. That judgment does not have the authority of *res judicata* and cannot be used as evidence (arts. 563 C.C.P. and 985 C.C.P.), but is referred to here to confirm the alleged facts, although without further detail. On the merits, however, the evidence adduced in that case is not that of this one, such that most of the judge's factual findings (particularly those concerning the state of science, in 1964, on nicotine dependence) are of no use.

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which they claim had been widespread since the late 1950s, as shown by expert evidence that the appellants claim the judge erroneously ruled out. In its brief, appellant ITL writes, for example, that:

> Note infrap. 9: As discussed herein, the Appellant tendered extensive expert evidence confirming that there was widespread public awareness of the risks of smoking throughout the Class Period, which crystallized by no later than the early 1960s.
>
> 299. In summary, the Trial Judge's findings in respect of the "knowledge dates" are quite simply in contradiction to the clear evidentiary record showing (*inter alia*): (i) surveys conducted in the 1950s and 1960s confirmed that between 80% and 90% of the Québec populace was aware of the harmful effects of smoking, including lung cancer; (ii) the government's own survey results from 1964 showed that 90% of Canadians were aware of the risks of smoking; and (iii) the media coverage of the risks of smoking − including "dependence" − was ubiquitous by the late 1950s and early 1960s.
>
> 302. Not only is this approach contrary to reason, it is also at odds with the extensive expert evidence from Professor Flaherty, Professor Lacoursière, Professor Duch and Dr. Perrins, each of whom confirmed the widespread public awareness of risks throughout the Class Period. In other words, the Appellants tendered detailed and specific proof - not contested by the Respondents by means of any qualified expert or Class Member evidence − confirming "that the victim knew ... of the defect" prior to this deemed "knowledge date".
>
> [References omitted.]

[588] In the same vein, JTM argues that:

> [132] This analysis contains significant errors of law coupled with palpable and overriding errors of fact. When the correct analysis is applied to the uncontradicted evidence, it is clear that, throughout the Class Period, class members were or should have been aware of the risks as they were reported on by the scientific community and relayed by the Federal Government, the media and the public health authorities.
>
> [133] More particularly, the evidence demonstrates that the class was, or should have been, aware in the 1950s that smoking may carry risks, including the risk of contracting lung cancer. As a consensus on medical causation was reached in the mid-1960s, the evidence demonstrates that the class was, or should have been, aware that smoking causes lung cancer and other fatal diseases.[575]
>
> …

[575] The last sentence of this paragraph is not without irony in that it refers to a "consensus on medical causation" that was allegedly well established in the 1960s, whereas, however, the appellants still dispute today the existence of such medical causation, at least at the individual level, an argument which is one of the main grounds of their appeals.

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> [134] As Côté explains, the manufacturer "est en droit de s'attendre que le consommateur fasse preuve également de prudence raisonnable." Accordingly, a manufacturer does not have a duty to warn of dangers that a reasonably diligent person should know of. What is pertinent, therefore, is at what point in time a reasonably diligent consumer should have been aware of the risks given the available information. This date, although necessary to determine on a class-wide basis when people knew or should have known of the risk, does not affect the fact that awareness, before such a collective determination, is and remains an individual issue.
>
> [References omitted.]

[589] The appellant RBH defers to the other two on this point.[576]

[590] At the appeal hearing, here is how the appellants formulated their arguments in this regard − and what follows is taken from the Outline for appellants' Oral Argument filed at the beginning of the appeal hearing:[577]

> **9. THE TRIAL JUDGE ERRED IN HIS ANALYSIS OF THE DEFENDANTS' OBLIGATIONS TO INFORM CLASS MEMBERS OF THE HEALTH RISKS OF SMOKING AND IN SETTING THE KNOWLEDGE DATES (C. Lockwood)**
>
> ...
>
> b. The trial judge's Knowledge Dates are not substantiated by the evidence and conflict with the trial judge's own findings. The trial judge:
>
> i. disregarded the legal significance of the mandatory 1994 addiction warning and imposed a period of "public internalization" that is not recognized at law and on which he received no evidence or submissions.
>
> ii. applied inconsistent definitions of "dependence" that contradicted the evidence and undermined his conclusions as to the public awareness of the risk.
>
> iii. improperly drew factual inferences from the government's policy decisions as to when and how to regulate, in the face of unchallenged expert evidence that contradicted such inferences.
>
> iv. improperly disregarded reliable and probative expert evidence from Professors Flaherty, Lacoursière, and Duch, and elevated a passing comment of Dr. Proctor − who was not even qualified to speak about issues of awareness and did not purport to do so − to the status of dispositive evidence of public awareness in Canada.

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576 Appellant RBH's Arguments at para. 9.

577 Quebec Class Actions Appeal − Outline for appellants' Oral Argument at 10−11.

[Emphasis in original.]

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[591] In short, they claim that the judge, particularly with respect to addiction, was wrong in setting the date on which the members of the Blais and Létourneau Classes, respectively, could be considered to have known the harmful effects of smoking, as these effects were known since the early 1960s, if not even the early 1950s.

> a. Was the notoriety of the toxic and addictive effects of cigarettes acquired during the 1950s, 1960s or 1970s?

[592] The judge concluded that the harmful effects of smoking were not known in the 1950s, 1960s or 1970s. The appellants have not demonstrated how this factual determination would be vitiated by a palpable and overriding error. There is obviously no question here of reviewing all the expert evidence on the subject (which evidence is highly contradictory) or repeating the lengthy assessment that the judge undertook to come to this conclusion, but some elements can be highlighted.

[593] First, it is very surprising to note that the appellants assert the notoriety of information, which until 1972, they carefully concealed,[578] and which they later (in 1988) disclosed only in insignificant fragments by means of the sibylline statement we examined earlier.

[594] Second, while it is true that some information was already circulating during the 1950s, 1960s and 1970s on the harmful nature of cigarettes, that is, the cause and effect relationship between cigarette smoking and the development of debilitating or fatal diseases, it did not reach the threshold required to speak of a level of knowledge likely to exempt appellants under the extracontractual or contractual rules we have already seen, a threshold largely ignored by the appellants' (and in fact even the respondents' experts).

[595] It is not only a matter of the user or consumer being aware of the possibility of danger or harm, he or she must be informed − as has often been repeated − in an accurate, complete and understandable manner, and also be informed about how to protect himself or herself from it, especially when the danger is high and the risk significant. Only such information makes it possible to infer knowledge that itself signifies the acceptance of the risk and harm and renunciation of the right to sue. The obligation to provide this information, however, rests with the manufacturer.

[596] Admittedly, the user has a duty to inform himself or herself, although the case law, in the case of consumer products, makes this a relatively light requirement, often related to good judgement or common sense, which of course depends on the nature of the property in question, but does not require in depth research. Indeed, a person who intends to acquire or use a product, especially a "mass consumption product," does not have to retain an expert, conduct extensive research, examine the scientific literature, or try to distinguish what is false from what is true or what is possible from what it probable: this is not his or her burden under any of the applicable legislation (arts. 1053 C.C.L.C. or 1473 C.C.Q. or s. 53 C.P.A.). In the context of an

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[578] Except for the surprising and isolated admission of RBH's predecessor company in 1958, which was quickly withdrawn.

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information imbalance such as that in which the manufacturer and user are found (where the latter can legitimately trust the former), the duty of the latter to obtain information, although real, is limited in scope.

[597] An individual who decided to start smoking in the 1950s, 1960s or 1970s, when half of his or her fellow citizens were already smoking,[579] does not have to undertake a major investigation into the mass product that are cigarettes, consult his or her doctor beforehand or read the reports of all kinds of government offices. Prior to 1972, there was no mention on the cigarette itself or its packaging or inside the packaging indicating or suggesting that it might be a dangerous product. Between 1972 and 1988, the statement referred to above was indicated.

[598] But let us suppose, however, that at that time (1950s, 1960s or 1970s), the user, as a prudent and diligent person decided to seek information. The information the user would find would not be of a nature to enlighten him or her and certainly not to the point where it could be found that the user knew enough to accept not only the risk of smoking cigarettes, but also the harm they could cause (except in the case of a user who was a health professional or researcher employed by a cigarette manufacturer[580] and other examples of that kind).

[599] Of course, if the user were to flip through newspapers or magazines, he or she would see that there were some warnings against smoking. In the 1950s, cigarette smoking (despite the number of smokers) was not always well regarded, especially for women. It was related to various diseases, it did not seem clean, and it left an odour on curtains and clothing.[581] A person looking for information would no doubt see that, which, in the public arena, was still superficial. On the other hand, the appellants themselves, up until 1972, did not disclose anything about the dangers and risks of tobacco smoking and, we repeat, there was nothing on their cigarette packages or advertisements to this effect. That, in itself, is already a powerful contradiction to the information that the user may have gleaned here and there.

[600] In addition, to diffuse the negative information that was gradually emerging, especially from the late 1960s and in the 1970s,[582] the appellants had, for a long time already, undertaken a disinformation campaign, using every means possible on every front, as already mentioned above, aiming to pull the rug out from under tobacco critics by denying the facts, minimizing

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579 In 1956, according to a survey by the Canadian Institute of Public Opinion reported by La Presse, 62% of Canadians smoked and 30% of Canadian women smoked, for an average of 46% (Exhibit 20065.826 − under Exhibit 20065 entitled “Flaherty Documents” at 134346 (J.S.) at 30).

580 Why the example of a researcher working for a cigarette manufacturer? This is because it is quite possible that even the ordinary employees of this manufacturer were not aware of the toxic effects of smoking, as shown by a leaflet distributed to the employees of the appellant ITL: *The Leaflet*, which devoted its June 1969 issue to a “Special Report on Smoking and Health” (see Exhibit 2 at 1 *et seq*.). Given the length of the relevant extracts, they are reproduced at the end of the judgment, ANNEX IV. The statements thus reproduced, which follow the testimony of the President of ITL before the House of Commons Committee on Health, Welfare and Social Affairs on June 5, 1969, are those that the appellants conveyed, in one way or another, from the 1960s to the late 1990s.

581 See Exhibit 758-11, *Sales Lecture no. 11 − Motivation Research: Cigarettes − Their Role and Function − Oct. 1957* at 1−5.

582 An ITL representative, in a 1976 note to his supervisor, refers to the “many, sometimes vociferous attackers” who attack cigarette manufacturers (see Exhibit 11 at 1) [Emphasis added].

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them, challenging the science on the subject[583] and
presenting the debate on the harmful nature of tobacco as a matter of *opinion*. At the same time, the appellants were engaged in advertising campaigns, which, contrary to the Codes of conduct they adopted in 1964 and in the 1970s, aimed to present cigarettes to consumers as a product that would promote their success (romantically, socially, personally), prestige, zest for life and so on.

[601] Consequently, when a person was concerned about what he or she may have read in the 1950s or 1960s, or was curious about the warning appearing on cigarette packages in 1972 and sought more information, he or she obtained contradictory information, a significant portion of which maintained that cigarette smoking was not harmful or was not as harmful as some would have us believe, information to which was superimposed advertising that was effective at playing the seduction card on many levels. The person may even have discovered that Prof. Hans Selye, a leading medical expert famous for his work on stress, concluded that tobacco reduces stress, thus compensating for the harmful effects it can have in other regards,[584] an idea that quickly spread.[585]

[602] What this person would not know, however, at least not at the time, is that Prof. Selye, in 1968 or in 1969, first rejected the idea of working with tobacco companies[586] after they refused to fund his research.[587] However, he said he was ready to "consider undertaking a program of experiment to demonstrate the possible beneficial effect of nicotine."[588] On March 26 1969, Imperial Tobacco's Vice-President, Research and Development informed Prof. Selye that the Ad Hoc Committee accepted his research project on the subject of "Stress and Relief from Stress." Over three years, he received $150,000 from Canadian tobacco companies and $150,000 from American tobacco companies, for work to be carried out independently, "no conditions

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583 They did this by, among other things, maintaining an artificial scientific controversy about the harms of tobacco and by publicly and systematically denying the links between smoking and disease. This was the watchword, certainly until 1988: "[T]he causal relationship between smoking and various diseases has not been proven" (Exhibit 580C at 31070); "There is disagreement among medical experts as to whether the reported association between smoking and various diseases are causal or not, The C.T.M.C.'s position is to the effect that no causal relationship has been established" (Exhibit 957 at 52328). The record is full of evidence to that effect.

584 See Exhibit 964C, Tobacco Institute document, December 1978, entitled "The Smoking Controversy: A perspective," which reports various statements by Professor Selye about the effect of cigarette smoking on stress, which was purported to be one of the advantages of this product, in addition to its virtues in maintaining a normal weight (at 11−12).

585 See e.g., Exhibit 20065.2980 − under Exhibit 20065 entitled "Flaherty Documents," at 134450 (J.S.). This article appeared in the family supplement to the *Journal de Montréal*, dated February 23, 1975, titles: "STRESS: more harmful than two packs of cigarettes a day." It should be noted that, at the same time, this newspaper also published articles against cigarette use (titled, for example, [TRANSLATION] "Cigarettes kill more Quebecers than cars," Exhibit 20064.127, October 16, 1977). See also Exhibit 2 at 2, which supports the proposition that cigarettes are an anti-stress product.

586 In particular, by testifying before the House of Commons of Canada Standing Committee on Health, Welfare and Social Affairs, which was then investigating tobacco. Dr. Gaston Isabelle chaired this committee, hence the "Isabelle Committee" to which the trial judgment refers (see paras. 105, 248 to 250, 456, 460).

587 See Exhibit 1399.

588 Exhibit 1399.

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attached."[589] While it is no doubt impossible to conclude that Prof. Selye did not have a sincere scientific conviction about the benefits of tobacco, it remains that his view, in opposition to the others, could convince the ordinary smoker, who would have learned of the relativity of the risks of smoking or even the absence of real risks.

[603] The trial judgment gives plenty of examples of the appellants' work to undermine information. Among other things, paragraphs 245 to 253, 257, 258 and 453 to 457 (which refer to the 1960s and 1970s), which would take too long to reproduce here, give a good idea of the appellants' counter discourse.

[604] However, the rule, which stems from the law regarding hidden defects and extends to the area of safety defects is clear: the manufacturer's failure to fulfill its duty to inform may result not only from the absence or lack of sufficient information on the danger inherent in the product, but also from its misleading or deceptive representations. One cannot blame anyone who has relied on such representations for not having obtained more information, let alone for not having sought to prove them false or questioned them.

[605] In this sense, the appellants' counter discourse is an impediment − or at least, one of the impediments − to the notoriety of the facts that they are trying to deny or trivialize. They may well argue that the evidence does not formally show that the public was aware of this counter discourse or influenced by it, but the opposite is inferred from their actions during this period. Moreover, while they argue that the public could not have failed to see or hear what the media of the time were broadcasting about the harmful effects of smoking, there is no reason to think that they saw or heard only that and none of the competing information they were disseminating at the same time. On this point, we can only agree with the trial judgment.

[606] Consequently, to return to the person who was trying to learn more about cigarettes in 1950s, 1960s or 1970s, he or she would have first found limited, and then contradictory and controversial information. That person would also have noticed that the federal government at that time was encouraging smokers to smoke lower tar and nicotine cigarettes (in fact, it continued to do so until about 2000).[590] The ordinary person could have legitimately inferred that this type of cigarette was not harmful or was much less so (which, as we now know, is not true). That person would also have noticed that 40 to 42% of the Canadian population smoked regularly (i.e., every day).[591]

[607] But let us go back for a moment to the warnings that the appellants had been placing on cigarette packages since 1972. Would the ignorance of the user (as well as that of the general public) not dissipate with the appearance of these warnings? Earlier, however, we showed what those warnings consisted of until 1988: the danger indicated is so general that it could not contribute significantly to the awareness of the true effects of smoking. In any event, a person alerted by those tepid warnings who sought more information would have discovered the controversial information described above.

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589 See Exhibit 1400 at 119038−119039.

590 On the encouragement provided by the federal government in this regard, see in particular the testimony of Denis Choinière, June 11, 2013, at 216 and 219.

591 See Exhibit 20005 at 14.

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[608] The trial judge further noted that:

> [254] In fairness, ITL did permit certain research papers produced by it or on its behalf to be published in scientific journals, some of which were peer reviewed. In particular, some of Dr. Bilimoria's work in collaboration with McGill University was published. This, however, does not impress the Court with respect to the obligation to warn the consumer.
> [255] Such papers were inaccessible to the average public, both because of their limited circulation and of the technical nature of their content. Moreover, the fact that the general scientific community might have been informed of certain research results does not satisfy ITL's obligation to inform. Except in limited circumstances, as under the learned intermediary doctrine, the duty to warn cannot be delegated. As the Ontario Court of Appeal states in *Buchan*: ...
>
> [Reference omitted.]

[609] The judge is correct: these articles published in scientific journals were not accessible to the public and cannot have been expected to make the toxic and addictive effects of cigarettes known to the public.

[610] In short, whether in the 1950s, 1960s or 1970s, it is impossible to conclude that the effects of smoking were well known; whether cigarettes caused lung and throat cancer or emphysema was, on the contrary, a controversial fact at the time. Let us recall here the definition of the term well known, as set out above:[592] "what is known in a sure and certain manner by a large number of people." We can in no way conclude that the dangers and risks of smoking were known, at that time, in a sure and certain manner by a large number of people, and not only a sophisticated group of well-informed people (including the appellants who kept the information to themselves).

[611] We must also consider the product we are dealing with: the toxic effects of cigarettes, except perhaps for addiction, only become apparent in the long term and possibly the very long term. Beyond anecdotes,[593] the knowledge of these effects from the moment when the information began to circulate more widely, (while remaining controversial, contradicted and undermined) and despite the appearance of generic and uninformative warnings in 1972, cannot be said to have been instantaneously well known. Given the state of the information battle taking place before 1980, to speak of the toxic effects of smoking and the cause and effect relationship between smoking and certain cancers or respiratory diseases as well-known facts in the 1950s, 1960s or 1970s, from which a presumption of knowledge could be inferred with respect to the public in general and the members of the Blais and Létourneau Classes in particular, does not stand up to analysis.

[612] At best, and this is what ultimately emerges from all the expert reports, while some of the

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592 See para. [456], referring to *Le Grand Robert de la langue française*, supra note 473.

593 Like that of the witness Steve George Chapman's grandfather, who died of lung cancer − for that reason, from an early age, the witness, born in 1964, knew about the links between tobacco and cancer (see *supra* note 510). But, of course, for every grandfather who died in this way, there is a grandfather who, although an avid smoker, lived to an advanced age. It is not this kind of anecdotal evidence that makes a fact well known.

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public or some users knew that smoking was not good for their health, they generally had no accurate knowledge of that fact, as the information on this subject was insufficient and contradictory. Above all, it was hardly possible to measure the risks that this otherwise ill-defined damage would materialize. In this respect, that puts us in the realm of possibilities, as opposed to the realm of predictability − knowing that smoking *can* cause lung or throat cancer or emphysema is not the equivalent of knowing that smoking actually *causes* lung and throat cancer and emphysema, and that the vast majority of people with such pathologies are smokers or former smokers.

[613] In these circumstances, it is impossible to find that the pathological and addictive effects of cigarettes were well known, let alone infer that the knowledge on the subject reached the high level required by law in order to exonerate the manufacturer.

[614] Moreover, and to add to a remark made at the beginning of this section, it should be noted that the appellants, who affirm that the links between cigarettes and diseases such as lung and throat cancer and emphysema were well known and claim that this was known to everyone since the 1950s, 1960s or 1970s, also endeavored to deny those same links, at least until the early 1990s (and even later). Earlier reference was made to a guide for spokespersons for a manufacturer related to the appellant RBH: not only does this guide, which uses a now well-known sales pitch, minimize the cigarette/lung cancer relationship by reducing it to a questionable statistical correlation ("because of its many inconsistencies") and render it insignificant for individuals,[594] but it does the same for emphysema. Thus:[595]

> **CLAIM: SMOKING IS THE MAJOR CAUSE OF EMPHYSEMA AND OTHER CHRONIC OBSTRUCTIVE LUNG DISEASES.**
>
> **RESPONSES:**
>
> — The origin and development of these diseases are poorly understood.[1]
>
> — Researchers have studied the possible role of many suspected factors associated with these diseases in addition to smoking, including air pollution, alcohol consumption, history of previous infections, occupational exposures, childhood diseases, adult infections, and genetic disorders.[2]
>
> — How can one explain the fact that animal experiments have failed to reproduce emphysema with cigarette smoke[3] while those with primary air pollutants have?[4]
>
> **CAUTIONS:**
>
> — Don't allow distinctions to be made between "main" and "contributory" cause.
>
> — If your credibility is challenged, stress the Industry's deep concern and record of funding research.

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[594] See *supra* note 554.

[595] Exhibit 846-AUTH at 27–28.

HEALTH- RESPIRATORY DISEASES

REFERENCES

> [the scientific references contained in notes 1, 2, 3 and 4 of the above text are not reproduced here; emphasis in original]

[615] This was the position taken by the appellants with the public and the media and the point of view they defended as of the 1970s, after years of outright denial. It is paradoxical, however, to say the least, to claim on the one hand that this causation was well known to the ordinary public, and then vigorously deny it on the other.

[616] But, a little more needs to be said about one of the effects of smoking, namely addiction.

[617] The appellants are particularly critical of the date chosen by the judge, March 1, 1996, to define when people became well aware of this point (this is 18 months after the first such references appeared on cigarette packages in September 1994). In their opinion, this characteristic of the product should have been known for a very long time. It is hard to quit smoking, few individuals succeed on the first attempt, and some never succeed: this is, according to the appellants, a fact that was known since the 1950s. Of course, at that time no one spoke about dependence, nor did we use the word "addiction," but people knew nonetheless that cigarettes were "habit forming and difficult to quit" – the reality was thus known, even if the vocabulary was not yet there.

[618] There is no doubt that the appellants themselves were well aware of this characteristic of smoking as early as the 1950s.[596] However, the fact that smoking was truly addictive and not just a bad habit was not a well-known fact. First, there is a significant difference between a bad habit, which is psychological, and addiction, which is an effect of physical or physiological dependence. However, the appellants argued at length, and falsely, that while smoking could be a habit, it was not a form of addiction.

[619] Was the addictive nature of cigarettes a well-known fact in the 1950s, 1960s or 1970s? Let us refer here again to the above-mentioned passage from a rather candid confidential note, addressed by Michel Descoteaux (ITL employee, who later became ITL's Director of Public Affairs) to Anthony Kalhok (Vice-President, Marketing, of the same company), in 1976:

> A word about addiction. For some reason, tobacco adversaries have not, as yet, paid too much attention to the addictiveness of smoking. This could become a very serious issue if someone attacked us on this front. We all know how difficult it is to quit and I think we could be very vulnerable to such criticism.

[620] In light of this note (not to mention the rest of the evidence), it is difficult to affirm that the "addictive" nature of cigarettes was well known before 1980, and all the more so since, as we saw earlier, the appellants denied that fact until 1994, and successfully opposed putting a mandatory statement to that effect on their cigarette packages.

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[596] Let us consult, somewhat at random, Exhibit 758-11, Sales Lecture no. 11 - Motivation Research: Cigarettes - Their Role and Function, *supra* note 581 at 1-3, document dated October 1957.

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[621] It is true that at that time, the Surgeon General of the United States had already, for six years (1988), recognized the addictive nature of tobacco, which we will recall, was compared to heroin or cocaine addiction.[597] The Royal Society of Canada did the same in 1989.[598] But if this establishes anything, it is that in the 1950s, 1960s or 1970s, this characteristic was not well known in the sense that we understand that term, at least in that we did not measure its real effects or extent until then.

[622] In conclusion, the Court considers that the trial judge did not err in finding that the pathogenic or addictive effects of smoking were not well known during the 1950s, 1960s and 1970s.

b. Were the toxic and addictive effects of smoking well known in 1980 (diseases) and 1996 (addiction)

[623] While he was not mistaken in finding that the harmful effects of smoking were not well known in the 1905s, 1960s or 1970s, did the trial judge err in setting the dates for those effects to be well known in 1980 (diseases) and 1996 (addiction)?

[624] The respondents argue that the actual extent of the risks and dangers of smoking [TRANSLATION] "was unknown to the public throughout the period covered by the actions"[599] (1950–1998) and, indeed, that [TRANSLATION] "members of the public still did not know the extent of these risks in 2012."[600] On the basis of the evidence, one may indeed wonder whether the judge was right to conclude that the pathogenic effects of smoking were well known on January 1, 1980, and that the addictive effects of smoking were well known on March 1, 1996.

[625] It should be recalled that the notoriety of the knowledge referred to here must be defined according to the threshold of knowledge for the user that would allow the manufacturer to be exonerated, namely, knowledge equivalent to acceptance of the risk and harm and renunciation of all recourse. The judge does not appear to have taken this threshold into account, however, when determining the dates when the knowledge became well known.

[626] First, let us consider the diseases caused by cigarette smoking. As the Court has observed on several occasions, the voluntary and then mandatory warnings on cigarette packages from 1972 to 1993 were very general and certainly insufficient to make the dangers of smoking well known to the point that would give rise to a presumption of knowledge reaching the required threshold (i.e., that of acceptance of risk and harm). Of course, during that time, several organizations (and also the federal and provincial governments themselves) were circulating information denouncing the harmful effects of smoking, but it is still doubtful that the required threshold of knowledge was reached in 1980 while the appellants were still actively campaigning and advertising to the contrary and the federal government was still suggesting that people smoke so-called light cigarettes.

[627] The findings set out in the previous section[601] can be transposed here: until at least 1988,

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597 Exhibit 601-1988 at 1 *et seq*.
598 Exhibit 212 at 1 *et seq*.
599 Respondents' Arguments at para. 254.
600 Respondents' Argumenta at para. 258.
601 In particular at paras. [605] *et seq*.

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before the *Tobacco Products Control Regulations* came into force, a smoker or potential smoker who, as a reasonable person, decided to seek information (without, however, conducting an exhaustive study of the matter, which was not required) would have been confronted with contradictory information about a product whose sale is legal (albeit with a half-hearted warning[602]) but that would nevertheless have harmful effects that the manufacturers themselves, however, denied or disputed their scientific nature. The situation changed little between 1989 and 1993, with more explicit, but still insufficient, warnings from September 1994 onwards, as mentioned earlier. One might think that the public should have given more weight to the statements made by cigarette detractors than to the denials of the appellants, but in the context of a user-manufacturer relationship characterized by a significant information imbalance and by the establishment of an implicit relationship of trust between the user and the manufacturer, one cannot conclude that the pathogenic effects of cigarettes were well known: perhaps a reasonable user would have understood from the information being circulated that cigarettes are not particularly good for health, but this does not mean they correctly understood the danger, i.e., the real risk that serious harm would occur. This danger was not yet known. Moreover, we can repeat that, while potential users have the responsibility to inform themselves, they do not have the responsibility to solve controversies regarding that information.

[628] And if that reasonable person or, if one prefers, that reasonably prudent and diligent person, could not, in this context, fully realize the dangers and risks of smoking in terms of the potential diseases, what can we say about the credulous and inexperienced person?

[629] This question cannot be avoided since s. 53 C.P.A., which came into force in April 1980, covers part of the period in dispute and applies to the case at bar, since the members of both Classes are consumers and the appellants are manufacturers within the meaning of that Act. However, given the uncertainty in the public arena that continued after January 1, 1980, and, similarly, after April 30, 1980, due to the appellants ' disinformation campaign, which continued well after that date, it is quite plausible to conclude that such a person may have spent the 1980s without acquiring or being able to acquire this knowledge, at least until the coming into force of the regulatory warnings in September 1994, which were more explicit than the warnings in 1989.

[630] As we know, up until 1994, the voluntary then statutory warnings on cigarette packages and elsewhere were still too general to be considered sufficient information with respect to the applicable standard of knowledge and the notoriety of that knowledge. However, while this remark applies to the reasonably prudent and diligent user (who could perhaps have obtained information elsewhere), it applies *a fortiori* to the credulous and inexperienced person. And all this without taking into account that the federal government, until 1987, advised Canadians to smoke cigarettes with lower tar and nicotine content,[603] which could leave the credulous and inexperienced person (and perhaps even the reasonable person) with the impression that they were safer (even if the packaging was labelled with the same regulatory warnings).

[631] Moreover, even as of 1994, when the regulatory warnings became more explicit

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602 For convenience, let us recall the content of this warning, from 1975 to 1988: "WARNING: Health and Welfare Canada advises that danger to health increases with amount smoked - avoid inhaling / AVIS: Santé et Bien-être social Canada considère que le danger pour la santé croît avec l'usage – éviter d'inhaler."

603 See the testimony of Denis Choinière, June 11, 2013, at 219.

(although still unsatisfactory in many respects), once again, we cannot ignore the counter-discourse maintained by the appellants, which continued unabated and which, following the Supreme Court judgment in 1995, was once again associated with misleading advertising strategies, contrary to ss. 219 and 228 C.P.A.[604]

[632] We will refer to only one example, in addition to those given in the previous sections (it is impossible to use more without making this demonstration more cumbersome). In seven issues of the newsletter *The Leaflet*, published by ITL in 1994 and 1995, there is a seven-part article following a vibrant argument in favour of individual freedom and responsibility,[605] containing the following remarks, which correspond to ITL's public discourse (and coincide in substance with that of the other appellants, which is not surprising given that they were following a coordinated strategy:[606]

> Mark Twain once said: "There are lies, damn lies, and statistics". Studies published by health and anti-smoking organizations have led people to believe that smoking causes lung cancer, heart disease, emphysema, and bronchitis. Furthermore, these studies have let people assume that smokers will inevitably suffer from one of these diseases at some time, and that by not smoking or quitting smoking, people avoid developing these diseases.

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[604] For example, Exhibit 1215 should be read. This is a note describing the advertising branding that the appellant RBH was considering for some of its products. See also exhibits 1217-2m and 1218-2m, which concern the branding of some of the appellant ITL's brands. This is referred to as "lifestyle" advertising, which will be analyzed further in the section that these reasons devote to sections 219 and 228 C.P.A.

[605] Exhibit 105-1994-PP-2m, Leaflet, vol. 30, no. 5, September / October 1994, article titled "Clearing the air – Part one: "Who is responsible,"" at 1 and 4, from which the following two sentences are extracted, and quite representative of the argument: "Realizing life's risks, people should maintain the right to decide for themselves, whether this decision is about eating greasy food, drinking alcohol or smoking cigarettes"; "Maybe what is required is not regulations on the part of the government, but virtue on the part of the individual: "tolerance, in the name of freedom, to do things one disagrees with or does not like, provided they do no outright harm to others.""

[606] Exhibit 105-1994-PP-2m, article titled "Clearing the air – Part two: "Smoking and Health, The scientific Controversy" at 2 and 6; Exhibit 20065.11790 – under Exhibit 20065 titled "Flaherty Documents" at 134945 (J.S.), article titled "Clearing the air – Part five: "Smoking and risk"" at 7. In 1994, in a brochure apparently intended for the public, BAT repeated the same discourse on the absence of scientifically established causation (Exhibit 242B-2m; similarly, see Exhibit 409-2m). That same year, Michel Descôteaux, representing the appellant ITL, made the same argument about the absence of a scientifically established causal relationship between tobacco and disease (Exhibit 26 at 4):

> [TRANSLATION]
>
> But I'm not telling you that tobacco is not the cause of disease, nor am I telling you that tobacco is the cause of disease. To sum up, what I'm trying to tell you is that on the basis of the cause-and-effect relationship, it's still pending, and the current state of knowledge doesn't allow us to decide.

In 1998, Mr. Rob Parker, then President of the Canadian Tobacco Manufacturers'' Council, speaking about the causal relationship between cigarettes and certain diseases, further argued that: "You can't say something exists if science hasn't demonstrated it. All of the smoking related diseases I know about are multifactorial. There is no single identifies cause. If all smokers got lung cancer and no non-smokers got those kind of cancers, then you would understand it is definitely there" (Exhibit 20063.11, taken from the *Vancouver Sun*, November 5, 1998, at 133976 (J.S.)).

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The facts are that researchers have been studying the effects of tobacco on health for 40 years now, but are still unable to provide undisputed scientific proof that smoking can cause lung cancer, lung disease and heart disease. The studies that have claimed that smokers have a higher risk than non-smokers of developing some diseases are statistical studies. Statistical studies look at people who develop certain diseases and compare their behaviour and lifestyles with people who do not develop those diseases. Although reports claim a statistical association between smoking and certain diseases such as lung cancer, heart disease and lung diseases, they have also found that many other things that people do, or are exposed to, are statistically associated with the same diseases.

"The fact is nobody knows yet how diseases such as cancer and heart disease start, or what factors affect the way they develop. We do not know whether smoking could cause these diseases because we do not understand the disease process."

...

Smokers and non smokers alike develop lung cancer and heart disease. So, although smoking has been statistically associates with lung cancer and heart disease, it is only one of many risk factors.

…

A certain activity is defined as a risk factor through epidemiological studies. "Epidemiology is the study of incidence, distribution and control of a disease in a population".

Epidemiological studies have found a statistical association between smoking and the development of cancer. Therefore, according to epidemiological studies, smoking is said to be a risk factor for developing cancer. This is misleading to the public because these studies can only show a statistical association, they cannot scientifically prove that smoking causes cancer. It would be like saying that having a driver's license is the cause of having a car accident.

"Having a driver's license is a risk marker for car accidents, because possession of a driving license is statistically associated with having an accident while driving a car; however, possessing a driving license does not of itself cause the accident..."

B.A.T brings up a theory presented by Skrabanek and McCormick (1989) referred to as the "fallacy of cheating death":

"All living species have a biological life span: plants, fish, animals and humans. While the upper limit of the human life span may be as much as 116 years, the median, or most usual biological life span, is probably about 85. Some of us may be programmed to die before our seventieth birthday and a few of us are programmed to become centenarians. This programme is coded in our genes and is unalterable, at least for the time being. The old may die with, rather than of,

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disease."

> This is a very important point, because it suggests that all life forms including humans have predetermined life spans encoded in our genes. Short of being in an accident, the age at which we die cannot be significantly altered by the activities in which we engage. Appliances have warranties, which are determined by the manufacturer. Tests performed on the appliances can tell the manufacturer approximately how long each part of the appliance will last. This is somewhat the idea behind the "fallacy of cheating death" theory.
>
> There are thousands of studies going on all the time, trying to determine what causes cancer, and what can prevent the cause of cancer, "...the public is continually receiving huge amounts of information, largely through the media, on an enormous variety of risk factors that they are supposed to take into account and avoid if they want to live a healthy life style and prevent disease".
>
> Coffee had been statistically associated with several types of cancer. The public was encouraged to switch to decaffeinated coffee to avoid the risk, until a chemical used in the decaffeination process was discovered to be a risk factor for cancer.
>
> "Food itself, for example, is essential for life and yet, is a major source of chemicals, many of which are considered by some health authorities to be potentially capable of causing cancer or to be toxic in other ways".
>
> Studies have shown that 99.9% of ail pesticides in our diet are unavoidable and natural products of the plants we eat (the plant produces its own pesticides to protect it from bacteria and insects).
>
> "However, because most of us survive in a healthy condition for a long time, it is clear that any injuries to the body caused by low dose exposure to such chemicals are fully repaired or neutralised by efficient natural defences. Such defences, of course, are believed to wane with age, rendering older persons more prone to develop diseases such as cancer."
>
> Everyone takes risks every moment of their lives. Breathing the air in the city, being exposed to direct sunlight, virtually everything we do could be statistically associated with a disease and therefore would be considered a risk factor. If we stopped doing everything that carries a risk, we would not be able to get out of bed in the morning. Everyone should be allowed to live their lives, doing everything — with moderation.

[633] This rhetoric is not trivial; it is, in fact, persuasive. The user (whether we're talking about a credulous and inexperienced person or an ordinary and reasonable person) exposed to this type of argument, particularly if he or she already smokes,[607] may be convinced of it despite being

[607] About 30% of the Canadian population still smoked in 1994–95, or almost one in three people (see Exhibit 40497.65, Statistics Canada, Health Statistics Division, *Report on Smoking in Canada, 1985 to*

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exposed to the contrary information circulating at the same time, in particular, through the warnings on cigarette packages. “Realizing life's risks, people should maintain the right to decide for themselves” – that is true, but it is still necessary to be able to “realize” the risk associated with such a decision by understanding its true measure. The “disinformation” counter-discourse assiduously put forth by the appellants at the time, however, did not promote realizing these risks, which was precisely the objective.

[634] Once again, the issue here is to determine whether the morbid effects of smoking (lung or throat cancer, emphysema) were well known – a high standard – and to determine the date on which the notoriety of that information can be established in order to draw the inference that at that point, all members of the Class knew or were able to know the risks, which presumed knowledge is equivalent to accepting risk and harm. Such knowledge could be used against smokers and exonerate the appellants from the liability that could arise from the fact that throughout the period in question (1950 – 1998) they systematically and deliberately failed to fulfill their duty to inform. Let us also repeat that users or future users of any product, while under the obligation to inform themselves, are not obliged to do extensive research on the subject and even less, to unravel the contradictory information received from each side.

[635] That being the case, the Court considers that it is not legally possible to conclude that the pathogenic effects of smoking (cancers, emphysema) were well known until 1988[608] (in the hypothesis most favourable to the appellants) or 1994,[609] or perhaps even in the case of the credulous, inexperienced person, until the end of the litigation period (1998). The social acceptability of cigarettes was certainly much lower at the time than in the 1960s or 1970s. But the information available to the public was still discordant and contradictory (although leaning more to one side than the other). And the risk associated with smoking beyond the general risk cannot be considered a fact that was “known in a sure and certain manner by a large number of people,” taking into account the standard applicable to this knowledge. Perhaps the pathogenic effects of smoking, at least with respect to lung or throat cancers and emphysema, were scientifically indisputable as early as the 1980s, but this was not yet known within the meaning of art. 1473 C.C.Q. or the prior case law and was not so widespread as to allow us to infer that there was general knowledge.

[636] On another note, we must also ask the following question: was the knowledge that users, future users or the general public could have of these effects not insufficient so long as the addictive nature of tobacco was not known? This effect weighs heavily in the balance of pathology: a person who only smoked a few cigarettes in their life is probably protected from the diseases caused by the prolonged use of this product.[610] A person who has smoked for a long time is at a higher risk, which increases with use. However, dependence – a true addiction – is the factor that guarantees smoker loyalty and at the same time, increases the risk of developing one of the diseases associated with cigarette smoking.

2001 (Ottawa, Minister of Industry: 2002); Exhibit 40497.64B, *Canadian Tobacco Use Monitoring Survey (CTUMS)* (Ottawa, 2008) at 202278 (J.S.)).

608 When the first regulatory information appeared on cigarette packages.

609 With the coming into force of statutory statements that describe in more detail the harmful effects of cigarettes on health.

610 Unless he or she is a victim of second-hand smoke, which is not the subject of the actions brought by the Respondents against the appellants.

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[637] Can the victims of harm be blamed, in fact and in law, for knowledge they may have had of the pathogenic effect of smoking when a crucial piece of the puzzle was missing? Because knowing, or not knowing, the powerful addictive effect of cigarettes directly affects users' or future users' assessment of the risk incurred. Assuming they know the danger, can we, nevertheless, say that they accept it when, because of their ignorance of a fundamental fact, they cannot correctly evaluate the risk that the damage will occur.

[638] Obviously, it will be countered that regardless of the subject of addiction, the last third of the 1980s was a time when people knew the pathogenic effect of smoking: on January 1, 1987, the *Act respecting the protection of non-smokers in certain public places*[611] came into effect, prohibiting, as its title indicates, smoking in certain public places.[612] These prohibitions, which were not yet very severe,[613] suggest, however, that if the smoker may assume the risks of his or her own smoking, he or she should not subject others to those risks. The smoker must, therefore, understand that there are risks in the first case as in the second. But again, can the smoker not deduce from the fact that the smoking ban does not cover all public places that the danger is not so great?

[639] In 1988, however, Parliament also passed *The Tobacco Products Control Act,*[614] which came into effect on January 1, 1989. We reproduce section 3 of the Act[615] here for the sake of convenience:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,	**3.** La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement :
(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the	*a)* de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant

611 *Act respecting the protection of non-smokers in certain public places,* S.Q. 1986, c. 13.

612 The *Non-Smokers' Health Act*, S.C. 1988, c. 21, prohibits smoking in (federal) workplaces, trains, aircraft and other means of public transportation, subject to the installation of smoking rooms or the designation of smoking areas.

613 This modest ban has nothing in common with the current prohibitions. The 1986 Quebec law prohibits smoking in a few places owned or leased by public bodies or, more precisely, in certain areas: a room or counter intended for the provision of services, a library, a laboratory, a conference room, a classroom or seminar room, an elevator, any other place designated by the person with the highest authority within the organism. Smoking is also prohibited in health care facilities, except in areas designated for staff use, in a smoking room or in an area designated by the person with the highest authority within the facility. Smoking is prohibited in ambulances, subway cars, school buses, buses for schoolchildren, disabled people, urban transport or airport transport, as well as in certain other places.

614 *Tobacco Act,* S.C. 1997, c. 13.

615 See above at para. [119].

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incidence of numerous debilitating and fatal diseases;	de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;
(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and	*b)* de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;
(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.	*c)* de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

[640] The legislator here refers to a "national public health problem of substantial and pressing concern," and conclusive evidence of the link between tobacco use and many debilitating and fatal diseases. The law even refers to "*tabagisme*" in French (a French term for the addiction of tobacco users) and to "dependence" in English caused by tobacco. Surely, one might imagine that a national public health problem of substantial and pressing concern would be known to all, at least with respect to the debilitating or fatal diseases referred to in paragraph 3(*a*).

[641] However, even if ignorance of the law is no excuse, it is unlikely that the public in general or smokers in particular would have been aware of this provision and that this could have been the basis for their knowledge of the morbid effects of tobacco, of its addictive effect, of the actual intensity of its addictive effect, and consequently, of the actual risks of those effects. Rather, the harmful effects of smoking were discussed in the media. Moreover, we must also note that despite the alarming wording of section 3 of the 1988 Act, it was not until 1994 that the federal government required manufacturers to put more explicit statements on cigarette packages, including the warning that "Cigarettes are addictive / *La cigarette crée une dépendence*". As the main provisions of the 1988 Act were declared contrary to the Canadian *Charter* in September 1995, this reference disappeared and was replaced by the following warning, voluntarily put on their packaging by the appellants: "Health Canada advises that cigarettes are addictive / Santé Canada considère que la cigarette crée une dépendence" (the other warnings were retained, also on a voluntary basis).

[642] In short, for all these reasons, the date on which the judge recognized that the information concerning pathologies related to smoking was well known cannot be that of January 1, 1980. As previously indicated, in the hypothesis most favourable to the appellants, that date cannot be before June 28, 1988, the date of assent to the *Tobacco Products Control Act*,[616] which recognized the morbidity of cigarettes, or January 1, 1989, the date of its coming into effect and the date of the first statutory notices. In the Court's view, however, knowledge of the addictive effect of tobacco is essential for being able to assess the pathogenic risk, and the two elements cannot be separated. Consequently, the morbid effects of cigarettes could not be well

[616] *Tobacco Act,* S.C. 1997, c. 13.

known before the date on which the addictive effect of cigarettes also became known, keeping in mind that this knowledge must reach a threshold that allows the members of the Class to have a level of knowledge equivalent to the acceptance of the danger, risk, and harm.[617]

[643] This naturally leads us to more closely examine the date on which, according to the trial judge, the addictive effect of cigarette became well known and consequently presumed to be known by the class members.

[644] The appellants argue that, in the best case scenario for the respondents and the class members, this date must be September 12, 1994, when the reference to addiction first appeared on cigarette packages, a reference prescribed by the *Tobacco Products Control Regulations* in its 1993 version, which would substantially be repeated on a voluntary basis by the appellants in 1995 and 1996 (and thereafter, until the new warnings prescribed by the *Tobacco Act*[618] in 1997 were imposed). At that point, in the absence of being personally informed, everyone was able to know about this effect of smoking and must therefore be presumed to have known it. They argue that the judge therefore erred in setting that date at March 1, 1996.

[645] The judge gave the following reasons for choosing March 1, 1996, over September 12, 1994:[619]

> [127] That the Companies recognize the new Warning's importance is telling, but the Court puts more importance on the fact that Health Canada did not choose to issue a Warning on dependence before it did. If the government, with all its resources, was not sufficiently concerned about the risk of tobacco dependence to require a warning about it, then we must assume that the average person was even less concerned.
>
> [128] That said, even something as visible as a pack warning does not have its full effect overnight.
>
> [129] The addiction Warning was one of eight new Warnings and they only started to appear on September 12, 1994. It would have taken some time for that
>
> one message to circulate widely enough to have sufficient force. The impact of

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[617] It should be noted that, in September 1995, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, Justice La Forest stated:

> [31] ... Abundant evidence has been filed at trial that tobacco use is a leading cause of cancer, as well as heart and lung disease causing death. Nowadays, this conclusion has become almost a truism. ... [Emphasis added.]

The evidence referred to in this passage is medical evidence (several reports date from 1988 or 1989), evidence used to justify the constitutionality of the *Tobacco Products Control Act* (1988 Act), particularly with respect to criminal law. It does not refer to the public's knowledge of this issue in the context of a civil liability action brought by users against manufacturers. The truism noted by Justice La Forest, in any event, is at a date that is close to the one that will be retained by this Court on the basis of the evidence in this case.

[618] *Tobacco Act,* S.C. 1997, c. 13.

[619] Paragraphs 129 and 130 of the judgment have already been reproduced in paragraph [143] of these reasons.

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> decades of silence and mixed messages is not halted on a dime. The Titanic could not stop at a red light.
>
> [130] The Court estimates that it would have taken one to two years for the new addiction Warning to have sufficient effect among the public, which we shall arbitrate to about 18 months, i.e., March 1, 1996. We sometimes refer to this as the "knowledge date" for the Létourneau Class.
>
> [131] There is support for this date in one of the Plaintiffs' exhibits, a survey entitled "Canadians' Attitudes toward Issues Related to Tobacco Use and Control". It was conducted in February and March 1996 by Environics Research Group Limited for "a coalition" of the Heart and Stroke Foundation of Canada, The Canadian Cancer Society and the Lung Foundation. Although this is a "2M" exhibit, meaning that the veracity of its contents is not established, Professor Duch cites it at two places in his report for the Companies. This should have led to the "2M" being removed and the veracity, along with the document's genuineness, being accepted.
>
> [132] The Environics survey sampled 1260 Canadians, of which some 512 were from Quebec. When they were asked to name, without prompting, the health hazards of smoking, "only two percent mention the fundamental hazard of tobacco use which is addiction".
>
> [133] Since the Létourneau Class's knowledge date about the risks and dangers of becoming tobacco dependent from smoking is March 1, 1996, it follows that the Companies' fault with respect to a possible safety defect by way of a lack of sufficient indications as to the risks and dangers of smoking ceased as of that date in the Létourneau File.[620]
>
> [References omitted.]

[646] In the Court's opinion, this determination is not erroneous and is even conservative in that it does not take into account the confusion that, at the time, still surrounded the idea of "dependence," a term often associated with habit rather than addiction. The appellants themselves, after 1994 and again after 1996, promoted that confusion by continuing to deny the addictive nature of cigarettes[621] and to decry the use of the term "addiction,"[622] which the judge,

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620 The Environics survey referred to in para. 132 of the judgment is Exhibit 1337-2m.

621 The appellant RBH even seemed to challenge it again in its defence of February 29, 2008, (at paras. 57 to 64), arguing that smoking is a habit that can be difficult to break, but that it can still be done with good intentions. See also the defence filed by the appellant JTM in the Létourneau case, at paras. 282 to 285 and ITL's defence in the Létourneau case, dated February 29, 2008, at paras. 32, 198 and 201.

622 In 1997, as Parliament was about to pass the *Tobacco Act*, Rob Parker, President of the Canadian Tobacco Manufacturers' Council, replied to senators before whom he appeared as follows "[w]e don't have a definition of addiction − it is a matter of opinion, not a matter of fact" (Exhibit 200065.10692 − under Exhibit 20065 entitled "Flaherty Documents," at 134870 (J.S.), *The Gazette*, April 2, 1997. In 1995, RBH continued to defend the view expressed by Prof. Warburton and Prof. Cormier, who criticized the Royal Society of Canada's report on the addictive effect of cigarettes as biased and scientifically inaccurate. In a note to the Canadian Tobacco Manufacturers' Council, John Macdonald, RBH representative, stated the following: "Addiction is very much a concern recognizing the situation

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who documented this behaviour at length, knew about and should have considered. We understand that he did not do so because he distinguished the appellants' fault in this area from the fault consisting of deliberately failing in their duty to inform, but, as we saw, there is a mistake here as these two faults cannot be separated. That is what the respondents argue, saying quite rightly that the date the information could have been well known can only occur after the date on which the appellants ceased their disinformation campaign and other counter-discourse, which did not occur until 1998 (and which, they argue, actually continued under more subtle appearances).

[647] It should also be noted that it was only in 1998 that the appellant ITL recognized this characteristic of cigarettes (nicotine addiction)[623] on its own (i.e., other than through the mandatory statutory warnings). The appellant RBH did so in 1999[624] and the appellant JTM, in 2004.[625]

[648] The fact that, in these circumstances, the knowledge of this attribute of cigarettes was only truly known in March 1996 does not seem to be an unreasonable conclusion given the evidence. Indeed, it would not have been unreasonable either for the judge to have concluded that this fact only became well known starting on the date on which the appellants stopped

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with the class action suit. I think that, at this point, the CTMC position is already adequately reflected in the Professors's Warburton and Cormier critiques of the Royal Society of Canada report on Addiction" (Exhibit 61 at 3). The reports of Profs. Warburton and Cormier are found in Exhibits 430 and 9A respectively.

623 Document entitled "ITL's Position on Causation Admission" (at 2):

> Regarding the issue of addiction, the evidence is clear that awareness of the difficulty of quitting and the phenomenon of habituation was widely known throughout the Class Period (see ITL's Notes & Authorities). However, the evidence also confirms that in 1989, the Royal Society of Canada posited a new definition of addiction and, pursuant to that definition, concluded that smoking was addictive (see Exhibit 212). Pack warnings to this effect appeared as of 1994, and were voluntarily carried by ITL on its packs and advertising after the TPCA was struck down by the Supreme Court of Canada. In its first formal position statement on smoking and health in 1998 (Exhibit 34), ITL stated that smoking can be described as an addiction as addiction was then defined.

624 Document entitled "RBH Response to the Court's November 21, 2014 Question, December 10" (at 2):

> In 1999, Philip Morris Companies also stated on its website that "[c]igarette smoking Is addictive, as that term is most commonly used today. It can be very difficult to quit smoking, but this should not deter smokers who want to quit from trying to do so." RBH endorsed that statement in 1999, see Trial Exhibit 1341-2m, and had never disputed that smoking can be difficult to quit. See Testimony of Steve Chapman, Oct. 22, 2013, at 83−84.

Philip Morris Companies made a statement to this effect in 1997, acknowledging that "nicotine, as found in cigarette smoke, has mild pharmacological effects, and that, under some definitions, cigarette smoking is "addictive."" (Exhibit 981E at 2).

In October 1999, in a paper for the House of Commons Health Committee (UK), BAT acknowledged that nicotine "does have mild pharmacological properties and does play an important role in smoking" but does not prevent anyone from quitting smoking (Exhibit 20230 at para. 45). See also paragraphs 44 and 46, which, however, indicate a certain reluctance to accept the term "addiction," except in a popular and diluted sense.

625 Document entitled "JTIM's Response to the Court's November 21, 2014 Question":

> 5. In 2004, JTIM stated on the record, in the current proceedings, that smoking can cause the class diseases, as defined in the Blais class action, and that smoking can be addictive, as this term is now understood.

denying it.[626]

[649] For all these reasons, the Court rejects the appellants' argument that the pathogenic and addictive effects of smoking could be considered well-known facts of general knowledge and therefore presumed to be known by all (art. 2846 and 2849 C.C.Q.) to a degree that would have allowed the parties concerned, as required by the applicable standards, to accept the risk and the harm (equivalent to renunciation of the right to sue). Contrary to what the appellants' suggest, not only was this information not well known during the 1950s, 1960s, or 1970s, but it is even doubtful that it was during the 1980s.

[650] Thus, the knowledge of the pathogenic effects alone, and more precisely of the causal relationship between smoking and lung or throat cancer and emphysema could not be acquired before January 1, 1980. Moreover, according to the Court, that date should coincide with the date on which the addictive effect of cigarettes became known, that is, March 1, 1996, since even if the persons concerned might have known about the pathogenic effects of cigarettes, they were deprived up until then of an essential factor for assessing the real risk posed by the use of the product. One might even be inclined to postpone the date on which the information became well known until 1998, when the information provided by the government and medical bodies combined with more explicit warnings prescribed by the 1997 *Tobacco Act*[627] finally prevailed in general over the strategy of disinformation that the appellants had been pursuing for 50 years and that they still did not immediately abandon.

[651] Consequently, the appellants have failed to establish that the class members had the presumed knowledge, which, within the meaning of the various applicable legislative provisions would have exonerated them from their liability despite their failure to fulfill their duty to inform.[628]

Even today, however, this recognition is still subject to certain reservations. The idea of addiction is indeed accepted, but in cautious language, intended to distinguish this type of addiction from that affecting users of certain illegal drugs (in the wake of the appellants' previous positions). Recognition is still mixed. For example, here is an excerpt from JTM's 2012 version of its website under the heading "addiction" (Exhibit 568):

> Many smokers report difficulties quitting smoking. The reasons they offer vary. Some say they miss the pleasure they derive from smoking. Others complain of feeling irritable or anxious. Others speak simply of the difficulty of breaking a well-ingrained habit. Given the way in which many people − including smokers − use the term 'addiction', smoking is addictive.
>
> **But no matter how smoking is described, people can stop smoking if they are determined to do so. No one should believe that they are so attached or 'addicted" to smoking that they cannot quit.**
>
> Over the past decades, millions of people − all over the world − have given up smoking. Most have done so by themselves. Recent studies have shown that the majority of ex-smokers have quit without treatment programs of other assistance. Other former smokers have used the many smoking cessation products or programs that are available.
>
> [Emphasis in original.]

626 See also below at para. [1111].

627 *Tobacco Act,* S.C. 1997, c. 13.

628 It should be noted that this is not the first time that a court has concluded that the public, including smokers, is poorly informed about the harmful effects of smoking. In 2003, in *J.T.I. MacDonald Corp. c. Canada (Attorney General)*, [2003] R.J.Q. 181, the Superior Court had already reached this conclusion (see paras. 127, 468−469), which conclusion the Supreme Court adopted in its subsequent

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[652] In the case at bar, the judge apportioned liability for the members of the Blais Class. If we understand the judgment correctly, the members of the Blais Class who began smoking on January 1, 1976, would have engaged in reckless behaviour leading to the apportionment of liability by the judge according to the combined rules of arts. 1477 and 1478 C.C.Q. The judge set this date to take into account the fact that addiction, according to his decision, takes place four years after a certain amount of smoking. As of January 1, 1980, knowing what they knew or were presumed to know regarding the pathogenic effects of smoking, these people could have quit smoking, which they did not do:

> [833] As for the relative liability of each party, this is a question of fact to be evaluated in light of all the evidence and considering the relative gravity of all the faults, as required by article 1478. In that regard, it is clear that the fault of the Members was essentially stupidity, too often fuelled by the delusion of invincibility that marks our teenage years. That of the Companies, on the other hand, was ruthless disregard for the health of their customers.

[653] We can wonder, however, whether the members of the Blais Class, as of the date determined in the trial judgment, had sufficient knowledge of the safety defect such that they could be blamed with a fault (i.e., the “stupid” recklessness of starting or continuing to smoke after 1976, when it became well known that tobacco can cause various diseases). Because there were two possibilities: either the members had all the information they needed to know what they were getting into (and here we are talking about a level of knowledge, as we saw earlier, equivalent to full acceptance of the risk and renunciation of all recourse), or they did not. In the first case, there could be no shared liability, since the first paragraph of art. 1473 C.C.Q. calls for the complete exoneration of the manufacturer (as claimed by the appellants). In the second case, perhaps liability should not have been apportioned, since no one can be blamed for recklessness when they did not have all the information needed to make an informed decision.

[654] However, is it conceivable that the members of the Class knew enough (or are presumed to have known enough) to be accused of imprudence within the meaning of art. 1477 C.C.Q. (hence an apportionment of liability under art. 1478 C.C.Q.) without this constituting full acceptance of the risk within the meaning of art. 1473 C.C.Q.?

[655] This is a thorny question, which the Court does not deem useful to answer, since the respondents did not appeal the apportionment of liability imposed by the judge.

[656] In summary, with respect to the ground of exoneration raised by the appellants, the Court concludes that:

- the safety defect affecting cigarettes is not apparent;

- the appellants have not demonstrated that the class members had actual knowledge of the morbid and addictive effects of smoking;

- nor did the appellants establish that these effects were so well known that it can be inferred that all members of the Class had knowledge equivalent to

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decision (*Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30, at para. 134 *in fine*).

> informed, full and complete acceptance of the risk and harm associated with using this product well before January 1, 1980. This knowledge was only acquired on March 1, 1996.

[657] However, this determination does not affect the outcome of the appeals. On the one hand, it leads to the result that the judge erroneously achieved by means of the inapplicability of knowledge to the distinct and independent fault allegedly committed by the appellants under art. 1457 C.C.Q. On the other hand, even if we retain the 1966 date, this has no effect on the quantum of compensatory damages awarded by the judge in the absence of a cross-appeal in the case of the Blais Class members. It also has no effect on the punitive damages awarded by the judge.

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C. Summary

[658] In conclusion, and like the trial judge, the Court finds that, during the entire period in question, the appellants failed in their duty to inform users and future users of the dangers and risks of smoking. They are therefore, *a priori*, responsible for the harm that the materialization of this safety defect in the product that they manufactured caused among members of the Class. Having failed to prove that the class members on the relevant dates were aware of this defect or were in a position to be aware of it, or to foresee the harm, the appellants cannot rely on the ground of exoneration set out in the first paragraph of art. 1473 C.C.Q., a ground that is recognized by prior law and which has its equivalent under s. 53 C.P.A.

[659] It remains to be seen whether, as they claim, the appellants can nevertheless deflect this liability by establishing a problem with respect to causation.

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D. Causation

i. General treatment of this issue under common law

[660] The principles of common law are not the only ones likely to apply in this case. This is because, as we will see below, the Quebec legislator has adopted legislation specifically targeting certain remedies related to tobacco products and it explicitly addresses causation. In order to fully understand the legal context of the dispute, it is nevertheless necessary to briefly discuss the various theories of causation developed under common law before focusing on the most distinctive elements of this case.

[661] In Quebec civil law, there are several theories that are both descriptive and normative to address the issue of causation. The main ones, and those on which the commentary focuses the most attention, are those dealing with equivalence of conditions,[629] adequate causation,[630] proximate cause[631] and the reasonable foreseeability of the consequences.[632]

[662] The theory of equivalence of conditions essentially consists in [TRANSLATION] "seeking all the facts, but for the presence of which, the damage would not have occurred."[633] Under this theory, identical causal value is conferred on all the facts necessary for the injury to exist.[634] Therefore, the elements that may have contributed to the injury are not sorted.[635] To establish the cause of harm under this theory is equivalent to identifying all the *sine qua non* conditions for

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629 Baudouin, Deslauriers & Moore, La responsabilité civile, vol. 1, *supra* note 265 at 713, para. 1-669; Frédéric Levesque, *Précis de droit québécois des obligations: contrat, responsabilité, exécution et extinction* (Cowansville, Qc.: Yvon Blais, 2014) at 242–243, paras. 464–466; Tancelin, *supra*, note 382 at 564–565, paras. 787–790; Centre de recherche en droit privé et comparé du Québec (ed.), *Dictionnaire de droit privé et lexiques bilingues: Les obligations* (Cowansville, Qc.: Yvon Blais, 2003), *sub verbo* "causalité"; Pierre Deschamps, "Conditions générales de la responsabilité civile du fait personnel" in *École du Barreau, Collection de droit 2018-2019*, vol. 5 "Responsabilité" (Montreal: Yvon Blais, 2018) at 43.

630 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 713, para. 1-669; Levesque, *supra* note 629 at 242–243, paras. 464–466; Patrice Deslauriers, "Injury, Causation, and Means of Exoneration" in Aline Grenon and Louise Bélanger-Hardy (eds.), *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Thomson Carswell, 2008) at 418; Centre de recherche en droit privé et comparé du Québec, *supra* note 629, *sub verbo* "causalité"; Deschamps, *supra* note 629 at 43–44.

631 Karim, *Les obligations*, vol. 1, *supra*, note 389 at 1212, para. 2839; Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 713, paras. 1-669; Tancelin, *supra* note 382 at 564–565, paras. 787–790; Centre de recherche en droit privé et comparé du Québec, *supra* note 629, *sub verbo* "causalité"; Deschamps, *supra* note 629 at 42–43.

632 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 713, para. 1-669; Karim, *Les obligations*, vol. 1, *supra* note 389 at 1212, para. 2839; Deslauriers, *supra* note 630 at 418; Deschamps, *supra* note 629 at 44.

633 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 714, para. 1-670.

634 Centre de recherche en droit privé et comparé du Québec, *supra* note 629, *sub verbo* "Equivalence of Conditions".

635 Deschamps, *supra* note 629 at 43. See also Lara Khoury, *Uncertain Causation in Medical Liability*, Collection Minerve (Cowansville, Qc.: Yvon Blais, 2006) at 18.

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it to occur.[636]

[663] Unlike the previous theory, the doctrine of adequate causation calls for a selection, among all the circumstances, behaviours, or events that may have led to the injury.[637] Adequate causation attempts to distinguish the true cause of the harm from the mere occasion of its occurrence or the circumstances that coincided with it.[638] Originating [TRANSLATION] "from the desire to find a criterion making it possible to discriminate among all the *sine qua non* conditions"[639] of the harm, this theory relies, according to some, on the criterion of the objective possibility of the result, or, according to others, on the criterion of usual experience.[640] Under the first criterion, sufficient cause is [TRANSLATION] "the event which, by its mere existence, objectively makes it possible for the damage to occur;"[641] under the second criterion, it is [TRANSLATION] "the fact which, in the ordinary course of events, substantially increases the possibility [of it]."[642]

[664] Even more selective than the theory of adequate causation, the theory of proximate cause [TRANSLATION] "retains only the cause immediately preceding the injury as its real cause."[643] With much support in the common law,[644] this theory distinguishes among all the adequate causes to retain only [TRANSLATION] "the event that occurred last in time and which, by itself, could objectively be sufficient to produce all of the damage."[645]

[665] The theory of reasonable foreseeability of the consequences, on the other hand, [TRANSLATION] "accepts a causal relationship between the fault and the injury, when the injury caused was normally foreseeable for the party."[646] Originating in Anglo-American law, this theory allows, in certain circumstances, "the exclusion of unusual or uncommon damages that are of exceptional gravity in relation to the fault."[647]

[666] In general, Quebec courts find that causation exists when it is shown that the damage is the logical, direct and immediate consequence[648] of the fault.[649] This understanding of causation

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636 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 714, para. 1-670; Deschamps, *supra* note 629 at 43.

637 Deschamps, *supra* note 629 at 43.

638 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 714−715, para. 1-672; Levesque, *supra* note 629 at 242, para. 464; Centre de recherche en droit privé et comparé du Québec, *supra* note 629, *sub verbo* "causalité adequate"; Deschamps, *supra* note 629 at 43.

639 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 715, para. 1-672.

640 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 715, para. 1-672; Deschamps, *supra* note 629 at 43−44.

641 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 715, para. 1-672.

642 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 715, para. 1-672. See e.g., Tancelin, *supra* note 382 at 564, para. 789; Centre de recherche en droit privé et comparé du Québec, *supra* note 629, *sub verbo* "causalité adequate".

643 Centre de recherche en droit privé et comparé du Québec, *supra* note 629, *sub verbo* "causalité immédiate". See also Tancelin, *supra* note 382 at 565, para. 790.

644 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 715, para. 1-674.

645 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 715, para. 1-674.

646 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 716, para. 1-675.

647 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 717 para. 1-676.

648 See art. 1607 C.C.Q. This provision is applied both in terms of non-contractual and contractual liability. See, for example, *Videotron, s.e.n.c. c. Bell ExpressVu, l.p.*, 2015 QCCA 422 at para. 81; Baudouin,

is most often reflected in the dismissal of theories of equivalence of conditions and proximate cause[650] The theory of reasonable foreseeability of the consequences is sometimes applied in conjunction with the theory of adequate causation, but adequate causation is more widely used in the case law.[651]

[667] In comparison, in the common law provinces, the causation test most frequently used is the "but for" test).[652] This test is an application of the theory of equivalence of conditions.[653] We must therefore ask ourselves whether, but for the fault of the defendant, would the damage have

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Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 374, para. 1-333.

649 *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 at para. 50, citing with approval: Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 720, para. 1-683. See also *Roberge v. Bolduc*,[1991] 1 S.C.R. 374; *Site touristique Chute à l'ours de Normandin inc. c. Nguyen (Succession de)*, 2015 QCCA 924 at para. 57; *Fédération des médecins spécialistes du Québec c. Conseil pour la protection des malades*, 2014 QCCA 459 at para. 139; *Wightman v. Widdrington (Estate of)*, 2013 QCCA 1187 at para. 243; *Syndicat des cols bleus regroupés de Montréal (CUPE, section locale 301) v. Coll*, 2009 QCCA 708 at para. 78; *Bourque c. Hétu*, [1992] R.J.Q. 960 (C.A.); Karim, *Les obligations*, vol. 1, supra note 389 at 1215, para. 2849; Tancelin, supra note 382 at 565, para. 791Centre de recherche en droit privé et comparé du Québec, *supra* note 629, *sub verbo* "causalité"; Nadeau & Nadeau, *supra* note 223 at para. 652.

650 Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 720−722 para. 1-683; Levesque, *supra* note 629 at 242−243, paras. 464−466; Tancelin, *supra* note 382 at 566, para. 794; Centre de recherche en droit privé et comparé du Québec, *supra* note 629, *sub verbo* "causalité immédiate".

651 *Laferrière v. Lawson*, [1991] 1 S.C.R. 541 at 602; Baudouin, Deslauriers & Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 720−721, para. 1-683; Levesque, *supra* note 629 at 242, para. 464; Tancelin, *supra* note 382 at 565, para. 791; Deschamps, *supra* note 629 at 45; Khoury, *Uncertain Causation*, *supra* note 635 at 27; Centre de recherche en droit privé et comparé du Québec, *supra* note 629, *sub verbo* "causalité adéquate". See e.g.,, *Crevette du Nord Atlantique inc. v. Conseil de la Première Nation malécite de Viger*, 2012 QCCA 7 at para. 93, leave to appeal to SCC refused, 34713 (19 July 2012); *Laval (Ville de) (Service de protection des citoyens, département de police et centre d'appels d'urgence 911) c. Ducharme*, 2012 QCCA 2122 at paras. 156−157; *Provencher c. Lallier*, 2006 QCCA 1087 at para. 40; *Viel c. Entreprises immobilières du terroir Ltée.*, [2002] R.R.A. 317 (C.A.) at paras. 77−80; *Chouinard c. Robbins*, [2002] R.J.Q. 60 (C.A.) at paras. 33−34; *Caneric Properties Inc. c. Allstate compagnie d'assurance*, [1995] R.R.A. 296 (C.A.).

652 See e.g., *Ediger v. Johnston*, 2013 SCC 18 at para. 28; *Clements v. Clements*, 2012 SCC 32 at paras. 8 and 13; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5; *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21−22; *Blackwater v. Plint*, 2005 SCC 58 at para. 78; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Horsley v. MacLaren*, [1972] S.C.R. 441; Philip H. Osborne, *The Law of Torts*, 5th ed., Collection "Essentials of Canadian Law" (Toronto, Irwin Law: 2015) at 54; Lara Khoury, "The Canadian, English and Australian Judge in the Face of Causal Uncertainty in Medical Liability" (2014) 594 McGill L.J. 989 at 994 and 1002; Erik S. Knutsen, "Coping with Complex Causation Information in Personal Injury Cases" (2013) 41 Adv. Q. 149; David Cheifetz, "The Snell Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Shark" (2005) 30:1 Adv. Q. 1; Louise Bélanger-Hardy, "Les délits", in Aline Grenon & Louise Bélanger-Hardy, eds., *Elements of Québec Civil Law: A Comparison with the Common Law of Canada* (Toronto, Thomson Carswell: 2008) at 396.

653 Lara Khoury, Uncertain Causation in Medical Liability, Collection Minerve (Cowansville, Qc.: Yvon Blais, 2006) at 18 [Uncertain Causation].

occurred.[654] If it is established that the damage would have occurred even in the absence of the defendant's fault, the defendant cannot be held liable.[655]

[668] Exceptionally, and in the presence of specific conditions, Canadian common law courts are prepared to mitigate the rigour of this test by replacing it with the "material contribution test." In *Resurfice Corp. v. Hanke,* Chief Justice McLachlin wrote:[656]

> Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach.

[669] More recently in *Clements v. Clements*, the Chief Justice revisited the pre-eminence of the "but for" test of causation – the nine judges of the Court were unanimous on this point – while making the following clarifications:[657]

> [43] It is important to reaffirm that in the usual case of multiple agents or actors, the traditional "but for" test still applies. The question, as discussed earlier, is whether the plaintiff has shown that the negligence of one or more of the defendants was a necessary cause of the injury. Degrees of fault are reflected in calculations made under contributory negligence legislation. By contrast, the material contribution to risk approach applies where "but for" causation cannot be proven against any of multiple defendants, all negligent in a manner that might have in fact caused the plaintiff's injury, because each can use a "point the finger" strategy to preclude a finding of causation on a balance of probabilities.
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> [44] This is not to say that new situations will not raise new considerations. I leave for another day, for example, the scenario that might arise in mass toxic tort litigation with multiple plaintiffs, where it is established statistically that the defendant's acts induced an injury on some members of the group, but it is impossible to know which ones.

[670] These nuances are important because, as discussed below, Legislative Assembly of

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654 *Ediger v. Johnston,* 2013 SCC 18 at para. 28*; Clements v. Clements,* 2012 SCC 32 at para. 8; *Blackwater v. Plint,* 2005 SCC 58 at para. 78; P. H. Osborne, *supra* note 652 at 54.

655 In this sense, the criterion of the but for test can be described as "very narrow inquiry surgically aimed at the defendant's breach of the standard of care as" a "potential cause of some harm. (E. S. Knutsen, supra, note 652, 151). See also Allen M. Linden & Bruce Feldthusen, Canadian Tort Law, 10th ed., Markham, ON, LexisNexis, 2015, p. 126. As one author remarks: "The test is grammatically awkward but it does have the merit of focusing on the defendant's role in producing damage to the exclusion of other legal extraneous causes. (Osborne, supra, note 652, 54).

656 *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 24 and 25.

657 *Clements v. Clements,* 2012 SCC 32 at paras. 43 and 44.

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British Columbia passed legislation in July 2000 entitled *The Tobacco Damages and Health Care Costs Recovery Act,*[658] from which the Quebec legislator drew inspiration in 2009. However, the repeated use in this law of the words "causes, directly or indirectly" and "causes or contributes to" – words which recall the terminology used in the material contribution to risk approach – seems to indicate an intention to incorporate a more flexible test for causation than the but for test.

[671] To this we must add several important clarifications taken from the Act adopted by the Quebec legislator, like that of several other provinces, to regulate certain legal proceedings related to tobacco products. Before proceeding with this analysis, it is worth recalling the conclusion that the Court came to above in paragraphs [404] *et seq*.: when a manufacturer's liability is triggered under articles 1468 and 1469 C.C.Q., the victim of an injury caused by the safety defect of a product is not required to demonstrate anything other than the causal relationship between the safety defect of that product and the injury. From this perspective, therefore, evidence of "conduct causation" is superfluous. Nevertheless, for the sake of thoroughness, the issue of conduct causation will also be addressed in the following analysis because it has been argued persistently by both sides without the parties questioning the specific scope of articles 1468 and 1469 C.C.Q.

ii. Effect of the *Tobacco-related Damages and Health Care Cost Recovery Act*

[672] The T.R.D.A. came into effect on June 19, 2009. It is well known that it is modeled on British Columbia's *Tobacco Damages and Health Care Costs Recovery Act*. Both Acts have been the subject of constitutional challenges before the courts. In both cases, the validity of the Act was upheld – by the Supreme Court of Canada with respect to the British Columbia law (*British Colombia v. Imperial Tobacco Canada Ltd*[659]) and by the Quebec Court of Appeal with respect to the T.R.D.A. (*Imperial Tobacco Canada Ltd. v. Québec (Procureure générale).*[660]

[673] In this case, the trial judge, ruling on the applicability and scope of the T.R.D.A., found that the Act applied to the actions before him and that by virtue of section 15, the Act allowed the Respondents to provide epidemiological or statistical evidence of (individual) medical causation and (individual) conduct causation.

a. The apparent scope of the T.R.D.A.

[674] Like the Act on which it is based, the T.R.D.A. enacted a number of rules that derogate from the general law, in particular with respect to the extinctive prescription period applicable to actions against tobacco manufacturers and with respect to various presumptions that may be invoked in some of these actions. The T.R.D.A. exists in a particular context, that of the civil law in force in Quebec. It is not identical to the *Tobacco Damages and Health Care Costs Recovery Act*, as the Quebec legislature included a few additional important details. The T.R.D.A. must be

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658 *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30.

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

660 *Imperial Tobacco Canada Ltd. v. Québec (Procureure générale),* 2015 QCCA 1554, leave to appeal to SCC refused, 36741 (5 May 2016).

interpreted accordingly.

[675] A close reading of the T.R.D.A. is necessary to fully understand its impact on this dispute. The provisions cited below are the most immediately relevant and help identify what appears to be the intentional scope of this legislation.

[676] As of the first section, the legislature announces its intentions. The Act deals with health and smoking. We see that the legislator establishes specific rules to facilitate government recovery through the courts of the cost of health care resulting from a fault committed by tobacco manufacturers. i.e., a breach of one of their obligations, but also that it wishes to make “certain of these rules” applicable to actions for damages related to tobacco that are brought by others than the government.

CHAPTER I PURPOSE AND DEFINITIONS	**CHAPITRE I** OBJETS ET DÉFINITIONS
1. The purpose of this Act is to establish specific rules for the recovery of tobacco-related health care costs attributable to a wrong committed by one or more tobacco product manufacturers, in particular to allow the recovery of those costs regardless of when the wrong was committed.	**1.** La présente loi vise à établir des règles particulières adaptées au recouvrement du coût des soins de santé liés au tabac attribuable à la faute d'un ou de plusieurs fabricants de produits du tabac, notamment pour permettre le recouvrement de ce coût quel que soit le moment où cette faute a été commise.
It also seeks to make certain of those rules applicable to the recovery of damages for an injury attributable to a wrong committed by one or more of those manufacturers	Elle vise également à rendre certaines de ces règles applicables au recouvrement de dommages-intérêts pour la réparation d'un préjudice attribuable à la faute d'un ou de plusieurs de ces fabricants.

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[677] The foregoing serves as a sort of forward to some specific rules, the meaning and scope of which cannot be misunderstood. The legislator uses a double reference within the same Act. For the purposes of analysis of these appeals, the starting point is section 25.

25. Despite any incompatible provision, the rules of Chapter II relating to actions brought on an individual basis apply, with the necessary modifications, to an action brought by a person or the person's heirs or other successors for recovery of damages for any tobacco-related injury, including any health care costs, caused or contributed to by a tobacco-related wrong committed in Québec by one or more tobacco product manufacturers.	**25.** Nonobstant toute disposition contraire, les règles du chapitre II relatives à l'action prise sur une base individuelle s'appliquent, compte tenu des adaptations nécessaires, à toute action prise par une personne, ses héritiers ou autres ayants cause pour le recouvrement de dommages-intérêts en réparation de tout préjudice lié au tabac, y compris le coût de soins de santé s'il en est, causé ou occasionné par la faute, commise au Québec, d'un ou de plusieurs fabricants de produits du tabac.
Those rules also apply to any class action based on the recovery of damages for the injury.	Ces règles s'appliquent, de même, à toute action collective pour le recouvrement de dommages-intérêts en réparation d'un tel préjudice.

[Emphasis added.]

[678] There can be no doubt that the two class actions decided by the trial judge are, within the meaning of this article, "class action[s] based on the recovery of damages for [a tobacco-related] injury." If we refer to Chapter II of the T.R.D.A. (entitled "RECOVERY OF TOBACCO-RELATED HEALTH CARE COSTS"), we note that the "rules ... relating to actions brought on an individual basis" mentioned in section 25 are all set out in §3 '"Special provisions for an action brought on an individual basis" of Division II ("EXERCISING RIGHT OF RECOVERY"), which encompasses sections 22, 23 and 24 T.R.D.A.

[679] The first reference is found in section 25. Section 24, included in §3 described above, makes a second reference. It specifies the following:

24. The provisions of section 15 that relate to the establishment of causation between alleged facts and to proof of health care costs are applicable to actions brought on an individual basis.	**24.** Les dispositions de l'article 15, relatives à la preuve du lien de causalité existant entre des faits allégués et à la preuve du coût des soins de santé, sont applicables à l'action prise sur une base individuelle.

[Emphasis added.]

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[680] We must therefore deduce from the above that the effect of the double reference is as follows: section 25 refers to section 24, which itself refers to section 15, thereby making '"the provisions … relate(ing) to the establishment of causation between alleged facts"' applicable in the context of a class action for the recovery of damages.

[681] But what are these provisions that the relevant part of section 15 refers to? Here is what it says:

> **15.** In an action brought on a collective basis, proof of causation between alleged facts, in particular between the defendant's wrong or failure and the health care costs whose recovery is being sought, or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling.
>
> **15.** Dans une action prise sur une base collective, la preuve du lien de causalité existant entre des faits qui y sont allégués, notamment entre la faute ou le manquement d'un défendeur et le coût des soins de santé dont le recouvrement est demandé, ou entre l'exposition à un produit du tabac et la maladie ou la détérioration générale de l'état de santé des bénéficiaires de ces soins, peut être établie sur le seul fondement de renseignements statistiques ou tirés d'études épidémiologiques, d'études sociologiques ou de toutes autres études pertinentes, y compris les renseignements obtenus par un échantillonnage.

[682] Section 25 is explicit and provides that the double reference referred to above must apply "'with the necessary modifications." What are these modifications?

[683] With the modifications required, section15 necessarily means that in actions such as those that were before the Superior Court, evidence of causation between the facts alleged therein, such as the fault or failure of a defendant and tobacco-related harm, can be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling.

[684] The specific wording of this section calls for some additional comments. It states that proof of causation between alleged facts in a class action of this type, "in particular" the causation between '"alleged facts" can be made in various ways. It can be established "on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies."' And where such studies are relevant, this same proof can also be established '"on the sole basis"' of any other information (this is the meaning of the word "including") "derived from a sampling." It is useful to draw attention to one thing: the words "alleged facts"' and "on the sole basis"' do not have a counterpart in the British Columbia legislation, which is reproduced in full in the appendix in *British Columbia* v. *Imperial Tobacco*

Canada Ltd.[661] Such differences are significant.[662]

[685] The above reading, which scrupulously follows the letter of the law, highlights the very general scope of the rule. In addition, the legislator took the trouble to add the following provision further on.

30. This Act may not be interpreted as preventing rules similar to those provided in the Act with respect to an action brought by the Government on a collective basis from being applied in a class action brought to recover damages for tobacco-related injuries.	**30.** Les dispositions de la présente loi ne peuvent être interprétées comme faisant obstacle à ce que des règles similaires à celles qui y sont prévues pour l'action prise sur une base collective par le gouvernement soient admises dans le cadre d'une action collective prise pour le recouvrement de dommages-intérêts en réparation de préjudices liés au tabac.

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

662 Another comparable law, the *Tobacco Damages and Health Care Costs Recovery Act*, S.O. 2009, c. 13, is also devoid of the words "on the sole basis of." This is what makes Prof. Khoury say that [TRANSLATION] "the Quebec legislation goes much further" than that of other provinces (Lara Khoury, "Compromis et transpositions libres dans les législations permettant le recouvrement du coût des soins de santé auprès de l'industrie du tabac" (2013) 43 RDUS 1 at 16.

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[686] By this, it points out that once the modifications have been made by the T.R.D.A., the general rules of civil liability, including through incremental changes in the case law, remain the reference in a class action for damages. This obviously does not exclude the possibility that the general law may evolve in accordance with that Act and that evidence of this same kind may be admitted in a class action.[663]

b. The appellants' critique of the scope of section 15 T.R.D.A.

[687] The appellants all argued that the respondents did not discharge their burden of proof with respect to causation. Before considering this aspect of the matter, however, it should be noted that the appellant RBH went further and also argued that the trial judge erred in law by interpreting the T.R.D.A. as he did. In their arguments, the appellants ITL and JTM state that they share RBH's view in this respect.

[688] According to RBH, a joint reading of section 15 and certain other provisions of the T.R.D.A. inexorably leads to the conclusion that the respondents, in several respects, failed to discharge their burden of proof. By its nature, the evidence that they adduced are powerless in law to establish either medical causation or conduct causation for the members of the Blais and Létourneau Classes. To support these claims RBH relies primarily on paragraphs 16(2) and 17(2) of the T.R.D.A. Let us reproduce sections 16 and 17 in their entirety as well as the other related provisions of section 15, which seem likely to shed light on the scope of the latter section:

13. If the Government brings an action on a collective basis, it is not required to identify particular health care recipients individually or prove the cause of the disease suffered by, or the general deterioration of health of, a particular health care recipient or the portion of the health care costs incurred for such a recipient.	**13.** S'il prend action sur une base collective, le gouvernement n'a pas à identifier individuellement des bénéficiaires déterminés de soins de santé, non plus qu'à faire la preuve ni de la cause de la maladie ou de la détérioration générale de l'état de santé affectant un bénéficiaire déterminé de ces soins, ni de la part du coût des soins de santé afférente à un tel bénéficiaire.
Moreover, no one may be compelled in such an action	En outre, nul ne peut, dans une telle action, être contraint:
(1) to answer questions on the health of, or the health care provided to, particular health care recipients; or	1° de répondre à des questions sur l'état de santé de bénéficiaires déterminés de soins de santé ou sur les soins de santé qui leur ont été

[663] See *Clements v. Clements*, 2012 SCC 32 at para. 44.

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	prodigués;
(2) to produce the medical records and documents of, or the documents related to health care provided to, particular health care recipients, except as provided by a law, rule of law or court or tribunal regulation that requires the production of documents relied on by an expert witness.	2° de produire les dossiers et documents médicaux concernant des bénéficiaires déterminés de soins de santé ou les documents se rapportant aux soins de santé qui leur ont été prodigués, sauf dans la mesure prévue par une loi, une règle de droit ou un règlement du tribunal exigeant la production de documents sur lesquels se fonde un témoin expert.
14. Despite the second paragraph of section 13, the court may, at the request of a defendant, order the production of statistically meaningful samples of records and documents concerning, or relating to health care provided to, particular health care recipients.	**14.** Nonobstant le deuxième alinéa de l'article 13, le tribunal peut, à la demande d'un défendeur, ordonner la production d'échantillons statistiquement significatifs des dossiers ou documents concernant des bénéficiaires déterminés de soins de santé ou se rapportant aux soins de santé qui leur ont été prodigués.
In that case, the court determines conditions for the sampling and for the communication of information contained in the samples, specifying, among other things, what kind of information may be disclosed.	Le tribunal fixe, le cas échéant, les conditions de l'échantillonnage et de la communication des renseignements contenus dans les échantillons, en précisant notamment la nature des renseignements qui pourront ainsi être divulgués.
The identity of, or identifying information with respect to, the particular health care recipients concerned by the court order may not be disclosed. Moreover, no record or document concerning, or relating to health care provided to, particular health care recipients may be produced under the order unless any information they contain that reveals or may be used to trace the identity of the recipients has been deleted or	L'identité des bénéficiaires déterminés de soins de santé visés par l'ordonnance du tribunal ne peut être divulguée, non plus que les renseignements permettant de les identifier. En outre, aucun dossier ou document concernant des bénéficiaires déterminés de soins de santé ou se rapportant aux soins de santé qui leur ont été prodigués ne peut être produit en exécution de cette ordonnance sans que les rensei-

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blanked out.

gnements identifiant ou permettant d'identifier ces bénéficiaires en aient été extraits ou masqués au préalable.

16. For a defendant who is a party to an action brought on a collective basis to be held liable, the Government must prove, with respect to a type of tobacco product involved in the action, that

16. Pour que la responsabilité d'un défendeur partie à une action prise sur une base collective soit engagée, le gouvernement doit faire la preuve, relativement à une catégorie de produits du tabac visée par l'action:

(1) the defendant failed in the duty to abide by the rules of conduct, to which the defendant is bound in the circumstances and according to usage or law, in respect of persons in Québec who have been or might become exposed to the type of tobacco product;

1° que le défendeur a manqué au devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposaient à lui envers les personnes du Québec qui ont été exposées à la catégorie de produits du tabac ou pourraient y être exposées;

(2) exposure to the type of tobacco product may cause or contribute to a disease or the general deterioration of a person's health; and

2° que l'exposition à la catégorie de produits du tabac peut causer ou contribuer à causer la maladie ou la détérioration générale de l'état de santé d'une personne;

(3) the type of tobacco product manufactured by the defendant was offered for sale in Québec during all or part of the period of the failure.

3° que la catégorie de produits du tabac fabriqués par le défendeur a été offerte en vente au Québec pendant tout ou partie de la période où il a manqué à son devoir.

17. If the Government establishes the elements of proof required under section 16, the court presumes

17. Si le gouvernement satisfait aux exigences de preuve prévues à l'article 16, le tribunal présume:

(1) that the persons who were exposed to the type of tobacco product manufactured by the defendant would not have been exposed had the

1° que les personnes qui ont été exposées à la catégorie de produits du tabac fabriqués par le défendeur n'y auraient pas été exposées n'eût été son manquement;

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defendant not failed in its duty; and

(2) that the exposure to the type of tobacco product manufactured by the defendant caused or contributed to the disease or general deterioration of health, or the risk of disease or general deterioration of health, of a number of persons who were exposed to that type of product.

2° que l'exposition à la catégorie de produits du tabac fabriqués par le défendeur a causé ou a contribué à causer la maladie ou la détérioration générale de l'état de santé, ou le risque d'une maladie ou d'une telle détérioration, pour une partie des personnes qui ont été exposées à cette catégorie de produits.

18. When the presumptions set out in section 17 apply, the court sets the cost of all the health care required following exposure to the category of tobacco products involved in the action and provided after the date of the defendant's first failure.

18. Lorsque les présomptions visées à l'article 17 s'appliquent, le tribunal fixe le coût afférent à tous les soins de santé résultant de l'exposition à la catégorie de produits du tabac visée par l'action qui ont été prodigués postérieurement à la date du premier manquement du défendeur.

Each defendant to whom the presumptions apply is liable for the costs in proportion to its market share in the type of product involved. That share, determined by the court, is equal to the relation between

Chaque défendeur auquel s'appliquent ces présomptions est responsable de ce coût en proportion de sa part de marché de la catégorie de produits visée. Cette part, déterminée par le tribunal, est égale au rapport existant entre l'un et l'autre des éléments suivants:

(1) the quantity of tobacco products of the type involved in the action that were manufactured by the defendant and that were sold in Québec between the date of the defendant's first failure and the date of the action; and

1° la quantité de produits du tabac appartenant à la catégorie visée par l'action fabriqués par le défendeur qui ont été vendus au Québec entre la date de son premier manquement et la date de l'action ;

(2) the total quantity of tobacco products of the type involved in

2° la quantité totale de produits du tabac appartenant à la catégorie

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the action that were manufactured by all the manufacturers of those products and that were sold in Québec between the date of the defendant's first failure and the date of the action.	visée par l'action fabriqués par l'ensemble des fabricants de ces produits qui ont été vendus au Québec entre la date du premier manquement du défendeur et la date de l'action.
19. The court may reduce the amount of the health care costs for which a defendant is liable or adjust among the defendants their share of responsibility for the health care costs if one of the defendants proves either that its failure did not cause or contribute to the exposure of the persons in Québec who were exposed to the type of product involved in the action, or that its failure did not cause or contribute to the disease suffered by, or the general deterioration of health of, a number of those persons, or cause or contribute to the risk of such a disease or such deterioration.	**19.** Le tribunal peut réduire le montant du coût des soins de santé auquel un défendeur est tenu ou rajuster entre les défendeurs leur part de responsabilité relativement au coût des soins de santé si l'un des défendeurs prouve soit que son manquement n'a ni causé ni contribué à causer l'exposition des personnes du Québec qui ont été exposées à la catégorie de produits visée par l'action, soit que son manquement n'a ni causé ni contribué à causer la maladie ou la détérioration générale de l'état de santé, ou le risque d'une maladie ou d'une telle détérioration, pour une partie de ces personnes.

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[689] RBH, we should repeat, bases its reasoning first on subsections 16(2) and 17(2) of the T.R.D.A. It is clear, according to RBH, that for a defendant's liability to be triggered in a class action, the government must, under subsection 16(2), prove *general* medical causation ("... may cause or contribute to a disease or the general deterioration of a person's health"). The methods of proof contemplated in section 15 can therefore only serve to provide evidence under section 16(2), i.e., proof of general medical causation and nothing else.

[690] In the same vein, RBH then argues that, if the government discharges the burden imposed on it by subsection 16(2), then section 17 should apply. Its second paragraph prescribes what the Court must presume, namely that exposure to certain tobacco products "caused or contributed to ... of a number of persons who were exposed to [it]" the health problems mentioned − which necessarily means *specific or individual* causation.

[691] In other words, according to RBH, section 15 serves to establish *general* medical causation (exposure to tobacco products is harmful to health) for which subsection 16(2) requires proof from the government. However, the same section 15 cannot be used to establish *specific* causation (i.e., exposure to tobacco products is the cause of a particular person's health problems) since this evidence would be superfluous: indeed, in accordance with subsection 17(2), specific causation would be presumed once proof of general causation has been provided by the government.

[692] In addition, according to RBH, the interpretation adopted by the judge violates certain other provisions of the T.R.D.A. The argument is expressed in these terms:[664]

> [The trial judge's] interpretation of s. 15 would effectively read ss. 18 and 19 out of the TRDA as well. Under those sections, the defendant in a collective recovery action by the government may rebut the s. 17 presumption of specific causation with proof that its fault did not cause the disease of some or all the persons whose medical costs the province seeks to recover. But the Trial Judge interpreted s. 15 to permit epidemiology to establish *conclusive* proof that smoking caused all class members' diseases, with no rebuttal as to other possible causes.

[693] This reading of the law, which is shared by all appellants, distorts its true scope.

[694] First, it is important to understand the effect of ss. 13 and 14 T.R.D.A. These two sections, like the following seven, make up § 2 ("Special provisions for an action brought on a collective basis") of the section concerning the government's right to recovery. They are used to define what constitutes and what may be covered by "collective action" by the government to recover healthcare costs as defined in section 10.

[695] Section 13 states a general principle and indicates in its first paragraph what is excluded from the judicial debate in the course of a class action: it cannot concern the particular situation of the specific beneficiaries of healthcare. Therefore, the identity of each beneficiary, the cause and development of his or her individual state of health, the specific care provided to him or her and the costs attributed to that care are irrelevant. What matters is a set or class of beneficiaries,

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[664] RBH's plan of argument at para. 119.

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considered collectively because of common characteristics, hence the qualification of “an action brought on a collective basis.” The government’s right of recovery is not related to the right of some beneficiaries to claim damages from tobacco manufacturers. That is why the second paragraph of section 9 T.R.D.A. specifies that the right of recovery “is not a subrogated right” and does not deprive the beneficiaries of the possibility of exercising their own remedies for their own damages. Admittedly, the second paragraph of section 13, in subparagraph 2, allows for particular medical information at the level of individual healthcare recipients, but in a very limited way, under distinct rules, foreign to the T.R.D.A., according to which an expert could be forced to disclose the documents used to produce his expert report.

[696] Section 14 significantly reinforces the idea that only the general situation of a group or class of beneficiaries considered collectively counts here. At the outset, it refers to “statistically meaningful samples” of records and documents relating to particular healthcare recipients. With respect to this information, the Court “determines the conditions for the sampling,” and the conditions for the communication of information contained in the documents. The T.R.D.A. also provides, in the third paragraph of section 14, that when the individual files are used to build a statistically meaningful sample, the identity of the healthcare recipients in those records, as well as any “information they contain that reveals ... the identity” of the recipients, must be rigorously purged.

[697] It is difficult to see, in these circumstances, how any genetic, behavioural or other characteristic specific to a particular beneficiary could be evidence in defence when the government is exercising the right of recovery. The debate must be conducted at the level of the target class, a comparable and representative class, or a representative subset of one of them, and can therefore only be done using collective data, which is exactly what section 15 of the T.R.D.A. covers, among other things.

[698] The double reference by which the legislator makes section 15 applicable to “any class action based on the recovery of damages for the [tobacco-related] injury” is a reference to section 15 and section 15 alone. It is not an additional or incidental reference to sections 16 to 19 since, obviously, no member of a class bringing such a class action holds the government’s right of recovery under section 9. The appellants, through RBH, argue that the evidence required from the government under subsection 16(2) is evidence of *general* medical causation. Once this proof has been established by the government in accordance with section 15, the la presumption of subsection 17(2) exempts the government from the requirement to prove *specific* medical causation. It should therefore be inferred from the foregoing that the object of the methods of proof listed in section 15 can only be general medical causation.

[699] In arguing thus, the appellants add an element to section 15 that is not there. In section 15, like section 24, it is a matter of “proof of causation between alleged facts.” These provisions make no distinction between the medical or conduct aspects of causation considered at the general or individual level: section 15 deals with proof of causation, a notion undertaken with its full singularity. There is therefore an inconsistency in the reasoning proposed by the appellants. Admittedly, the government, in the exercise of its right of recovery on a collective basis, benefits from a presumption that renders proof of specific causation superfluous by means of the particular methods of proof under section 15. But this in no way implies that, when a party other than the government brings a class action for tobacco-related harm, it must be deprived, on the pretext that it does not enjoy the same presumption of the government, of the ability to prove

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causation in all its aspects by the methods of proof that section 15 authorizes. The appellants' conclusion ("section 15 only refers to general medical causation") does not derive in any way from the premises they formulate ("only proof of general medical causation is required of the government under section 16, and this proof gives rise to presumption of specific medical causation in favor of the government under section 17.")

[700] Pushing this argument further, the appellant RBH also claims that the trial judge's finding on the meaning of section 15 "would effectively read ss. 18 and 19 out of the T.R.D.A. as well."[665] In reality, this is not the case, for the following reasons.

[701] All the provisions of § 2 (entitled, once again, "Special provisions for an action brought on a collective basis") must be understood in a way that is consistent with the first paragraph of section 13, with which those provisions must be compatible. An action "brought on a collective basis" by the government must proceed to a judgment on the merits, regardless of what may be revealed by one or more pieces of evidence relating to a specific healthcare recipient (or a "particular" healthcare recipient, to use the terminology of the Act).

[702] Section 18 sets out the conditions under which the court may fix the cost of healthcare recoverable by the government and prescribes the method to be used to determine the share of liability of each defendant depending on their respective market share. Section 19 authorizes the court to reduce a defendant's share of liability, to adjust the sharing of liability among the defendants, where one of them proves that their alleged fault (i) did not cause or contribute to the exposure to tobacco or (ii) did not cause or contribute to an adverse health effect. It should be noted from a reading of section 19 that again, as in subsection 17(2), the Act is expressed in terms of aggregates of persons ("persons," "a number of persons" and "a number of those persons").

[703] As recently pointed out by Justice Bich on behalf of a unanimous panel of five judges of the Court, legislative debates can provide useful clues as to the scope of legislation. In this regard, she stated:[666]

> [TRANSLATION]
>
> [166] We know that parliamentary debates are an interpretative tool whose use requires some caution, given their nature. We also know that the use of such a tool is not always decisive and cannot contradict an unambiguous text. Nevertheless, the tool has since earned its stripes in the case law, and the Supreme Court itself reiterated this point recently in *Mouvement laïque québécois v. Saguenay (Ville)*, where it stated that such debates (as well as other elements), when they are unambiguous, are part of the indications that allow us to establish the legislator's objective, and therefore its intention.
>
> [Cross-reference omitted]

[704] In this case, section 19 of the T.R.D.A. was the subject of some specific and

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665 RBH's plan of argument at para. 119.

666 *Air Canada c. Québec (Attorney General)*, 2015 QCCA 1789.

unambiguous comments during the detailed study of the T.R.D.A. by the parliamentary committee (at the time Bill 43).

[705] The clause-by-clause study of Bill 43 took place on June 15, 2009, before the Standing Committee on Social Affairs. Introducing section 19, the Minister of Health and Social Services at the time, Yves Bolduc, first mentioned a minor amendment made at the request of the Barreau du Québec, which does not affect the issue discussed here. He then described the objectives sought by the presumptions in section 17. The Minister was accompanied by Mtre Pierre Charbonneau, a lawyer from the Department of Justice who, throughout the clause-by-clause study of the Bill, provided technical details to the members of the Committee. The debate on section 19, as far as what is relevant here, included the following discussion:[667]

> [TRANSLATION]
>
> **Mr. Bolduc:** Thank you, Mr. Chair. In section 19 of the draft Bill, replace the words "the alleged failure" by the words "its failure", and the words "this failure" by the words "its failure".
>
> The text of the amended Bill, section 19: "The court may reduce the amount of the health care costs for which a defendant is liable or adjust among the defendants their share of responsibility for the health care costs if one of the defendants proves either that its failure did not cause or contribute to the exposure of the persons in Québec who were exposed to the type of product involved in the action, or that its failure did not cause or contribute to the disease suffered by, or the general deterioration of health of, a number of those persons, or cause or contribute to the risk if such a disease or such a deterioration."
>
> Comments. This section properly recognizes the right of any defendant in an action brought on a collective basis to obtain a reduction in the amount of healthcare costs for which it may be held liable if it is able to rebut any of the presumptions of causation provided for in section 17.
>
> In such a case, this section also gives the Court the power to adjust the other defendants' share, if any, of the cost of healthcare for which they are held liable.
>
> **Chair (Mr. Kelley):** So, first, on the amendment, our usual question of omissions. Are there any comments? No. Then, the amendment is passed.
>
> We will now open the floor to a more general discussion on section 19, as amended. The Honourable Member for Hochelaga-Maisonneuve.
>
> **Ms. Poirier:** If I understand correctly, if it is proved that one of the defendants has a lesser involvement, the amount of costs could be reduced. Is that correct?
>
> **Chair (Mr. Kelley)**: Mr. Charbonneau.

[667] Quebec, National Assembly, Standing Committee on Social Affairs, *Journal des débats*, 39-1, vol. 41, No. 37 (June 15, 2009) at 49.

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> **Mr. Charbonneau (Pierre)**: Yes, that's right.
>
> **Ms. Poirier:** I'm trying to understand how we arrive at that.
>
> **Mr. Charbonneau (Pierre):** It could, for example, prove that it did not manufacture those products, except for from this year to that year, or that there was a period where there was no distribution in Quebec for that product, which would reduce its obligation.

[706] On the one hand, it follows from the text of the T.R.D.A. that the presumptions created by section 17 are *juris tantum* presumptions. The use of the word “presumes” in section 17 and the word “deemed” in section 21 shows that the legislator had in mind the distinction drawn by art. 2847 C.C.Q. On the other hand, with respect to the rules applicable in actions taken on a collective basis by the government, the effect of sections 13 and 14 is to considerably limit the type of evidence admissible to trigger the application of section 19. The comments above from the *Journal des débats* provide two illustrations of evidence administered in defence that could have this effect. Medical evidence or conduct evidence on an individual scale cannot be relevant to this debate, and the statistical sampling contemplated in section 14 necessarily goes beyond the scope of evidence targeting specific and identified individuals.

[707] The appellants are therefore correct in characterizing the presumptions set out in section 17 T.R.D.A. as simple presumptions, but for the rest, their claims, as described above in paragraphs [687] to [692] are unfounded. The trial judge could take into account the methods of proof listed in section 15 T.R.D.A. to determine, on the one hand, the alleged causation between the appellants’ fault and the likely conduct of the members of the Blais and Létourneau Classes, and, on the other hand, the alleged causation between cigarette consumption and the diseases contracted by these members, or their tobacco dependence.

[708] Moreover, it would be surprising, to say the least, if the sole intention of the legislator in adopting the T.R.D.A., and, more specifically, section 15 of the Act was to facilitate proof of general medical causation in litigation involving tobacco products. The T.R.D.A. received royal assent on June 19, 2009. At that time, it was common knowledge that tobacco is very harmful to health and that its consumption is highly addictive. Thus, and as an example among others, almost two years to the day before the adoption of the T.R.D.A. by the National Assembly, Chief Justice McLachlin wrote the following in a unanimous decision of the nine members of the Supreme Court of Canada:[668]

> Parliament was assisted in its efforts to craft and justify appropriately tailored controls on tobacco advertising and promotion by increased understanding of the means by which tobacco manufacturers seek to advertise and promote their products and by new scientific insights into the nature of tobacco addiction and its

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[668] *Canada (Attorney General) v.* JTI-Macdonald Corp., 2007 SCC 30 at para. 9. Already in 1995, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 116, in a case concerning the constitutionality of the *Tobacco Products Control Act*, SC 1988, c. 20, La Forest J. observed: “The appellants are large corporations selling a product for profit which, on the basis of overwhelming evidence, is dangerous.” It is true that this remark appears in the dissenting reasons of Justices L'Heureux-Dubé, Gonthier and Cory regarding the validity of the Act under section 1 of the *Canadian Charter.*

> consequences. On the findings of the trial judge in the present case, tobacco is now irrefutably accepted as highly addictive and as imposing huge personal and social costs. We now know that half of smokers will die of tobacco-related diseases and that the costs to the public health system are enormous. We also know that tobacco addiction is one of the hardest addictions to conquer and that many addicts try to quit time and time again, only to relapse.

[709] In the case at bar, the appellants themselves argued that these facts became public knowledge before the knowledge dates established by the trial judge. There can therefore be no doubt that in 2009, the legislator's intention was not to facilitate proof of a fact that was public knowledge, or even judicial knowledge, about the harmful effects of smoking on health, but rather with the explicit aim of facilitating, as it itself states, "proof of causation between alleged facts."

iii. Issue joined at trial

[710] The notion of causation was at the forefront of the Blais and Létourneau cases. It is appropriate to identify the relevance of the notion here before situating it in the specific context in which the parties addressed it.

[711] Fundamentally, if there is causation between the faults alleged against the appellants and the harm inflicted on the members of the Blais and Létourneau Classes, it can have both a medical and a conduct aspect at the same time. Beyond this first distinction, medical causation can be analyzed from four main angles, which are clearly discernable in the appeal cases. In Blais, there is first general medical causation − the fact that tobacco products manufactured by the appellants are allegedly toxic and constitute a major cause of certain serious diseases that are widespread among the population in question. Next comes individual medical causation, the fact that one of these diseases contracted by a member of the Blais Class could have as its true cause in that particular case and on the basis of overwhelming evidence, the person smoking a sufficient quantity of cigarettes manufactured by the appellants, rather than another cause unrelated to tobacco (for example, a genetic predisposition or prolonged contact with some carcinogenetic agent in the environment. In the Létourneau case, general medical causation is said to be due to the fact that cigarettes, the only product covered by the two actions, created an addiction that was abnormally difficult to overcome, without a smoker's knowledge. Individual medical causation refers to the fact that the addiction of each member of the Létourneau Class on tobacco is attributable to their smoking cigarettes manufactured and sold by the appellants and not to an unrelated cause. With respect to conduct causation, it is possible that for various reasons that should be explored, it is not the faults alleged against the appellants that had any impact on smoking by the members of the Blais and Létourneau Classes, or at least by some of them − for example, because long before the knowledge dates established by the trial judge, they were already fully aware of the risks they were taking when they started or continued to smoke.[669] Finally, these various smoking habits within a Class or even the general attitude of the individual members with respect to smoking, can also influence causation − this could be the case for a smoker, who by personal inclination, persisted in excessive smoking or who, aware of the health risks, never made any attempt to quit smoking. The line between those two types of

[669] The example of the active smoker who was a pulmonologist or oncologist practising in the 1960s was raised during the pleadings in the Court of Appeal.

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conduct causation is quite thin.

[712] It is therefore conceivable that many individual variables could be at play here.

[713] The motion to institute proceedings in the Blais case is divided into several parts in which causation is frequently discussed. First, it is alleged in very general terms that the appellants' faults caused harm to the members of the Class (para. 4). Cigarette smoking is alleged to caused or contributed to causing the lung cancer of Representative Blais (para. 21). Direct inhalation of tobacco smoke, combined with the phenomenon of addiction is said to be one of the leading causes of illness and death in Canada (para. 69), accounting for 85% of lung cancer and 30% of throat and pharyngeal cancer (para. 70) among the Canadian population. Smoking cigarettes manufactured and sold by the appellants is said to be the cause of cancers suffered by the members of the Blais Class (para. 71). Various scientific studies, including those conducted by the U.S. Surgeon General confirm the existence of this causation (paras. 73 and 74). The same would apply to 85% of the emphysema cases in Canada (para. 76), and therefore, of the members of the Class (para. 77). The respondents then list, with lengthy excerpts from what they anticipate will be their evidence, the alleged faults of the appellants and the impact of those faults on the members of the Class. The appellants are alleged to have known about causation between various types of cancer and cigarette smoking for many years. (para. 97−104), but deliberately refrained from disclosing this fact by artificially maintaining a fictitious scientific controversy (para. 110−116) and denying the existence of any authentic scientific causal demonstration (para. 117−123), choosing instead to systematically trivialize the risks associated with smoking (para. 124−131) and adopting a counter-discourse to encourage smoking, especially among young people, and through cigarettes misleadingly described as "light" or "mild" (para. 132−162). Many of these allegations are reflected in the motion to institute proceedings in the Létourneau file. The Blais file contains a number of allegations relating to the assessment of punitive damages and [TRANSLATION] "non-pecuniary compensatory" damages (para. 163−169), which as discussed below, were the subject of significant amendments during the trial.

[714] In defence, the position taken by the appellants − and reiterated many times in their submissions − is in substance that causation is inseparable from a case-by-case examination of the situation of each member of the Class, in both the Blais case and the Létourneau case. It is pointless here to go back over each aspect of the issue joined because the Ariadne's thread always remains the same. This can be illustrated by some excerpts from their arguments. Thus, in its amended defence of November 17, 2008, in the Blais case, the appellant JTM immediately showed its colours by stating:[670]

> [I]n order to determine the existence and cause(s) of, or the contribution of a risk factor to, any disease suffered by putative members of the Class, a full assessment as to each individual member's risk profile − including familial and occupational history, medical history, lifestyle factors, smoking history and a verification of the disease diagnosis itself − would be required.

[715] This is a recurrent theme. Concluding on this issue, the same appellant affirmed the following in its defence.

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[670] JTM's amended Defence, November 17, 2008, at para. 2c).

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218. In such individual assessments, there are many specific important facts that need to be determined on an individual basis for each class member, upon which JTIM has the opportunity to cross examine, where relevant, before the liability of JTIM can be determined in regard to any Class Member and an award for damages granted in respect of that individual. The non-exhaustive questions are, *inter alia:*

(i) Was, and if so, when was the Class Member aware (or could he have been aware) of the health risks associated with smoking as well as the risk that smoking may be difficult to stop?

(ii) If the Class Member was not so aware of the risks associated with smoking at certain points, would he or she have smoked even if he would have been aware of these risks?

(iii) If the Class Member was not aware of these risks on starting smoking, which must be assessed, when did he or she become aware of these risks and did he stop smoking when he or she became so aware of these risks? If no, why not?

(iv) If the Class Member stopped smoking when he or she became aware of these risks (or it is decided that he should have stopped smoking at that point), what was the risk of this smoking causing the disease at that point?

(v) For how long has a Class Member stopped smoking?

(vi) Did the Class Member smoke JTIM's products? If not, he or she has no legal interest in regard to JTIM;

(vii) If the Class Member smoked other products than JTIM's products, what, if any, is the risk attributable to the period he smoked JTIM's products? Did he also smoke the products of other Canadian tobacco manufacturers?

(viii) Which product(s) did he smoke, regular, LTN or descriptor cigarettes and what were the reason(s) for doing so? In what amounts and intensity did he smoke such cigarettes? When and where did he smoke such cigarettes? For what periods and with or without interruption?

(ix) Did the Class Member believe that LTN or Lights cigarettes were safer and, if so, why? Would the Class Member have stopped or not started smoking without his belief?

(x) When did he or she start smoking and at what age? Why did the Class Member start to smoke?

(xi) Was the Class Member aware of the alleged denials or trivializations, or statements made or views expressed by JTIM with regard to the health risks associated with smoking? If so, when did he or she become so aware and did he rely on any such alleged denials, trivialisation, statements or views in his smoking related decisions;

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> (xii) Was the Class Member aware of the alleged misleading marketing strategies and other marketing strategies that allegedly conveyed false information about the characteristics of the products sold? If so, when did he or she become so aware and did he or she rely on any such marketing and other marketing strategies in his smoking related decisions including the decision to start?
>
> (xiii) Has the Class Member been told to quit smoking by his/her doctor, teachers and/or family or friends? Did he or she follow that advice?

[716] In its defence, the Appellant RBH comments on the seven common questions to be addressed collectively as reformulated by the trial judge in paragraphs 3 to 5 of his reasons. It argues on this point that, in each case, "even if the Court were to give an affirmative answer to [this] Question, no finding of liability would be justified since such an answer cannot address in any fashion the issues of damages and causation."[671] And further on, in paragraph 98 of its defence, it follows in the footsteps of the appellant JTM by arguing the following

> As for the four diseases (cancer of the lung, cancer of the larynx, cancer of the throat and emphysema) covered by the CQTS [Centre québécois sur le tabac et la santé] class action:
>
> • Each of these diseases' etiology is complex and multifactorial;
>
> • While some smokers will develop one of these diseases, not all smokers will. Even non-smokers can develop one of these diseases;
>
> • Smoking in certain instances may only be one of many risk factors and in other instances it may not be the cause at all;
>
> • In order to determine a cause or several causes of any of these four diseases, it is absolutely necessary to proceed to an individual in depth examination of each member of the class since epidemiological studies cannot establish individual causation;

[717] To which the respondent Létourneau replied, in its Answer dated October 23, 2009: [TRANSLATION] "She has no knowledge of the allegations set out in paragraph 98 of the defence, which do not concern her."[672]

[718] This summarizes the terms in which the debate on causation was defined at first instance. But, to this must be added several contextual elements related to the conduct of the dispute at first instance.

iv. <u>An aspect of the conduct of the proceedings at first instance</u>

[719] The originating motions in the Blais et Létourneau cases both date back to September

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[671] RBH's defence, February 29, 2008, at para. 36.
[672] Respondent Letourneau's Answer to RBH's defence, October 23, 2009, at para. 59.

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30, 2005. There is significant overlap in the allegations they contain, particularly with respect to causation.

[720] On March 28, 2014, just over eight months before the end of the trial, the respondents filed an amended motion to institute proceedings in the Blais case, in which they reiterated all the allegations made on September 30, 2005, but made two significant changes to the lawsuit: (i) they replaced the description of the Class in accordance with terms of an interlocutory judgment dated July 3, 2013,[673] and (ii) in the wake of that amendment, as well as in light of expert evidence given by the respondents at trial, they substantially revised the calculation of damages claimed from the appellants.

[721] Following that, in the joint "notes and authorities" for both cases, that were communicated to the trial judge during deliberations, the respondents waived the recovery of individual claims for pecuniary damages that were the subject of their amended motion to institute proceedings. They did so in these terms:

> 2323. In both class actions, Plaintiffs seek collective recovery of moral and punitive damages.
>
> 2324. Should the Court grants both class actions, the issue that must be answered is whether or not for other damages the Court should order that they be the object of individual claims.
>
> 2325. Section 1028 of the C.c.P. provides that the Court has a discretion not to order those claim to be adjudicated.
>
> > 1028. Every final judgment condemning to damages or to the reimbursement of an amount of money orders that the claims of the members be recovered collectively or be the object of individual claims.
>
> 2326. Section 1034 provides guidance as to when the Court may exercise the discretion not to order such individual adjudication.
>
> 2327. One of the criteria is where it would be too expensive or impractical to order such individual adjudication.
>
> 2328. Section 1034 of the C.p.c. provides:
>
> > **1034.** The court may, if of opinion that the liquidation of individual claims or the distribution of an amount to each of the members is impossible or too expensive, refuse to proceed with it and provide for the distribution of the balance of the amounts recovered collectively after collocating the law costs and the fees of the representative's attorney.
>
> 2329. In the present cases, given that systemic abuse by Defendants described above, it will be impractical and excessively expensive to adjudicate each individual claims. Given the past behavior of the defendants, they will likely

[673] *Québec Council on Tobacco and Health cv. JTI-MacDonald Corp. (Létourneau v. JTI-MacDonald Corp.),* 2013 QCCS 4904.

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> succeeded in delaying for years the court process and in exhausting the financial resources of all class members who dare try to obtain compensation. Outside of collective recovery, recourses of the members against the defendants are just impossible.

[722] In response to this change of course, the trial judge made the following observations at the very end of his reasons:

> [1193] The Plaintiffs displayed an impressive sense of clairvoyance in their Notes when they opted to renounce to making individual claims, declaring that "Outside of collective recovery, recourses of the Members against the defendants are just impossible". The Court agrees.
>
> [1194] The Companies are of two minds about this. While no doubt rejoicing in the knowledge that there will be no need to adjudicate individual claims in the present files, they wish to avoid the possibility of any new actions being taken by current Class Members, a highly unlikely event, to be sure. That is why they insisted that the Plaintiffs not be allowed to remove the request for an order permitting individual claims and that the Court rule on it. The Plaintiffs do not object.
>
> [1195] Consequently, we shall dismiss the request for an order permitting individual claims of the Members against the Companies in both files.

[723] We can therefore see that proof of causation in each of the aspects identified above raised a problem of scale several times in the course of the litigation: was it necessary to present evidence of causation on a balance of probabilities at the level of each member of the two Classes, or could we be satisfied with evidence (also on a balance of probabilities, it goes without saying) allowing us to extrapolate the impact that cigarettes and the faults alleged against the appellants had on the members to all or part of each Class?

[724] This question was first addressed in an interlocutory judgment dated September 13, 2013,[674] which was partially overturned by a judgment dated May 13, 2014.[675] On that occasion, the trial judge was to rule on a motion to quash the subpoenas *duces tecum* by which the appellant ITL, through a test case, was attempting to obtain the complete medical records of the representatives Jean-Yves Blais and Cécilia Létourneau. This was not the first time the issue had surfaced because, as the trial judge pointed out, he had already rendered a judgment on July 22, 2011,[676] denying ITL the requested access to the medical records of members already listed in the Classes of representatives Blais and Létourneau. Confirming this dismissal by a

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674 *Québec Council on Tobacco and Health c. JTI-Macdonald Corp.,* 2013 QCCS 4863.

675 *Imperial Tobacco Canada Ltd c. Létourneau*, 2014 QCCA 944.

676 *Québec Council on Tobacco and Health c. JTI-MacDonald Corp.,* 2011 QCCS 4090. Previously, in 2008, the appellants sought permission to conduct pre-trial examinations of 100 Members of the Létourneau Class and 50 Members of the Blais Class, and attempted to obtain their medical records, which was refused in both cases: *Québec Council on Tobacco and Health c. JTI-MacDonald Corp. (Létourneau v. JTI-MacDonald Corp.)*, 2009 QCCS 830, leave to appeal to the C.A. refused, 2009 QCCA 796 (27 April 2009).

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decision rendered on October 2, 2012,[677] Wagner J.A., as he then was, stated the following, with which his colleagues Pelletier and Hilton, J.J.A. :

> [TRANSLATION]
>
> [51] I am of the opinion that the judge's reasoning in dealing with access to the medical records, like the order to submit to medical examinations, is consistent with the state of the law, and I do not see how obtaining the medical records, or the order to submit to medical examinations, could allow for a relevant debate on common questions that go beyond the individual personality of the members. In all respects, this is a management decision and, in the absence of an error of law or a palpable and overriding error of fact that could jeopardize the right to a full and complete defence, the Court should not intervene.

[725] By its application, which concerned only the medical records of the two representatives, the appellant ITL was seeking a decision in principle.

[726] On appeal, the Court found [TRANSLATION] "that the disputed subpoena were valid with respect to the respondent Létourneau personally and the successor or successors of the respondent Blais".[678] Access was therefore granted to their medical records. The unanimous decision, dated May 13, 2014, was written by Bich, J.A.

[727] It is useful to reproduce large excerpts from these reasons here to set out the background to the issue:

> [TRANSLATION]
>
> [17] Since at least 2009, at both the pre-trial and trial stages, the appellant repeatedly requested permission, in various ways, to examine not only representatives Létourneau and Blais, but also a number of Class Members *and* to have access to their medical records. The appellant invoked its right to a full and complete defence (in particular with respect to causation between fault and harm); and argued that even if it could be held liable in any way, this evidence is necessary to demonstrate the inappropriateness of the collective recovery sought by the respondents. In essence, the appellant argued that this evidence would allow it to establish, for example, that the members were warned of the dangers of smoking by their physicians and nevertheless chose to continue smoking, or that, (particularly in the case of the Blais Class), other factors may have caused or contributed to the disease or that the situations of the Class Members are so disparate that collective recovery cannot be considered (even for only an award of moral damages).
>
> [18] As for examining the Members, we understand from the judgment *a quo* that the appellant was finally granted permission to examine some of the persons registered in both actions. With respect to the medical records of these individuals, however, permission was consistently denied, including by this Court

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677 *Imperial Tobacco Canada Ltd. c. Létourneau*, 2012 QCCA 2013.

678 *Imperial Tobacco Canada Ltd. c. Létourneau,* 2014 QCCA 944 at para. 5.

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in 2012.

...

[30] Indeed, relevance is one of those concepts whose application may well vary during a proceeding and even during the trial: what does not seem relevant one day may become relevant at a later time, depending on how the evidence unfolds, and vice-versa. A judge who allows an objection to the evidence can later realize that, on the contrary, such evidence was necessary, or is necessary, or useful, to resolve the issues in dispute and therefore has the power to rescind his or her previous determinations or change his or her mind for the future.[679] This proposition is supported by *Allali c. Lapierre*.[680] ...

[31] Obviously, it is clear that a party cannot repeatedly request what has been refused, in the same way that the opposing party cannot repeatedly oppose evidence that the judge declares admissible. Such behaviour could rightly be interpreted as an attempt to circumvent or as an abuse and could constitute a *fin de non-recevoir.* The circumstance of this case, however, do not lend themselves to such a qualification (nor did they lend themselves to it in the case decided by this Court in 2012).

...

[35] These common questions were stated in the authorization judgment in 2005. We see that they were defined in terms that target the fault of the defendant companies. The questions, therefore, are whether, together or individually, the companies knowingly or negligently marketed a product harmful to the health of consumers, whether they tried to conceal the risks and dangers associated with smoking, whether they marketed the product on the basis of false and misleading information, whether they deliberately used ingredients in their products that were likely to increase the dependence of users, etc.

[36] The wording of these questions in such terms does not, however, complete the list of questions that the trial judge will have to resolve in order to decide the respondents' action. It should also be noted that the authorization judgment was intended to determine only "the main questions of fact and law" at stake. It goes without saying, however, that in the case of extracontractual liability actions, where the class action is merely the procedural vehicle, the trial judge, if he or she answers any of the questions defined by the authorization judgment in the affirmative (thus finding a fault), must also answer the questions of whether this fault caused the harm alleged by the respondents, the existence of which must also be established.

[728] Then, after citing *Bou Malhab v. Diffusion Metromedia CMR inc.*[681] and various sources of commentary, Justice Bich added:

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[679] See Léo Ducharme, *Précis de la preuve*, 6th ed. (Montreal: Wilson & Lafleur, 2005) at 601, para. 1472.
[680] *Allali v. Lapierre*, 2007 QCCA 904.
[681] *Bou Malhab v. Diffusion Metromedia CMR inc.,* 2011 SCC 9.

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[TRANSLATION]

> [41] It follows from all this that the respondents' burden does not stop at demonstrating the existence of the fault of the appellant and its co-defendants with respect to the class members, but includes the inseparable aspects of harm and causation, with respect to each of the members of these classes. It is also their responsibility to demonstrate the appropriateness and feasibility of the collective recovery they require. The trial judge will have to rule on all these elements, which are part of the common questions to be resolved in order to rule on these actions, i.e., to decide whether to allow or dismiss them and if they are allowed, to then decide on the appropriate method of recovery and other accessory determinations.

[729] It follows from the foregoing that the relevance of evidence relating to individual members of each Class is a matter to be reassessed, in light of what the trial reveals at each stage in regard to the issues in dispute, including causation. Justice Bich went on to say:

[TRANSLATION]

> [48] To discharge their burden of proof with respect to injury and causation, the respondents chose the means of essentially expert statistical and epidemiological evidence. They consider that this method of proof will allow the judge to draw a sufficient (i.e., on a balance of probabilities) inference of harm and causation (which is confirmed by s. 15 of the *Tobacco-related Damages and Healthcare Costs Recovery Act*, a provision applicable to the two actions in this case under ss. 24 and 25 of the Act), while sufficiently establishing the conditions for collective recovery (art. 1031 C.C.P.). However, neither the representatives nor any of the class members were heard as plaintiffs at the trial.
>
> ...
>
> [51] The trial judge allowed the appellant to question members of both classes. However, the appellant would like to have at its disposal and potentially produce the medical files of the representatives, as well as those of the members it plans to examine. Is the appellant entitled to have those files?
>
> [52] As a matter of principle, it should be noted, first, that it is certainly not because the respondents chose the path of expert statistical and epidemiological evidence, excluding evidence related to individual cases (including those of the representatives), that the appellant should be forced to do the same. The appellant, in fact, wants to challenge the respondent's evidence not only with expert statistical and epidemiological evidence with respect to harm and causation, but also individual evidence. It also appears destined to serve as a counterbalance to the respondents' evidence with respect to fault by focusing on the free will of smokers, as well as establishing the inappropriateness of an order for collective recovery because of the disparity in causes and damages, if any.
>
> [53] In accordance with article 4.1 C.C.P., which applies to class actions, taking into account their particularities, the respondents are the masters of their case and

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> are free to decide on their strategies and means of proof. The appellant, however, has the same freedom to refute the respondents' evidence and exercise its right to a full and complete defence. In short, if the appellant must be restricted in the choice of evidence or in the scope of evidence, it cannot be because of the choices made in this regard by the respondents, nor, moreover, because of s. 15 of the *Tobacco-related Damages and Healthcare Costs Recovery Act.* This provision does not prevent a defendant from using the means it deems necessary to counter the presumption that the judge is authorized to draw from the statistical, epidemiological and other evidence.
>
> ...
>
> [59] At the appeal hearing, counsel for Mr. Blais and the Conseil québécois sur le tabac et la santé indicated that he did not object to the representatives being examined in this way (obviously, Mr. Blais himself will not be examined, given his death), including questions on their respective medical records, nor did he oppose their production. Ms. Létourneau's lawyer was less agreeable. In any event, it should be noted that the appellant already has Mr. Blais's and Ms. Létourneau's medical records in its possession, that it already examined them on this matter (at the pre-trial stage), and that they even obtained a second opinion in Mr. Blais's case. In these circumstances, it seems normal and appropriate to allow both the examination and the production of this information, which the judge will, in any event, need to rule on the particular cases of Ms. Létourneau and Mr. Blais (even if this does not necessarily lead to the same conclusion with respect to the other members of the class).
>
> [61] What about the members (other than the representatives) whom the appellant wants to examine (as the trial judge allowed), and whose medical records the appellant would also like to obtain? It goes without saying that one cannot consider obtaining testimony from all the members, or even a significant number of the members, which, in any event, would not be feasible, without infringing the legislative intent underlying class actions, and distorting them. That being said, we know that it is not uncommon, precisely because we want to support the evidence one way or another, for some members of a class to be heard (this was the case, for example, in *Bou Malhab*, *Biondi* and *Fédération des médecins spécialistes du Québec v. Conseil pour la protection des malades).* We also know this was allowed in this case by Justice Riordan.
>
> [Emphasis added; references omitted.]

[730] Although less restrictive, no doubt, than the ruling the trial judge handed down on September 13, 2013, this decision nevertheless defines a perimeter within which the issue of conduct causation could legitimately be debated, on an individual scale, but as evidence representative of the members of each Class.

[731] That judgment had consequences. To clarify, we will reproduce here an extract of the oral arguments of November 24, 2016, before the Court of Appeal, when the issue of the impact this decision had on the proceeding in the Superior Court arose. Mtre Johnston and Mtre

Lespérance, counsel for the respondents, replied as follows:[682]

[TRANSLATION]

Mtre BRUCE JOHNSTON:

> And there is something very important in that regard because before this Court, in the home stretch of the trial, permission was requested to question the members. This is a judgment that has been quoted extensively by our colleagues, a judgment from May 2014, written by Madam Justice Bich, the defendants' attorneys stated before the Court that they would call witnesses and that they had to do so now. And the Court asked them, [TRANSLATION] "But are you going to ask the members to come in?" The answer was yes, and they never called anyone.
>
> We prepared ... how many?

Mtre ANDRÉ LESPÉRANCE:

> A hundred and fifty (150).

Mtre BRUCE JOHNSTON:

> A hundred and fifty (150) people to be examined at trial, and they didn't call one of them. If you want to talk about a strategic decision, here is one.

THE COURT (YVES-MARIE MORISSETTE):

> You mean a hundred and fifty (150) members ... of the Class.

Me BRUCE JOHNSTON:

> Yes.
>
> …
>
> We identified members; we met with them ...
>
> ...

Mtre ANDRÉ LESPÉRANCE:

> They chose the members.

Mtre BRUCE JOHNSTON:

> They chose them, yes. But we prepared them.

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[682] Stenographic notes of November 24, 2016 (SténoFac) at 179–182.

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…

But regardless of all that, the important thing is that there was a choice that was made. They preferred ... they criticized us; it's everywhere in the brief, they ...

THE COURT (ALLAN R. HILTON):

Was it during the trial that you met the ... the members of the ... Class?

Mtre BRUCE JOHNSTON:

Yes, yes.

THE COURT (YVES-MARIE MORISSETTE):

Following the Court of Appeal judgment?

Mtre BRUCE JOHNSTON:

Yes, that's right.

THE COURT (YVES-MARIE MORISSETTE):

Did you read it carefully?

Mtre BRUCE JOHNSTON:

Yes, including paragraph 48. The strategic choice that was made was to preserve ... the defendants probably felt they would have arguments to make in their favour if no member came in. They preferred those arguments to the possible arguments they could have had from bringing the people in.

[732] Although this last comment is only an interpretation of the events by one party's counsel, the facts are clear: approximately 150 members were chosen by the appellants and prepared by the respondents' counsel. Subsequently, the appellants refrained from questioning them, such that the record contains no individual evidence (with the exception of the very fragmented evidence relating to the Blais and Létourneau representatives) and no evidence relating to the conduct of individual members of either Class.

[733] It seems, moreover, that the appellants' decision not to call these witnesses was made in full knowledge of the facts. Thus, on May 23, 2014, ten days after the judgment in question here, ITL announced at the hearing before the trial judge that it would not call these witnesses. Counsel spoke to the issue in these terms:[683]

Mtre SUZANNE CÔTÉ:

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[683] Submissions of Mtre Côté, May 23, 2014, at 43−44.

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> So, Mr. Justice, I promised, I undertook to come back to you today with our ... with Imperial's decision regarding the testimony of the class members and the representatives. I already thanked you last week when, I answered your email, for the extension that you have granted to us. ...
>
> And I think that you will be very pleased to know that the fact that you gave us the extension, gave us more time ... because we had to do a lengthy analysis of the decision of the Court of Appel [sic], it's an important decision, there are a lot of things mentioned in that decision, so we needed to involve many people, more than one (1) or two (2) people. And we came to the decision, because of what is in that decision of the Court of Appeal, not to call any Class member evidence, nor to call any of the representatives.
>
> So I am pleased to tell you that sometimes, when we have more time to think and to discuss, it permitted us to come to that decision.
>
> So this is it. As far as Imperial is concerned, no more evidence in terms of class members and representatives.

[734] Although there is no need to dwell further on this point, one may wonder why the appellants did not take the opportunity to interview the members identified for this purpose. Perhaps they considered that these persons could not constitute a representative sample of the members' situation, but this seems incompatible with the guidelines set by the Court in its 2014 judgment cited in paragraph [728] above. Perhaps they felt, in the wake of one of their main arguments, that the absence, in their view, of any evidence of individual causation by the respondents should necessarily result in the dismissal of the actions or, in the alternative, that the actions should result in individual claims rather than a collective recovery. We do not know. But by explicitly authorizing epidemiological evidence through section 15 T.R.D.A., the legislator wanted to allow causation to be established at the collective level of a population, so that − at the very least − evidence of causation that could be refuted by evidence to the contrary could be inferred. Contrary evidence here could have taken the form of a demonstration that, among the members appointed for individual examination or questioning, a significant proportion of them had a conduct profile that could blur the lines of inquiry and significantly weaken the respondents' thesis. But this was not done.

v. Appellants' complaints regarding evidence of causation

[735] *A priori*, at trial, the onus was on the respondents to prove causation between the appellants' alleged fault(s) and the harm(s) alleged by the respondents. The appellants all argue, each in its own way, that the deficiencies in the evidence administered at trial by the respondents required the outright dismissal of both actions.

[736] The appellant RBH gives the argument the most weight but does not differentiate it as much as ITL and JTM do. The absence of proof ("no evidence") is strongly asserted starting on the fourth page of its brief, where it states in the following terms what it considers to be a fundamental and insurmountable weakness in the judgment:

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> 11. As the Trial Judge recognized, Plaintiffs needed to prove two separate causal links:
>
> (a) *Conduct causation*: Defendants' faults caused each and every class member to smoke; and
>
> (b) *Medical causation*: for all class members, wrongfully caused smoking led to their injuries − *i.e.,* to disease in *Blais* and to dependence in *Létourneau.*
>
> 12. Plaintiffs led no evidence on the first link and did not carry their burden on the second. Either failure was sufficient to preclude liability. The Trial Judge erred in nonetheless imposing liability, and proceeding directly to collective recovery, without Defendants' being able to test for any class member either of the two causal links the Trial Judge simply presumed for everyone.

[737] In the appellants' briefs, there are a total of 56 allegations relating to the complete absence of proof ("no evidence"), which vary in intensity from "without evidence" to "without any evidence whatsoever," and which of course overlap.

[738] However, caution must be exercised in considering these claims. The Supreme Court of Canada's recent decision in *Benhaim v. St-Germain*[684] reiterates certain constants in the case law that are relevant here.

[739] First, the existence or non-existence of causation between two known elements is a question of fact, and the conclusion drawn from the facts commonly takes the form of an inference, with respect to which the standard of appellate intervention is significantly more restricted than on a question of law. Justice Wagner, author of the Supreme Court's majority reasons in *Benhaim v. St-Germain*, noted the following in this regard:[685]

> [36] The standard of review is correctness for questions of law, and palpable and overriding error for findings of fact and inferences of fact: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 10 and 19; *St-Jean*, at paras. 33-36. Causation is a question of fact, and so the trial judge's finding on causation is owed deference on appeal: *St-Jean*, at paras. 104-5; *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 8; *Ediger v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98, at para. 29.
>
> [37] It may be useful to recall the many reasons why appellate courts defer to trial courts' findings of fact, which were described at length in *Housen*, at paras. 15–-18. Deference to factual findings limits the number, length and cost of appeals, which in turn promotes the autonomy and integrity of trial proceedings. Moreover, the law presumes that trial judges and appellate judges are equally capable of justly resolving disputes. Allowing appellate courts free rein to overturn trial courts' factual findings would duplicate judicial proceedings at great expense, without any

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684 *Benhaim v. St-Germain,* 2016 SCC 48.

685 The citation refers to *St-Jean v. Mercier,* 2002 SCC 15.

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> concomitant guarantee of more just results. Finally, according deference to a trial judge's findings of fact reinforces the notion that they are in the best position to make those findings. Trial judges are immersed in the evidence, they hear *viva voce* testimony, and they are familiar with the case as a whole. Their expertise in weighing large quantities of evidence and making factual findings ought to be respected. These considerations are particularly important in the present case because it involves a large quantity of complex evidence.

[740] Particular note should be taken of the last four sentences of this passage.

[741] Very tangible institutional constraints justify this division of roles between trial and appellate courts. As it was a medical liability case, Justice Wagner wrote that *Benhaim v. St-Germain* involved a large quantity of complex evidence. All the more so in a case such as these appeals: their complexity by far overshadows that of most, if not all, medical liability cases. The *Benhaim v. St-Germain* trial lasted six days. In comparison, the trial in these cases lasted 251 days, spread over 33 months, during which 74 witnesses, including 21 experts, were heard, sometimes at the request of several parties. As for the documentary evidence on file, tens of thousands of numbers were assigned to the exhibits, many of which include numerous decimals[686] (such that on appeal, Schedule III, together with the appellants' briefs, is over 265,000 pages long). The pace of such a trial is obviously not that of an appeal hearing. The trial judge had ample opportunity to question witnesses, obtain oral or written explanations and clarifications from them (giving them time to do so), and assimilate details that will not even be likely to be mentioned in the Court of Appeal. Despite an exceptionally long hearing period on appeal – these appeals required six days of hearings – the parties' lawyers are obliged to be selective. It necessarily follows from the foregoing that the detailed understanding of the evidence and the overall assessment of it are primarily the responsibility of the trial judge. When an error capable of being corrected on appeal enters into this overall assessment, it is up to the appellants to define it clearly, and by its nature, such an error, if it deserves to be qualified as "palpable and overriding," will be easy to demonstrate.

[742] More recently, in *Nelson (City) v. Mowatt,*[687] a panel of seven Supreme Court Judges issued a unanimous decision in which they reiterated the importance of deference to the findings and inferences of fact made by the trial courts. The reasons of the Court were written by Justice Brown, who stated:

> [38] I acknowledge that the Court of Appeal's finding of fact that adverse possession of the disputed lot was continuous from December 1909 to at least February 1923 is not unreasonable. It is certainly possible to weigh parts of the evidence differently than the chambers judge did. The possibility of alternative findings based on different ascriptions of weight is, however, not unusual, and presents no basis for overturning the findings of a fact-finder. It is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. Absent palpable and overriding error — that is, absent an error that is "plainly seen" and has affected the result — an appellate court may not upset a

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686 Exhibit 987, for example, decimalized 50 times, is over 12,000 pages divided into 28 volumes of schedules.

687 *Nelson (City) v. Mowatt*, 2017 SCC 8.

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> fact-finder's findings of fact (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 6 and 10; see also *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 55). The standard of palpable and overriding error applies with respect to the underlying facts relied upon by the trial judge to draw an inference, and to the inference-drawing process itself (*Housen*, at para. 23). In my respectful view, the Court of Appeal erred by interfering with a factual finding where its objection, in substance, stemmed from a difference of opinion over the weight to be assigned to the evidence. The chambers judge, having held two hearings, the latter of which occurred as a result of his allowing the Mowatts an opportunity to adduce further evidence, and having carefully canvassed the evidence in two sets of cogent and thorough reasons for judgment, reached findings that were available to him on the evidence. Those findings should not have been disturbed.

[743] In sum, to paraphrase Justice Brown, it is never sufficient to argue that "some evidence could be assessed differently than the trial judge did."

[744] Secondly, we must always be careful not to confuse scientific causation with legal causation. This warning was repeated twice by Justice Wagner in *Benhaim v. St-Germain*:[688]

> [47] [...] Sopinka J. held that it is not necessary that the plaintiff adduce expert scientific or medical evidence definitively supporting the plaintiff's theory of causation, as "[c]ausation need not be determined by scientific precision" (p. 328; see also pp. 330-31). This is because the law requires proof of causation only on a balance of probabilities, whereas scientific or medical experts often require a higher degree of certainty before drawing conclusions on causation (p. 330). Simply put, scientific causation and factual causation for legal purposes are two different things. Factual causation for legal purposes is a matter for the trier of fact, not for the expert witnesses, to decide: *Laferrière v. Lawson*, [1991] 1 S.C.R. 541, at pp. 607-8; see also *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959), at pp. 109-10.
>
> …
>
> [54] In sum, the Court held in *Snell* that "the plaintiff in medical malpractice cases — as in any other case — assumes the burden of proving causation on a balance of the probabilities": *Ediger*, at para. 36. Causation need not be proven with scientific or medical certainty, however. Instead, courts should take a "robust and pragmatic" approach to the facts, and may draw inferences of causation on the basis of "common sense": *Snell*, at pp. 330-31; *Clements*, at paras. 10 and 38. The trier of fact may draw an inference of causation even without "positive or scientific proof", if the defendant does not lead sufficient evidence to the contrary. If the defendant does adduce evidence to the contrary, then, in weighing that evidence, the trier of fact may take into account the relative ability of each party to produce evidence: *Ediger*, at para. 36.

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[688] *Benhaim v. St‑Germain,* 2016 SCC 48. See also *Harper v. Canada (Attorney General),* 2004 SCC 33 at para. 78.

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[745] In Quebec law, article 2804 C.C.Q. sets out the meaning of evidence on a balance of probabilities by stating that "[e]vidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.".

[746] This idea of the balance of probabilities is generally foreign to the decisions that would be made by the peer review committee of a good scientific journal. A committee of this type will be guided first and foremost by the search for scientific certainty. Nevertheless, it will not hesitate to accept for publication works that are innovative or controversial if they seem promising, if they seem likely to stimulate a serious debate and if they are based on an intelligible methodology that can be repeated.[689] Demonstrating the case for a disputed fact before the courts is something of a completely different nature, partly because of the necessary purpose of court decisions. As Justice Binnie wrote in an article cited by the trial judge in paragraph 766 of his reasons, "[t]he court is a dispute resolution forum, not a free-wheeling scientific enquiry, and the judge must reach a timely decision based on the available information."[690]

[747] There are countless judgments which, on the basis of evidence "on a balance of probabilities" within the legal meaning of the expression, i.e., that of article 2804 C.C.Q., find that this or that fact is the cause of this or that other fact. In a large majority of cases, the court reaches this conclusion without having been able to benefit from scientific research on the facts at the origin of the dispute, which are long past, and *a fortiori* without having had the luxury of laboratory work, cross-referenced studies or double-blind controlled studies carried out over many years. In this case, the appellants complain that the trial judge was satisfied with evidence that is not the evidence of the last or ultimate cause – biological, genetic, molecular or other – of the disease or addiction from which each member of the Blais or Létourneau Class allegedly suffer. However, judges are not medical researchers. They must rule at that moment on what "renders the existence of a fact more probable than its non-existence" (art. 2804 C.C.Q.), based on the evidence before them at trial.

[748] Finally, the rules with which courts must comply in matters of causation are also intended to guide them in the assessment of evidence. As Justice Wagner stated in *Benhaim v. St-Germain*:[691]

> [66] In cases of causal uncertainty, both parties face the difficulty of attempting to establish facts in the absence of complete information. This case raises the issue of how that difficulty ought to be distributed between plaintiffs and defendants in cases involving what Prof. Lara Khoury calls "negligently created causal uncertainty": *Uncertain Causation in Medical Liability* (2006), at p. 223 (emphasis deleted). That distribution must balance two considerations: ensuring that defendants are held liable for injuries only where there is a substantial connection between the injuries and their fault, on the one hand, and preventing defendants

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689 During his cross-examination on his expert status, Dr. Siemiatycki, discussed below, observed in this regard: "An editor would require that any novel methods be explained and described in such a way that they are persuasive and / or that they are sufficiently understandable, that a critical reader can understand what was done." (testimony of Dr. Jack Siemiatycki, February 18, 2013, at 58)

690 Ian Binnie, "Science in the Courtroom: The Mouse that Roared", (2007) U.N.B.L.J. 307 at 312.

691 *Benhaim v. St‑Germain,* 2016 SCC 48. The work cited is that of Prof. Khouri (L. Khoury, *Uncertain Causation*, supra note 635).

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> from benefitting from the uncertainty created by their own negligence, on the other. In *Snell*, this Court struck a balance by clarifying that an adverse inference may be available in such circumstances, while leaving the decision on whether to draw that inference to the trial judge as part of the fact-finding process, which is governed by ordinary principles of causation.

[749] In this case, we should repeat that the appellants consistently argued in their written submissions and oral arguments that a complete absence of evidence on several logical links essential to the respondents' case should seal the fate of these actions. Such an appeal argument forces the opposing parties to guide the court to the evidence likely to refute it. However, it is not for the respondents to demonstrate that the trial judge would have committed a palpable and overriding error of fact if he had found in favour of the appellants – to argue that this is so would amount to reversing the roles of the appellants and the respondents. It is the former, not the latter, who must overcome the obstacles to the reopening of factual issues on appeal.

[750] With these clarifications in mind, it is now appropriate to reconsider the evidence in the trial record and the judge's assessment of it.

vi. Evidence of causation and its assessment by the judge

[751] At trial, the dispute was heard taking into account the distinction between medical causation and conduct causation. Medical causation raises the following questions: were the moral damages allegedly suffered by the respondents caused by the illnesses of the Blais Class members and by the addiction demonstrated by the Létourneau Class members? Did smoking cause the illnesses suffered by members of the Blais Class, or did it cause the tobacco addiction suffered by members of the Létourneau Class? Conduct causation as contemplated by the judge raises the following question: are the faults alleged against the appellants the cause of the smoking of members of both Classes? The judge devoted Chapter VI of his reasons to causation, which is considered under all these aspects.

a. Medical causation

[752] The trial judge discussed the issue of medical causation at paragraphs 654 to 767 of his judgment. The link between the harm and the alleged faults is a logical part of this analysis, but an even more central issue drew his attention. He formulated it under subtitle C of his reasons: "Were the Diseases caused by smoking?". It is this question that we will focus on first, because it is undoubtedly this aspect of the matter that is the subject of the most extensive evidence on the record by the parties. The matter is the subject of a marked disagreement between the appellants and the respondents. In the wake of this question is the one concerning the Létourneau case, stated as follows by the judge: "Was the tobacco dependence caused by smoking?" We will then examine the relationship between the damages and the alleged faults.

a.1. Blais file

[753] Was it open to the judge to find that smoking is the cause of the diseases in question?

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[754] First of all, it should be noted that, on the issue of medical causation, the same generic argument runs through the briefs of all the appellants. A clear and succinct statement of this argument is found in a passage from the plan of argument filed by the appellant JTM in the Superior Court. It should be mentioned here because it clearly highlights the claim argued before the trial judge on which he had to rule:[692]

> The law requires that the Plaintiffs demonstrate that each member of the class has an injury caused by smoking. Plaintiffs have attempted to prove only that a disembodied, theoretical average of the class has an injury caused by smoking. Even on the assumption that they have succeeded in that proof (and they have not, for all the reasons given), Plaintiffs have not demonstrated that each member of the class has an injury caused by smoking. Proof with respect to a theoretical average member of the class is not proof with respect to each member of the class. The evidence with respect to smoking behavior and other risks tells U.S. [sic] that it is not.
>
> [Emphasis in original.]

[755] Many excerpts from the briefs and plans of argument echo this same argument. Thus, and for example, the appellant RBH expresses it in these terms in its Factum:[693]

> By its very nature, however, epidemiology cannot prove specific causation. Epidemiology is the study of disease in a population as a whole. Epidemiology could, for example, compare a population of smokers to a similar population of non-smokers. If the smokers had a significantly greater incidence of a disease, and the study adequately controlled for other possible causes, the epidemiology could identify smoking as a cause of that type of disease. Thus, epidemiology can prove that smoking causes a particular disease and it can estimate how many smokers in a given population developed that disease because of smoking. It cannot, however, tell us *which* smokers in a population developed the disease because of smoking and which developed it because of some other factor:
>
> > [TRANSLATION] Epidemiology is a branch of public medicine that studies the frequency and distribution of diseases in time and space in a human population, as well as the factors that determine such frequency and distribution.
>
> [Emphasis in original; references omitted]

[756] Based primarily on the testimony of two of the experts cited by the plaintiffs, Dr. Desjardins[694] and Dr. Guertin,[695] the judge referred to very general epidemiological statistics. Dr. Desjardins said that smoking causes 85% to 90% of lung cancers. He added that smoking, according to the American Cancer Society, causes between 93% and 97% of deaths from this

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692 JTM's plan of argument at para. 2536. Obviously, it should read "us" instead of "U.S." in the last line of the quotation.

693 RBH's argument at para. 97. The quotation in the quotation is from *Spieser c. Canada*, 2012 QCCS 2801 at para. 469.

694 Recognized by the Superior Court as “an expert chest and lung clinician.”

695 Recognized by the Superior Court as " as an expert in ear, nose and throat medicine (otorhinolaryngology) and cervico-facial oncological surgery ".

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cancer in men over 50 years of age and between 86% and 94% of these deaths in women. Dr. Guertin stated that cigarettes are the main etiological agent for 80% to 90% of “throat” cancers (remember that this term refers to cancers – squamous cell carcinomas[696] – of the larynx, oropharynx and hypopharynx).[697] Equally important and alarming figures were provided by Dr. Desjardins for emphysema. The judge pointed out three times the lack of convincing evidence to the contrary[698] and went on to state: “[A]s indicated, these opinions are not effectively contradicted by the Companies, who religiously refrain from allowing their experts to offer their own views on medical causation between smoking and the Diseases".[699] This led him to the following question:

> [677] It remains to determine what "smoking" means in this context, i.e., how many cigarettes must be smoked to reach the probability threshold on each of the Diseases. For that, the Plaintiffs turn to their epidemiologist, Dr. Jack Siemiatycki.

[757] We can therefore see on which specific aspect of the problem the respective arguments of the respondents and the appellants were likely to clash.

[758] As the Judge mentioned, Dr. Siemiatycki, the main expert witness called by the respondents to resolve this issue, is an epidemiologist. He produced a lengthy report and testified for over twenty hours in February and March 2013. This testimony was supplemented by a first table updated and filed in February 2014,[700] then by a second table requested by the judge during deliberations and submitted on March 13, 2015.[701] It is not necessary to give a detailed account of this evidence here because the judge deals with it in several places in his reasons and gives an overview of it in paragraphs 695 to 718. In order to determine what smoking dose is likely to increase the relative risk (“RR”) of contracting any of the diseases covered by the actions (and thus, in his opinion, to satisfy the burden of the balance of probabilities) to at least two (2), Dr. Siemiatycki conducted meta-analyses combining the results of various epidemiological studies published between 1965 and 2000 relating to the diseases in question. He concluded that, evaluated in pack years,[702] the dose that reaches this level of RR (the critical dose of smoking) is about four pack years. Using data from various sources, including the Quebec cancer registry compiled by the Ministère de la Santé et des Services sociaux, he then estimated

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696 Dr. Guertin explained that squamous cell carcinoma accounts for 90% of cancers that develop in the upper airways and that only this type of cancer is formally associated with smoking: Exhibit 1387 at 2.

697 *Québec Council on Tobacco and Health c. JTI-MacDonald Corp.*, 2013 QCCS 4904 at paras. 9–16 and 83.

698 In fact, the experts cited by the appellants admitted to these figures or failed to question them.

699 Judgment *a quo* at para. 676. Perhaps there is a certain exaggeration (“religiously”) in this sentence, but its meaning is clear.

700 Dr. Siemiatycki modified his calculations to take into account some of the criticisms made by the appellants’ experts. In particular, they criticized him for using data from a Statistics Canada survey to establish the smoking profile of the Quebec population. In his recalculations, Dr. Siemiatycki used data from a study of the Montreal population: testimony of Dr. Jack Siemiatycki, February 18, 2013, at 99–102. The results of his recalculations were introduced into evidence with Exhibit 1426.6.

701 See exhibit 1426.7.

702 Recall that a pack year is a unit of measurement equivalent to 7,300 cigarettes. This unit of measurement is attained by smoking one pack of twenty cigarettes a day for one year, but can also reflect consumption that is otherwise equivalent, such as, for example, half a pack (10 cigarettes) a day for two years or any other rate of consumption totalling 7,300 cigarettes.

the number of people affected by the diseases in Quebec, based on smoking doses ranging from four to twenty pack years.

[759] Dr. Siemiatycki's methodology is somewhat innovative, as he himself acknowledged during his testimony, when he commented on the section of his report entitled "*Estimating smoking patterns among diseased population*":[703]

> Q. Okay. You have to agree, though, that the first step – what I call the first step, major step, that is to say the determination of a critical amount – is also where you had to innovate in order to develop a critical amount? You say that at page 33 of your report.
>
> R. H'm ... I guess the word "innovate", one has to think ... figure out what you mean by that. The components of that process were not novel, putting them together the way I did was novel.
>
> Q. Very well.
>
> R. As far as I know. Other people may have done it; I wasn't aware of it. That's all I would say.
>
> …
>
> Q. Okay. Is it fair to say that that, at least putting together all these various components, was the innovation and it was novel?
>
> R. I don't know that it hasn't been done before. What I meant is that it is not. this is not described in textbooks that I had available, how to do this. The components are very straightforward and it's part of the statistical and epidemiological canon, but doing it in this context for this purpose, I wasn't aware of this.

[760] That being said, this is a far cry from the kind of "junk science" denounced by Justice Binnie in *R. v. J.-L.J.*,[704] and which should be excluded at the admissibility stage. Dr. Siemiatycki's evidence was most certainly admissible here and had to be assessed on its probative value.

[761] Three experts called by the appellants, Mr. Marais,[705] PhD in mathematics/statistics, Dr. Mundt,[706] epidemiologist, and Mr. Price,[707] PhD in mathematics/statistics, criticized Dr.

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[703] Testimony of Dr. Jack Siemiatycki, February 20, 2013, at 13–15.

[704] *R. v. J.-L.J.*, 2000 SCC 51 at para. 25.

[705] Recognized by the Superior Court "as an expert in applied statistics, including in the use of bio-statistics and epidemiological data and methods to draw conclusions as to the nature and extent of the relationship between an exposure and its health effects.".

[706] Recognized by the Superior Court "as an expert in epidemiology, epidemiological methods and principles, cancer epidemiology, etiology and environmental and lifestyle risk factors and disease causation in populations."

[707] Recognized by the Superior Court "as an expert in applied statistics, risk assessment, the statistical

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Siemiatycki's report from many angles. The judge discussed this in paragraphs 719 to 767 of his reasons. In paragraphs 745 to 748, he explained why he dismissed Price's report in its entirety. The reasons he offers are serious. In short, this report is an application in the field of statistics of the thesis defended by the appellants and summarized above: it is, in a way, an exacerbated version of criticisms repeated by experts Marais and Mundt, a version that could be summarized by the contention that epidemiology is not a diagnostic tool at the individual level.

[762] It is certain that the methodology used by Dr. Siemiatycki left more room for extrapolation than that proposed by Mr. Marais, who would have been satisfied only with a detailed survey of a representative (and homogeneous) sample of a few thousand people with the targeted diseases in Quebec. However, there is every indication that the judge was fully aware of the risk of distortions in the results obtained by meta-analyses. This explains why he incorporated in his analysis a datum from Dr. Mundt's testimony, for whom the relative risk of developing lung cancer only becomes really significant between 10 and 15 pack years.[708] Hence the following conclusion by the judge:

> [759] Since Dr. Siemiatycki's method necessarily ignores several relevant, albeit minor, variables and, in any event, is not designed to calculate precise results, the Court will pay heed to Dr. Mundt's comments. Accordingly, we shall set the critical dose in the Blais File at 12 pack years, rather than five. The Class description shall be amended accordingly.

[763] This major change to the Class description for the Blais Class significantly affected its composition. There is one specific fact that shows this. According to figures collected by Dr. Siemiatycki, 112,506 new cases of lung cancer were diagnosed in Quebec between 1995 and 2011. Of these, 98,730 people would meet the four pack years criterion, which falls to 82,271 when the twelve pack years criterion is applied.

[764] In fact, the reservations expressed by Dr. Mundt and, above all, by Mr. Marais, are also a statistical extension of the legal argument that medical causation is only precisely understood at the individual level. When the cause is considered at the population level, regardless of size, distortions would appear and skew the results. The criticism of Dr. Siemiatycki's treatment of heterogeneity, insisted upon by Mr. Marais, illustrates this.

[765] The notion of heterogeneity is introduced as a fundamental reason to reject the critical dose of smoking criterion. In essence, this notion refers to the variation in the results observed among the studies chosen for the purpose of a summary such as a meta-analysis. During his testimony, Mr. Marais clarified the meaning in these terms:[709]

> [E]ven if he could rely on the critical amounts, the critical amounts fail to distinguish between smokers on dimensions of heterogeneity such that inference is that Dr. Siemiatycki bases on the critical amounts are, in effect, assigning an

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analysis of health risks and the use and interpretation of epidemiological methods and data to measure statistical associations and to draw causal inference."

[708] It is also interesting to note that, in his report, Mr. Marais (JTM) wrote that, assuming that Dr. Siemiatycki's method is valid, the "tobacco dose" at which the relative risk would hypothetically reach 2.0 would be 11 pack years: Exhibit 40549 at 71, paragraphs 57 and at 73, paragraphs 63–64.

[709] Testimony of Laurentius Marais, March 10, 2014 at 72.

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> average metric, an average measure for a heterogeneous group. This is calculated from all the individual members of the class, a single average, assigning that average back to each individual member of the class and labelling that an individual assessment. But there's nothing individual about it.

[766] He went on to provide the example of a measure of the average size of individuals in a given population:[710]

> It is as if one is concerned with measuring the heights of Quebecers, and one goes and measures individual heights and calculates an average height for all Quebecers, and then assigns that average back to each individual Quebecer and labels the result an individual assessment; there's nothing individual about it.

[767] These explanations were elaborated on later in his testimony with figures from Statistics Canada on the average size of Canadians.

[768] In this case, however, the plaintiffs' evidence was more than sufficient to consider the meta-analyses conducted by Dr. Siemiatycki to be conclusive. In addition to the fact that he claimed to have solid experience in analyses of this type, which was noted by the judge in paragraph 701 of his reasons, this expert considered, that in this case, the heterogeneity factor had no consequences for the purposes of his study. He accepted almost all the theoretical proposals presented to him in cross-examination, but also stated the following:[711]

> Q. Okay. All right. The numbers, the formal tests, though, don't tell you that they're telling the same story, the measures of heterogeneity; right?
>
> R. Not those tests.
>
> Q. Right.
>
> R. But, you know, tests of heterogeneity can be deceptive. You might ... there's a difference between statistical significance and clinical significance. And you'll find this described in statistics textbooks, as well as in... as well as sort of the methodologies of conducting statistical tests.
>
> So, if you have large enough study samples, for example, you'll find that the difference between a treated group and an untreated group might be statistically significant, but the effect of the treatment is so trivial, a change of one millilitre (1 ml) of mercury in blood pressure or something like that, that it has no clinical relevance.
>
> So, clinical importance and statistical significance are two different things. And what I contend is that the heterogeneity among these studies has no meaningful clinical impact.
>
> Q. You actually, though, didn't inquire to look, to consider the actual source of

[710] Testimony of Laurentius Marais, March 10, 2014 at 73.
[711] Testimony of Dr. Jack Siemiatycki, March 19, 2013, at 96–97

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the heterogeneity.

R. No, I didn't.

Q. Because, in fact, you didn't know that there was that amount of statistical heterogeneity?

R. I saw the lists of estimates of relative risks and of slopes, I saw that there was heterogeneity, but I saw that all of the estimates were within a range that would tell the same story.

[769] In this case, Dr. Siemiatycki concluded that, regardless of the degree of heterogeneity between the studies he used for his meta-analyses, “the range of values from all [of them] was so far off the charts for what we usually see in terms of the magnitude of relative risks and the magnitude of dose-response relations, that it would have little impact of [sic] the final results. [712]

[770] It is clear that he knew what such distortions consisted of. At another point during cross-examination, he expressed himself in a way that showed that he understood very well what he was being accused of but that in his eyes this accusation was a misrepresentation:[713]

Q. All right. But ... okay, we'll just look at what that means for lung cancer. But if I wanted to know the average height of Quebecers and I didn't know anything about their average height, and I relied ... and I simply took the average height of everyone in the world...

R. Yes.

Q. ... Chinese, whatever it is, and if the data is extremely ...

R. Heterogeneous.

Q. ... heterogeneous, I cannot be that confident as to whether I've hit the right parameter for Quebec; is that not correct?

R. That's correct.

Q. Right.

R. I certainly would not do the exercise that I did to estimate the height of Quebecers.

Q. Okay.

R. It's a different problem and I wouldn't address it in the same way.

[771] In addition, as the judge noted in paragraphs 762 *et seq*. of his reasons, the record

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[712] Testimony of Dr. Jack Siemiatycki, March 19, 2013, p. 70.
[713] Testimony of Dr. Jack Siemiatycki, February 20, 2013, at 196.

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contains several pieces of information that converge with the evidence offered by Dr. Siemiatycki and corroborate its content. The evidence thus clearly shows that smoking is by far the most significant risk factor for each of the diseases involved.[714] For example, there is some evidence that smoking is the cause of nearly 90% of lung cancers, while occupational exposure to carcinogens is thought to be responsible for less than 15% of these cancers[715] (in cross-examination, Dr. Barsky (JTM) acknowledged in particular that asbestos exposure is responsible for about 2% of lung cancers).[716] Moreover, Exhibit 40549.1 suggests that even after a period of abstinence of more than 40 years, "the risk for lung cancer among former smokers remains elevated compared with never-smokers."[717] In the same vein, the Surgeon General acknowledged that "[l]ung cancer risk decreases with successful cessation and maintained abstinence, but not to the level of risk for those who have never smoked, even after 15 to 20 years of not smoking."[718] This observation applies to smokers of both sexes and to all histological types of lung cancer.[719] In sum, still according to the Surgeon General:[720]

> Even with the longest durations of quitting that have been studied ... the risks for lung cancer remain greater in former smokers compared with lifetime nonsmokers (NCI 1997). The absolute risk of lung cancer does not decline following cessation, but the additional risk that comes with continued smoking is avoided. The study of veterans in the United States that was initiated in the early 1950s provides some of the lengthiest follow-up data. Although smoking was assessed only at the beginning of the study, those who reported having quit were assumed to have remained nonsmokers during the follow-up period. With this assumption, the veterans study provides a picture of risks for lung cancer up to 40 years after smoking cessation. Even for this duration, former smokers have a 50 percent increased risk of death from lung cancer compared with lifetime nonsmokers. The 1990 Surgeon General's report (USDHHS 1990) reviewed findings of additional cohort and case-control studies. The results consistently showed declining RRs, compared with continuing smoking, with increasing duration of not smoking. The general pattern of this decline was the same for men and women, for smokers of filtertipped and unfiltered cigarettes, and for all major histologic types of lung cancer. However, lung cancer incidence in former smokers, even decades after quitting, has not been shown to return to the rate seen in persons who have never smoked.

[772] Dr. Siemiatycki also addressed this phenomenon in his testimony.[721]

[773] Exhibit 40549.1 also shows that there is no significant gender difference in the "susceptibility" of developing lung cancer: "[T]he results of studies that have compared the RR estimates for men and women for a specific degree of smoking history demonstrate very similar

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714 See in particular Lung Cancer (Exhibit 1382 at 58; Exhibit 1428 at 504 *et seq*.; Exhibit 1709 at 42 *et seq*.); Throat Cancer (Exhibit 1387 at 24); Emphysema / COPD (Exhibit 1382 at 14).

715 Exhibit 40504.21 at 216 *et seq*.; Exhibit 40549.1 at 34S.

716 Testimony of Dr. Sanford H. Barsky, February 18, 2014, at 23 *et seq*.

717 Exhibit 40549.1 at 35S and 41S–43S.

718 Exhibit 601-2004 at 43.

719 Exhibit 601-2004 at 49.

720 Exhibit 601-2004 at 49.

721 Testimony of Dr. Jack Siemiatycki, February 19, 2013, at 23–24.

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associations."[722]

[774] And, in fact, there is ample evidence that smoking is a major risk factor for each of the diseases involved, despite the existence of individual factors that are capable of influencing – either negatively or positively – the risk of developing a disease. The "power" of smoking as a risk factor is so strong that the Surgeon General repeatedly concluded that "[t]he evidence on the mechanisms by which smoking causes disease indicates that there is no risk-free level of exposure to tobacco smoke."[723] Let us again cite the Surgeon General, in his 2004 report:[724]

> The excess risks for smokers, compared with persons who have never smoked, are remarkably high. Many studies provide RR estimates for developing lung cancer of 20 or higher for smokers compared with lifetime nonsmokers (USDHHS 1990; Wu-Williams and Samet 1994). A risk-free level of smoking has not been identified, and even involuntary exposure to tobacco smoke increases lung cancer risks for nonsmokers (USDHHS 1986).
>
> [Emphasis added.]

[775] In the same vein, with regard to the relationship between smoking and the various other risk factors for the diseases in question, Dr. Siemiatycki offered the following explanation: "Because smoking is such a dominant risk factor compared to any of the others, whether it's radon, whether it's alcohol, whether it's asbestos, we're talking about Mount Everest compared to Mount-Royal and which one can obscure the other one."[725] In his report, he illustrated the relative importance of smoking as a risk factor, noting in particular that "in the populations in which these [other risk] factors have been studied, the relative risk of lung cancer in relation to those factors rarely exceeded 3.0. ... By contrast, ... the relative risk due to smoking is around 10.0, and even more for heavy smokers."[726] This statement is based on his knowledge of "hundreds and perhaps thousands of publications.".[727] The evidence provided by Dr. Desjardins and Dr. Siemiatycki revealed that cigarette consumption is a major confounding factor in epidemiological studies to determine the association between other risk factors and lung cancer.[728]

[776] With respect to, for example, "throat cancers," Dr. Guertin's evidence, cited by the respondents, reveals that the "power" of smoking far exceeds that of other risk factors, including alcohol. In his report, Dr. Guertin stated the following on this subject:[729]

> [TRANSLATION]
>
> Alcohol is reported in several studies as important etiological factors[sic] in the development of SCC of the UAT [squamous cell carcinomas of cancers of the upper aerodigestive tract].[730] It acts as a contributing factor in nearly three-

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722 Exhibit 40549.1 at 37S.
723 Pièce 601-2010A at 9.
724 Exhibit 601-2004 at 43.
725 Testimony of Dr. Jack Siemiatycki, March 19, 2013, at 171.
726 Exhibit 1426.1 at 23.
727 Exhibit 1426.1 at 23.
728 See in particular Exhibit 1382 at 59–60; Exhibit 1426.1 at 22–23.
729 Exhibit 1387 at 21 and 24.
730 Cancers of the upper aerodigestive tract correspond to cancers of the larynx, pharynx [oropharynx and

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> quarters of UAT SCCs. As reported in the study by Day *et al*. the cigarette-alcohol combination is responsible for 73% of the SCCs in the oral and pharyngeal cavity. The effect of alcohol alone without cigarette exposure on the risk of developing SCC of the UAT is significant only at very high levels of consumption…
>
> The major clinical significance of alcohol consumption is in potentiating the carcinogenic effect of tobacco at all levels of tobacco consumption. This effect is most noticeable at the highest levels of exposure and the magnitude of this effect is at least additive and most often multiplicative depending on the sub-sites UAT SCCs and the exposure levels.
>
> ...
>
> Alcohol is involved in the carcinogenesis of SCC of the UAT [throat cancers]. However, it becomes significant at very high levels of consumption. Its role seems to be mainly related to the multiplier effect it has on the relative risk associated with smoking.
>
> …
>
> It is clear that cigarettes are the main etiological agent involved in the occurrence of nearly 80 to 90% of UAT SCCs. …
>
> [References omitted.]

[777] As for emphysema and COPD,[731] Dr. Desjardins stated that doctors hold smoking responsible for 85% of COPD cases.[732] In comparison, alpha-1-anti-trypsin deficiency − an inherited disease that is also recognized as a risk factor for emphysema and COPD − is a very rare cause of these diseases (it is attributed to less than 1% of emphysema cases).[733] In fact, in Dr. Siemiatycki's words, the evidence shows that "[n]o other factor approaches smoking in terms of the strength of association"[734] with respect to emphysema and COPD.

[778] What conclusions could the judge draw from these expert reports?

[779] The experts who testified for the plaintiffs on the medical and epidemiological aspects of the case were all highly qualified and had extensive clinical or field experience.

[780] The experts cited in defence to answer the experts Desjardins, Guertin and Siemiatycki were also highly qualified. In contrast, however, the general impression that emerges from the evidence they provided is that it was directed at the methodology of the epidemiological work

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hypopharynx] and oral cavity. In common parlance, these types of cancers are sometimes referred to as "throat cancers." It is important to remember that in this case, however, the notion of "throat cancers" refers only to squamous cell carcinomas of the larynx, oropharynx and hypopharynx (see *supra* note 151).

731 See the definition of COPD, *supra* note 43.

732 Exhibit 1382 at 14.

733 Exhibit 1382 at 14.

734 Exhibit 1426.1 at 26.

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used by the plaintiffs and that its main and perhaps only objective was to confine the debate to the possible etiology of the diseases diagnosed for the members of each Class − but considering each of them individually, from the first to the very last, without leaving any out. In so doing, it sought to raise doubts about the usefulness of epidemiological research in proving causation and, beyond this issue, about the applicability of collective recovery in both actions.

[781] The criticism of Dr. Siemiatycki's report and testimony by Mr. Marais suggests that, with respect to the incidence of smoking on the diseases covered by the Blais action, fully reliable epidemiological statistics on group size are very difficult to collect. It is argued that to be valid as evidence, they should be at a level of granularity such that any imaginable causal factor (congenital, environmental, behavioural, etc.) is taken into account for each member of the Class, before one can venture to suggest that tobacco is probably responsible for anything regarding the health of each of these people suffering from any of the diseases in question − and furthermore, in the case of an unknown number of them, tobacco may have been only a secondary, even marginal or even inoffensive factor. A valid approximation, as Mr. Marais said at the very end of his testimony,[735] could perhaps be obtained by conducting a survey from a representative sample of the Blais Class members on the thirteen topics previously mentioned in paragraph [715]. Mr. Marais acknowledged, however, that he had never tested such a method before. Had he done so (which he did not), the judge would most certainly have considered such evidence relevant and useful − he stated as much in paragraph 740 of his reasons.

[782] Finally, and in any event, the surest method according to the defence experts would be to demonstrate a clinical diagnosis by a pathologist of the origin of the disease in the case of each Class Member. In this regard, Dr. Barsky,[736] called by JTM, placed particular emphasis on the crucial role of a pathologist in diagnosing a cancer patient:[737]

> There's an idiom or axiom in our field that states "the tissue is the issue," meaning that it's the gold standard. Virtually every case of cancer in a patient is never treated until there is tissue confirmation, tissue verification of this diagnosis.

[783] It is this histology of cancerous tissue that, according to the same witness, would make it possible to separate the causes of certain cancers, for example by detecting DNA mutations attributable to certain carcinogenic substances contained in tobacco.

[784] This contrasting evidence in response to Dr. Siemiatycki's evidence seems to result

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[735] He described it in these terms: "I think it may well be and that statistical methods can actually be applied to that situation, to that problem, but I think that the first necessary step in applying statistical methods to that question would be a kind of statistical method that we have not seen in this case. And that would be to perform a survey for mapping the demographics of the potential Class in this case that would actually ... that would actually be illuminating about the dimensions of the population we're talking about here. [T]his kind of survey is very much likely the polling example that I used, and the sample size would be comparable, in fact could … in my judgment … be comparable to both the kind of political poll sample size that we see in the real world and to the sample size used in the Stats 12 Canada survey that I used as the example of heights here, yesterday, which was only a handful of thousands of people. … [M]y sense is that this could be accomplished with a sample size in the low single digits of thousands …" (testimony of Dr. Marais, March 12, 2014, at 323−325).

[736] Recognized by the Superior Court as an expert in pathology and cancer research.

[737] Testimony of Dr. Sanford H. Barsky, February 17, 2014, at 107−108.

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largely from a confusion of genres. Indeed, the purpose of the class action is not to attempt to restore the health of each member of the class, but to compensate the victims of an injury which, according to preponderant evidence, even epidemiological evidence, would have been caused by the fault of one or more defendants. The judge was therefore correct in stating, in regard to the expert reports prepared by experts Marais, Mundt and Price:

> [737] As a general comment, the Court finds a "fatal flaw" in the expert's reports of all three experts in this area in that they completely ignored the effect of section 15 of the [*Tobacco-Related Damages and Health Costs Recovery Act*], which came into effect between 18 and 24 months prior to the filing of their respective reports. Dr. Marais and his colleagues preferred to blinder their opinions within the confines of individual cases, even though they should have known (or been informed) of the critical role that this provision plays with respect to the use of epidemiological evidence in cases such as these.

[785] Contrary to what the appellants claim, it can be assumed that the Classes as defined by the judge are most likely under-inclusive. Let us take the Blais Class. In this case, it is because significant numbers of people (let us call them subset A) may suffer from one of the diseases identified in the judgment, and may be affected by it because of, scientifically speaking, their smoking, but do not qualify as members of the Class because the definition of the critical dose of smoking excludes them[738] if they smoked less than 12 pack years[739] over the course of their life.

[786] It can also be assumed that in another respect, and for the opposite reason, the Class thus defined is over-inclusive. Indeed, people (let us call them subset B) may have the same diseases and qualify as members of the Class because they have smoked 12 or more pack years, when in reality, scientifically speaking, they contracted their disease because of a causal factor unrelated to tobacco use.

[787] In either case, it will almost always be impossible to provide a scientific demonstration of the only true causal factor, namely, smoking in the first case and another factor in the second. Even today, this data still escapes any rigorous demonstration that fully meets the requirements of science: the last or ultimate cause is an unknown and will remain so in the current state of scientific knowledge.

[788] Here, however, the legislator clearly allows epidemiological evidence of general *and* individual causation. In the case at bar, by defining the Class as he did, the judge ensured that, in all likelihood, the population constituting subset B will be reduced to very few, at the expense, of course, of the much larger population constituting subset A. One is the counterpart of the other.

[789] If, however, the difficulty created by the unknown can be overcome, on a balance of

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[738] Similar reasoning is possible for other elements that fall within the definition of the Classes or Sub-Classes set by the trial judge. This is the case, for example, when the judge, in paragraphs 761, 996 and 997 of his reasons, reduced the size of the emphysema Sub-Class from 46,172 to 23,086 Members, to reflect the high error interval in the statistics compiled by Dr. Siemiatycki. The first Class was probably over-inclusive. There is every reason to believe that, reduced to 23,086 Members, the revised Class is under-inclusive.

[739] That is to say 87,600 cigarettes.

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probabilities, by epidemiological evidence, the result remains fundamentally fair to the respondents as soon as sub-set A is given a magnitude that far exceeds the size of sub-set B. These parties are thus ordered to pay significantly less damages than they would have to face if there were a scientifically recognized way to eliminate the unknown at the individual level of each patient or Class member.

[790] In the case at bar, the judge therefore found that the respondents provided evidence, on a balance of probabilities, of medical causation for each of the members of the Blais Class. In essence, the reasoning behind this finding is set out in the following reasons:

> [740] To be sure, such a study would have made the Court's task immeasurably easier. That does not mean that it was absolutely necessary in order for the Plaintiffs to make the necessary level of proof at least to push an inference into play in their favour. In fact, it is our view that they succeeded in doing that through Dr. Siemiatycki's work. Thus, "an inference of causation", as Sopinka J. called it in *Snell*, is created in Plaintiffs' favour.
>
> [741] In the same judgment, he noted that where such an inference is drawn, "(t)he defendant runs the risk of an adverse inference in the absence of evidence to the contrary".[740] Here, the Companies presented no convincing evidence to the contrary. Logically, once the inference is created, rebuttal evidence must go beyond mere criticism of the evidence leading to the inference. That tactic is exhausted in the preceding phase leading to the creation of the inference.

[791] In the presence of serious, precise and concordant presumptions that were not countered with convincing evidence to the contrary, the judge was justified in finding, as he did, on medical causation in the case of the Blais Class.

a.2. Létourneau file

[792] Was it open to the judge to find that smoking is the likely cause of tobacco addiction for the members of the Létourneau Class?

[793] With regard to this aspect of medical causation between smoking and tobacco dependence, the judge was obviously correct to say, at paragraph 768 of his reasons, that only tobacco is likely to create tobacco dependence in its users.

[794] It is more difficult to formulate an objective criterion to distinguish between people who developed such dependence and those who did not. Nevertheless, again, the expert evidence provided by the respondents was overwhelming. The report and testimony of Dr. Negrete,[741] which the judge preferred to those of expert witnesses Davies[742] and Bourget,[743] for the reasons

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740 *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 330.

741 Recognized by the Superior Court “as an expert psychiatrist with a specialization in addiction.”

742 Recognized by the Superior Court “as an expert in applied psychology, psychometrics, drug abuse and addiction.”

743 Recognized by the Superior Court “as an expert in the diagnosis and treatment of mental disorders, including tobacco use disorder, as well as in the evaluation of mental.”

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explained in paragraphs 156 to 165 of his reasons, are convincing. They place the sure signs or symptoms of tobacco dependence well below the thresholds set by the judge. Faced with this evidence based on an exhaustive study of the phenomenon and the scientific literature on it, the judge noted, in paragraph 167 of his reasons, that "[a]s usual with the Companies' experts, they were content to criticize the opinions of the Plaintiffs' experts while voicing little or no opinion on the main question."

[795] There was ample evidence to ground the conclusion that a person with the characteristics listed by the judge in paragraph 788 of his reasons will have developed a tobacco dependence, in the clinical sense of the term. As in the case of the Blais Class, and again according to the explanations already given above starting at paragraph [785], the judge defined the Class in a way that, in light of this evidence, necessarily makes it under-inclusive. This neutralizes any distortion that would result from the approximations that may be included in the epidemiological evidence.

b. Conduct causation

[796] This part of the analysis, as already mentioned in paragraph [671], is unnecessary if we accept the conclusions already stated by the Court and if we consider the perspective provided by articles 1468 and 1469 C.C.Q. That being said, for the purposes of the dispute between the parties, proof of conduct causation is also governed by section 15 T.R.D.A. Consequently, to the extent that this evidence was incumbent on them to establish the conditions for liability based solely on article 1457 C.C.Q.(which must be distinguished in this regard from articles 1468, 1469 and 1473 C.C.Q.), it was open to the respondents, in accordance with section 15, to make this demonstration "on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling." And that is indeed what they did, by means of presumptive evidence that the appellants were powerless to refute. The reasoning followed here is similar to that previously discussed in relation to medical causation.

[797] The evidence of conduct causation presupposes, in short, that the appellants' faults are a likely factor in the decision of the members of the Blais and Létourneau Classes to start and to continue smoking. Reduced to its simplest expression, the respondents' argument was that the failure for such a long period of time to recognize the toxic nature of cigarettes, known to the appellants, and the failure for such a long period of time to recognize the addictive nature of nicotine, known to the appellants, omissions moreover reinforced by advertising, sponsorship and conduct likely to encourage smoking, were together the likely causes of smoking among these members.

[798] The trial judge considered these assumptions in paragraphs 791 to 817 of his reasons. He concluded that the appellants' faults "were one of the factors that caused the members to smoke," both in the case of the Blais Class (paragraph 806) and in the case of the Létourneau Class (paragraph 813). This results in an inference of conduct causation that is not refuted in the case of either the Blais Class (paragraphs 807 and 808) or the Létourneau Class (paragraphs 813 to 816).

[799] In this analysis, conduct causation closely parallels a crucial fact that has long been denied or ignored by the appellants, namely the dependence that nicotine creates because of its

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addictive nature. As one of the respondents' lawyers argued at the November 24, 2016, hearing, [TRANSLATION] "... when we talk about conduct causation, the most rational and probable explanation for smoking is addiction."[744] The inference of conduct causation is a corollary of the addictive nature of the product: what, more likely than any other factor, leads the smoker to smoke and continue to smoke is addiction, which is developed relatively quickly.

[800] According to the evidence, however, the appellants had known for a long time that their product had this characteristic; they had every reason to suspect it and then to be aware of its indisputable existence long before the public became aware of it. With respect to conduct causation, it is not appropriate here to review all of the evidence adduced by the respondents or the appellants for or against the argument summarized above. But some representative information from this evidence provides a good idea of its overall content.

[801] First of all, as an introduction, we cannot ignore the many reports of the US Surgeon General on tobacco use,[745] which are rich in information and fill some 35 volumes of the schedules attached to the briefs. The 1988 report, entitled *The Health consequences of Smoking: Nicotine Addiction. A Report of the Surgeon General*, probably the most eloquent report on the effects of tobacco addiction, provides an overview of prior and contemporary work. It is appropriate to quote here, in full, the first few paragraphs of the preface to this report, as they provide a concise and reliable idea of the context that the judge had to consider:[746]

> The 20th Report of the Surgeon General on the health consequences of tobacco use provides an additional important piece of evidence concerning the serious health risks associated with using tobacco.
>
> The subject of this Report, nicotine addiction, was first mentioned in the 1964 Report of the Advisory Committee to the Surgeon General, which referred to tobacco use as "habituating." In the landmark 1979 Report of the Surgeon General, by which time considerably more research had been conducted, smoking was called "the prototypical substance-abuse dependency." Scientists in the field of drug addiction now agree that nicotine, the principal pharmacologic agent that is common to all forms of tobacco, is a powerfully addicting drug.
>
> Recognizing tobacco use as an addiction is critical both for treating the tobacco user and for understanding why people continue to use tobacco despite the known health risks. Nicotine is a psychoactive drug with actions that reinforce the use of tobacco. Efforts to reduce tobacco use in our society must address all the major influences that encourage continued use, including social, psychological, and pharmacologic factors.
>
> After carefully examining the available evidence, this Report concludes that:
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> • Cigarettes and other forms of tobacco are addicting.

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[744] Stenographic notes of November 24, 2016 (SténoFac) at 66.

[745] They cover a very long period, from 1964 to 2014, the first research having been launched by the Surgeon General in 1959.

[746] Exhibit 601-1988 at i.

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> • Nicotine is the drug in tobacco that causes addiction.
>
> • The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.
>
> We must recognize both the potential for behavioral and pharmacologic treatment of the addicted tobacco user and the problems of withdrawal. Tobacco use is a disorder which can be remedied through medical attention; therefore, it should be approached by health care providers just as other substance-use disorders are approached: with knowledge, understanding, and persistence. Each health care provider should use every available clinical opportunity to encourage or assist smokers to quit and to help former smokers to maintain abstinence.

[802] The judge sets 1996, which is 18 months after the appearance of the warnings that refer to it, as the time when tobacco dependence became a known fact for a vast majority of people. It can be said that, in doing so, he was very cautious. What is certain is that, as early as 1989, the appellants could not ignore the Surgeon General's formal findings. It is not unrealistic to generally attribute to them a much more extensive knowledge of the characteristics of their products than that which could have been available to the general public. According to the judge's findings from the evidence, the appellants were aware of the issue of tobacco dependence since the beginning of the period covered by the actions.

[803] More specifically, the respondents filed the minutes of a meeting dated November 15, 1961, written by Sir Charles D. Ellis. At the time, he was Director of Research for British American Tobacco, the parent company of Imperial Tobacco in Canada and Brown & Williamson in the United States. As previously noted (see paragraph [130]), he wrote:[747]

> Smoking demonstrably is a habit based on a combination of psychological and physiological pleasure, and it also has strong indications of being an addiction. It differs in important features from addiction to other alkaloid drugs, and yet there are sufficient similarities to justify stating that smokers are nicotine addicts.

[804] After listing various explanatory hypotheses that had already been the subject of research on the possible physiological causes of addiction, he went on to say:[748]

> [S]o much progress has been made that it is reasonable to hope we might solve these problems with a little more work.
>
> The need to do this is emphasised by the rapid increase in the use of "tranquilisers" and "pep" pills which may become very serious competitors to smoking. There is little knowledge of how tranquilisers work, but extensive experimentation is going on. If the competition is to be met successfully it must be important to know how the tranquilising and stimulating effects of nicotine are produced, and the relation of addiction to the daily nicotine intake.

[805] Nearly fifteen years later, in October 1976, an Imperial Tobacco public relations

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747 Exhibit 1379 at 2.
748 Exhibit 1379 at 2.

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executive, Michel Descoteaux, wrote a memo to Anthony Kalhok, then Vice President of Marketing of the company. Both testified at the trial. The document in question was prepared for a meeting in the United Kingdom organized by British American Tobacco and attended by executives of companies controlled by the latter. Marked confidential, the document attempts to provide an update on what the company's public relations strategy, understood in a very broad sense, should be. It contains the following passage:[749]

> A word about addiction. For some reason, tobacco adversaries have not, as yet, paid much attention to the addictiveness of smoking. This could become a very serious issue if someone attacked us on this front. We all know how difficult it is to quit smoking and I think we could be very vulnerable to such criticism.
>
> I think we should study this subject in depth, with a view towards developing products that would provide the same satisfaction as today's cigarettes without "enslaving" consumers.

[806] Much of the evidence presented by the plaintiffs shows that the phenomenon of tobacco dependence, or addictiveness, was known to the appellants and had been confirmed very early on in reliable scientific literature.

[807] Among the experts they called to testify on conduct causation, the respondents called Dr. Juan Negrete,[750] a psychiatrist. During his testimony on March 20, 2013, Dr. Negrete wanted to comment on a study published in 2007 in an American scientific journal by twelve co-authors entitled "*Symptoms of Tobacco Dependence After Brief Intermittent Use*." Two of the appellants objected to the filing of this article on the ground that it had been sent to them by email only shortly before Dr. Negrete's examination. The judge dismissed the objection as follows:

> I understand both objections. In the context of this case, however, I am going to allow the filing of the report. You will be able to have all the time necessary for your experts to review it and counter it, should that be appropriate, since they will probably not be testifying for another year or so.

[808] One of the interesting points raised in this 2007 study, to which the judge refers in paragraph 773 of his reasons, is that it places the emergence of serious research by the scientific community on tobacco dependence very early.

[809] Thus, referring to three articles by researcher M.A. Russell published respectively in 1971, 1971 and 1974 in medical and scientific journals, the 2007 study states the following: [751]

> Among his many important contributions, Russell outlined a "model of smoking behavior" in a series of influential essays published more than 30 years ago. In this model, initial experimentation with smoking is motivated by psychosocial factors and curiosity, but quickly the "pharmacological rewards" of nicotine in the form of "indulgent," "sedative," or "stimulation" smoking provide the motivation for

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749 Exhibit 11 at 4. This passage is also reproduced above at para. [129]; see also para.[619] above.

750 Recognized by the Superior Court as an "expert psychiatrist with a specialization in addiction."

751 Exhibit 1471 at 704.

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> use prior to dependence. According to Russell, "After 3 or 4 years of intermittent smoking, regular adult-type dependent smoking sets in." When intake exceeds 20 cigarettes per day, "addictive smoking" ensues and the "smoker experiences withdrawal symptoms whenever he has gone 20 to 30 minutes without smoking."
>
> This classic description of the natural history of nicotine dependence was only rarely challenged through the end of the 20th century.
>
> [References omitted.]

[810] The trial judge summarized Dr. Negrete's testimony in his reasons. He found, as reflected in the amended definition of the Létourneau Class in subparagraph 2 of paragraph 1233 of the reasons set out in his judgment, that a person (1) who started smoking before September 30, 1994;[752] (2) who smoked on average at least 15 cigarettes[753] per day between September 1 and 30, 1998; and (3) who, as of February 21, 2005, or until his death if before that date, was still smoking on average 15 cigarettes[754] per day would be tobacco dependent. On this point, the judge stated the following:

> [786] Based on the above, the Court holds that the threshold of daily smoking required to conclude that a person was tobacco dependent on September 30, 1998 is an average of at least 15 cigarettes a day. <u>The Companies steadfastly avoided making any evidence at all on the point, so there is nothing to contradict such a finding</u>.
>
> [Emphasis added.]

[811] According to the judge, this definition allows us to conclude that a person is addicted to tobacco. But this does not resolve the issue of the right to compensatory damages for the members of the Létourneau Class. As the judge explains in paragraphs 946 to 951 of his reasons, this Class is too heterogeneous, particularly in terms of the damage actually inflicted on members: "[T]he level of difficulty experienced by smokers attempting to quit varies greatly," the judge noted.

[812] This statement can be accepted without hesitation. On the other hand, it will be understood that, in terms of dependence and conduct causation, people who, for example, started smoking before January 1, 1976, who smoked twelve pack years and who developed one of the diseases in question and were diagnosed before March 12, 2012, would present a considerably more homogeneous picture than that described above in the amended Létourneau Class definition.

[813] It should be recalled once again that, according to the respondents' argument, the appellants' liability arises from their denial or failure to disclose (i) the toxic nature of smoking and, later, (ii) the addiction created by tobacco, practices combined with advertising, sponsorship and the appellants' conduct. According to this argument, it is these elements together that explain the consumption habits of smokers during the relevant period. In structuring his reasoning, the judge took into account the date on which the risk of developing any of the

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[752] And who, since that date, have been smoking mainly cigarettes manufactured by the plaintiffs.

[753] Manufactured by the plaintiffs.

[754] Manufactured by the plaintiffs.

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diseases involved as a result of cigarette consumption became known to a large majority of the public (he set it at January 1, 1980) and the date on which the addiction warnings had the desired impact on the public (he set it at March 1, 1996). In the assessment of damages, he attributed an estimated 20% share of responsibility to persons who, otherwise meeting the conditions for inclusion in the Blais Class, started smoking as of January 1, 1976. He obviously considered that these people were partly responsible for their situation because they had started smoking less than four years before the risk of developing one of the diseases in question became known and persisted in their smoking habits even though, on the one hand, this risk, in his opinion, was now known,[755] but on the other hand, they had not yet crossed the threshold for tobacco dependence established by the judge. The addiction factor was not known, however, and this factor alone significantly increases the risk to health. It is in this context that evidence of conduct causation must be assessed, with the knowledge cigarette sales are still legal and that, even long after January 1, 1980, or March 1, 1996, many people continue to smoke.

[814] If care is taken to distinguish analytically between causation, the alleged faults and injury, the issue of causation can be resolved without difficulty on the basis of the statistics presented in evidence by the appellants and the respondents.

[815] Some data on the extent of smoking in Canada are significant in this regard. Exhibit 40495.33, produced by one of the appellants, to which the judge refers in footnote 355 of his reasons, describes the results of research conducted on behalf of the Canadian Cancer Society. It includes tables on the prevalence of smoking in Canada among people over 15 years of age. According to Table 1.1, the proportion of smokers in 1965 was 50% (61% for men, 37% for women).[756] By 2010, it had dropped to 21% (25% for men, 19% for women). According to Table 1.7, between 1999 and 2010, among people aged 15 to 19, the proportion of smokers fell from 27.5% to 12%.[757] It is certain that various factors combined to cause this clear downward trend in smoking. In view of these figures, however, there can be no doubt that a high prevalence of smoking is a function of both a lack of knowledge of the health effects of smoking and a lack of knowledge of the addictive nature of nicotine. Conversely, there can be no doubt that fewer and fewer people will smoke if the public is better informed and if the social acceptability of tobacco use continues to decline. The latter two factors are the very ones that sponsorship and advertising, including lifestyle advertising,[758] are intended to combat, as is the refusal to publicly concede that nicotine is highly addictive, creating dependence on a product that is harmful to health.

[816] The judge could most certainly draw the conclusions he made in paragraphs 803 to 817 of his reasons from the evidence before him.

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[755] Describing the nature of the respective faults of the Members who started smoking after January 1, 1976, and the appellants, he wrote the following at paragraph 833 of his reasons: “In that regard, it is clear that the fault of the Members was essentially stupidity, too often influenced by the delusion of invincibility that marks our teenage years. That of the Companies, on the other hand, was ruthless disregard for the health of their customers.”

[756] Exhibit 40495.33 at 14.

[757] Exhibit 40495.33 at 17.

[758] This concept is defined in the *Tobacco Act*, SC 1997, c. 13, s. 22(4) as follows: “advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring. (*publicité de style de vie*).”

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[817] To contradict the hypothesis of conduct causation attributable to the faults alleged against them, the appellants cited various experts who, for example, responded to Dr. Negrete's expert report, challenged the effectiveness of the mandatory warnings on cigarette packages or argued that tobacco advertising did not have the impact that the respondents attributed to it.

[818] It should be recalled, however, that in 1994, in *RJR − Macdonald Inc. v. Canada (Attorney General),* ITL and JTM acknowledged that warnings serve to alert and raise public awareness of the risks associated with smoking and help reduce tobacco use:[759]

> These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.
>
> [Emphasis added.]

[819] Chief Justice McLachlin, for a unanimous court, reiterated this conclusion in 2007 in *Canada (Attorney General) v. JTI-Macdonald Corp.*[760] Moreover, in that case, the Chief Justice expressly acknowledged that, since the 1994 litigation, a "[a] mass of evidence in the intervening years supports this conclusion,"[761] i.e., that warnings produce results and contribute to reducing the incidence and prevalence of tobacco use.

[820] In this case, the judge was sceptical of the expert opinions provided by the witnesses called by the appellants and clearly explained why. The case of experts Davies and Bourget has already been discussed. With respect to Professor Viscusi,[762] an economist by training, and Mr. Young,[763] an ergonomist with a PhD in Engineering Psychology from Rice University, the judge discusses their testimony in paragraphs 290 to 309 of his reasons, where he identifies their weaknesses. This explains his subsequent comment on the inference of a causal link between the appellants' faults and the smoking of the members of the Blais Class:

> [808] The Companies were entitled to rebut that inference, a task entrusted in large part to Professors Viscusi and Young. We have examined their evidence in detail in section II.D.5 of the present judgment and we see nothing there, or in any other part of the proof, that could be said to rebut the presumption sought.

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759 *RJR-Macdonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 at 353.

760 *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30.

761 *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30 at para. 135.

762 Recognized by the Superior Court "as an expert on how people make decisions in risky and uncertain situations and as to the role and sufficiency of information, including warning to consumers, when making the decision to smoke."

763 Recognized by the Superior Court "as an expert in the theory, design and implementation of consumer product warnings and safety communications."

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[821] As for the expert report of Professor Soberman,[764] who teaches marketing at the University of Toronto, the judge had harsh words for the conclusions in that report: "This flies so furiously in the face of common sense and normal business practice that, with respect, we must reject it." That said, a reading of Professor Soberman's testimony and paragraphs 426 to 435 of the judgment shows without a doubt that the judge assessed this testimony at its true value. In the final analysis, moreover, he drew no inference, positive or negative, from this expert opinion, in regard to the appellants or the respondents. But the rejection of this report allows us to focus on the effects of cigarette advertising.

[822] The trial judge is criticized for not having referred in his reasons to the testimony of James J. Heckman,[765] an expert called by ITL and whose name appears only in the list of expert witnesses attached to the judgment.[766] Professor of Economics at the University of Chicago and winner of the Nobel Prize in Economics[767] in 2000, Mr. Heckman was called upon to respond to the expert opinion of Professor Pollay.[768] The respondents had called the latter, a marketing professor at the University of British Columbia, to testify as to what the appellants' tobacco product advertising and marketing practices revealed about their intentions. The judge faithfully summarized Professor Pollay's conclusions in paragraphs 383 to 391 and then 415 to 417 of his reasons. Further on, it is clear from paragraph 530 that, although the judge considered this expert opinion to be largely well founded, he considered it to be insufficiently probative.

[823] In addition to his opinion on Professor Pollay's methodology, Professor Heckman was invited by ITL to comment on the following questions: does the advertising in question substantially increase total ("aggregate") tobacco consumption? Does it attract new smokers? In the absence of an impact on total tobacco consumption, what economic incentives are likely to encourage advertising? In his report, Professor Heckman summarizes his findings as follows:[766]

> Dr. Pollay's analysis does not provide reliable empirical support for the conclusion that tobacco company advertising was a causal factor in initiation, quitting or intensity of smoking decisions. As a result, his work does not provide reliable evidence addressing the narrower question of whether tobacco company alleged misconduct caused harm to the class.

[824] However, the judge had good reasons not to subscribe unreservedly to the conclusions of

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764 Recognized by the Superior Court "as an expert in marketing, marketing theory and marketing execution."

765 Recognized by the Superior Court "as an expert economist, expert econometrician and an expert in the determination of causality."

766 ITL thus expresses this complaint: "Notably, in so ruling, the Trial Judge did not even make so much as a passing reference to the extensive evidence proffered by Dr. James Heckman, a Nobel Prize-winning econometrician, which dispositively demonstrated that there was no evidence of impact of advertising on overall consumption rates." Arguments of ITL at para. 348 [emphasis in original.]). Paragraph 77 of RBH's Arguments and note 359 of JTM's Arguments echo this criticism.

767 As is called the Bank of Sweden's economics prize in memory of Alfred Nobel that the Royal Swedish Academy of Sciences awards.

768 Recognized by the Superior Court "as an expert on marketing, the marketing of cigarettes and the history of marketing."

this report, which ITL described as “dispositively demonstrated.”[769]

[825] Professor Heckman repeated several times that the price of cigarettes is one of the main factors influencing smoking prevalence. His tables on smoking prevalence in Canada cover the period from 1965 to 2008. He had to admit on cross-examination, however, that he was unaware that the appellants had been involved in cigarette smuggling and that ITL had pleaded guilty to one charge of smuggling cigarettes between 1989 and 1994. He also acknowledged that, had he known this, he would likely have taken it into account in his econometric modelling since smuggling normally affects the price of cigarettes, and therefore their level of consumption. Similarly, he had to admit on cross-examination that he did not know when the Canadian Parliament had passed the new version of the *Tobacco Act*[770] (following the invalidation of the first version of the Act by the Supreme Court of Canada in 1995) and admitted that he had not analyzed the effect of the new Act. It also appears from his testimony that he was unaware that the appellants had increased the number of advertisements in the form of sponsorships following the adoption of the first version of the *Tobacco Act*.[771]

[826] On this subject, he testified as follows:[772]

> Q. ... In nineteen ninety-eight (1998), just assume that the Government comes and says, “Sponsorship is over, it's finished”. This is a total ban, nineteen ninety-eight (1998); would that be an important event?
>
> R I mean, each of these events that tightens the law and makes it more astringent is going to be an event, yes.
>
> ...
>
> Q. ... a total ban, would it be important if you tried to estimate ...
>
> R. A total ban on what, I'm sorry, sale of cigarettes?
>
> Q. Advertising, sponsorship.
>
> R. Okay.
>
> Q. Nineteen ninety-eight (1998), a total ban. Would that ...
>
> R. Yes.
>
> Q. ... be important?
>
> R. Would that be important?
>
> Q. Yes.

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769 Exhibit 21320.1 at 3−4.
770 *Tobacco Act,* SC 1997, c. 13.
771 *Tobacco Act,* SC 1997, c. 13.
772 Testimony of Professor Heckman, April 15, 2014, at 98−99.

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R. It might, it might be important, yes, that's to be determined with the data; it might be.

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[827] Still on cross-examination, the same witness conceded that knowledge of the risks and dangers associated with smoking had an impact on an individual's decision to start or continue smoking. He also acknowledged that the disclosure of new or more complete information should in principle have the effect of reducing the prevalence of smoking. The analysis he presented seems to be based on the idea that the population had access to sufficient information about the risks and dangers associated with smoking. However, this assumption is not consistent with the trial judge's findings that the risks and dangers of disease and addiction were only known to the general public in 1980[773] and 1996, respectively. In addition, the impact of advertising in its various forms, warnings, and the phenomenon of addiction is not directly reflected in the model used by Professor Heckman. Like the other experts called in defence, he criticized the methodology of the expert opinion filed by the plaintiffs (in particular because it does not exclude confounding factors). His own testimony, however, certainly does not constitute counter-proof demonstrating the absence of a causal link between advertising, marketing, warnings and smoking prevalence.

[828] In short, in addition to the fact that the judge was not required to mention Professor Heckman's testimony, his decision not to do so can be explained by the flaws that seriously eroded the probative value of this expert opinion.

c. Dependence and definition of the Létourneau Class

[829] There remains one last aspect that needs to be addressed.

[830] The judge specifically addressed the notion of dependence in paragraphs 771 *et seq*. of his reasons. Based, among other sources, on the evidence provided by Dr. Negrete and a Statistics Canada survey he cited in his report, the judge concluded that a person who usually smokes 15 cigarettes a day is addicted to tobacco. Then, at paragraph 788, he turned to the definition of the Létourneau Class, which he reformulated in the terms already set out above, specifying that membership in the Class presupposes that each member, on February 21, 2005, or until his or her death if it occurred before that date, was still smoking an average daily dose of 15 cigarettes manufactured by the appellants and that he or she had smoked for at least four years in this manner. According to the judge, for any person with this profile, the medical causation of his or her tobacco dependence must be considered proven.

[831] The appellants challenged this definition of tobacco dependence from various angles. In summary, their claims consist of the following. The judge's findings were based not on Dr. Negrete's report but on Dr. DiFranza's article (an issue already discussed above). The judge was allegedly mistaken when he considered that dependence is established after four years of daily consumption, a piece of information from a third-party source cited in Dr. DiFranza's article. In addition, the Negrete report was refuted by the expert opinions of Prof. Davies and Dr. Bourget (an issue already discussed above), and the evidence showed that only an individual clinical diagnosis can establish the existence of tobacco dependence, as confirmed by the *Diagnostic*

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773 And even later: see in particular paras. [650] and [656] above.

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and Statistical Manual of Mental Disorders − V (or "DSM – V").[774] The judge notes, in paragraph 784 of his reasons, that 95% of daily smokers are addicted to nicotine, but this conclusion is allegedly not supported by the evidence, even though the DSM − V sets the incidence of addiction at 50% of current daily smokers. In the final analysis, the judge included in the Létourneau Class many smokers who cannot be considered to be addicted to tobacco.

[832] The respondents first respond to this by stating that, for the reason already cited, the judge did not award compensatory damages to the members of the Létourneau Class,[775] although he considered it possible to order the appellants to pay punitive damages to them on a collective basis. On this subject, he wrote in paragraph 950 of his reasons: "The inevitable and significant differences among the hundreds of thousands of Létourneau Class members with respect to the nature and degree of the moral damages claimed make it impossible to establish with sufficient accuracy the total amount of the claims of the Class." There is no cross-appeal in the Létourneau case, however, which makes the appellants' appeals on the definition of dependency for the most part, moot. Indeed, the definition of the Létourneau Class will have no impact on the outcome of the litigation.

[833] Nevertheless, and notwithstanding the foregoing, the respondents reply that, on the merits of the appellants' grievances, the evidence consulted and heard by the judge provided a more than sufficient basis for his findings on the definition of dependence. The "gestation" period for dependency retained by the judge is based on the testimony of Dr. Negrete, which is based, among other things, on an article co-authored by 12 researchers and published in a scientific journal involving a peer-review process. In addition, the "gestation" period for addiction discussed in that article was based on an article written by an eminent scientist, Dr. Russell. In addition, at the trial, Dr. Negrete explained that [TRANSLATION] "meeting the clinical criteria [for addiction] takes longer than starting to experience the symptoms that form part of the addiction syndrome much sooner."[776] The same witness also reported that 38.3% of children who started smoking met the clinical criteria for addiction after only two years of use. In light of these elements, the judge's conclusion that addiction sets in after four years of daily smoking is therefore conservative and, the respondents argue, certainly not vitiated by a palpable and overriding error.

[834] In reality, the question of the definition of tobacco dependence remains relevant only with respect to the determination of the "smoking date" in the Blais case, that is, January 1, 1976. This date is exactly four years before the knowledge date on which the health hazards in the Blais case became known, set by the judge at January 1, 1980.[777] In fact, according to the evidence that the judge considered preponderant, tobacco dependence would occur four years after the beginning of cigarette consumption.

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774 This is a standard reference work published by the American Psychiatric Association. The fifth edition was published in 2013.

775 He also concluded that, even if the award of compensatory damages had been possible in the Létourneau case, the distribution of an amount to each of the Members of the Class would be "impossible or too expensive" within the meaning of article 1034 f.C.C.P.

776 Testimony of Dr. Negrete, March 20, 2013, at 130.

777 Recall that the Court fixed this date on 1 March 1996, see in particular paras. [642], [648] and [656] above.

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[835] The appellants argue that the judge erred in fact and in law in finding that tobacco dependence manifests itself after a four-year "gestation period." In essence, their claims on this point are directed at the judge's assessment of the evidence, but they do not establish that he committed a palpable and overriding error in his assessment of that evidence.

[836] First, the judge is criticized for the fact that he preferred Dr. Negrete's evidence to that of Professor Davies and Dr. Bourget. However, as we have seen, the judge very explicitly stated the reasons why he retained the first testimony and dismissed the other two. With regard to the latter, the judge stated, *inter alia*,: "They used semantics as a way of side-stepping the real issue of identifying the harm that smoking causes to people who are dependent on tobacco." And further on, he added: "Unlike Professor Davies, [Dr. Negrete] is a medical doctor and, unlike Dr. Bourget, he has significant experience in the area of tobacco dependence, including as seminar leader of the post-graduate course in psychiatry at the McGill University Medical School. This impresses the Court." Here, we are at the epicentre of the trial judge's unfettered discretion in regard to the assessment of evidence.

[837] Moreover, the four-year period identified by the judge echoes Dr. Negrete's testimony that the first clinically verifiable symptoms of addiction (according to current diagnostic criteria) appear between three and a half and four years after the start of smoking. This statement is based in part on an extensively documented and previously mentioned article by Dr. DiFranza, whose research has been frequently cited in the reports of the U.S. Surgeon General,[778] as well as the work of psychiatrist M. A. Russell, who was quoted by the U.S. Surgeon General in his 1988 report on tobacco addiction.[779] In a complementary expert report, Dr. Negrete provides additional details on the incidence of tobacco dependence among young people:[780]

> [TRANSLATION]
>
> The smoker's loss of autonomy with regard to consumption is a prodromal indicator of dependence that manifests itself very early in the clinical course of the disorder. Follow-up studies with children who started smoking around the age of 12 years revealed a certain loss of autonomy – defined as the presence of any of the manifestations in the Hooked on Nicotine Checklist – from their first experiences with smoking. This phenomenon is more firmly established among young people, who experience a feeling of relaxation. At the end of the two-year follow-up (second year of high school), 38.2% of children who smoked already met the criteria for clinical diagnosis of nicotine dependence (ICD-10).
>
> ...
>
> A similar study, conducted among grade 7 I students in Montreal (age 13), found loss of autonomy in all (100%) of those who smoked daily; and the clinical diagnosis of nicotine dependence was retained for 70% of girls and 65% of boys who smoked at that rate.

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778 See e.g., Exhibit 601-2012.

779 See references cited in Exhibit 601-1988.

780 Exhibit 1470.2 at 3

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[838] These observations coincide with several other pieces of evidence on file that show that the vast majority of smokers start smoking during adolescence.[781] The 2012 report of the U.S. Surgeon General reveals that "among adults who become daily smokers, nearly all first use of cigarettes occurs by 18 years of age (88%)."[782]Similarly, it appears that for most smokers, the transition from occasional to daily cigarette consumption occurs during that period.[783]

[839] Given this evidence – of which only a very selective overview is provided here, and which undeniably constitutes sociological, epidemiological or "other" studies covered by section 15 of the T.R.D.A. – it is clear that the judge could conclude, as he did, that tobacco dependence, which results from the appellants' faults, is acquired four years after the onset of smoking (with an average consumption of at least 15 cigarettes per day). The appellants have not demonstrated that this conclusion is tainted by a palpable and overriding error that would justify the Court's intervention. In fact, as previously stated, the judge's conclusion in this regard appears rather conservative in light of the evidence referred to above, much of which suggests that tobacco dependence is likely to develop in a period of less than four years and with a consumption of fewer than 15 cigarettes a day.

vii. Summary

[840] Among various theories of causation, the vast majority of Quebec courts have opted for the theory of adequate causation: is the damage the logical, direct and immediate consequence of the fault? The T.R.D.A., a statute whose scope is misunderstood by the appellants, has significantly facilitated the manner in which such evidence can be provided in litigation against cigarette manufacturers. The appellants challenged this evidence from various angles but mainly argued that it could only be provided on a case-by-case basis, depending on the particular circumstances of each member of the Blais and Létourneau Classes. When they were given the opportunity during the trial to question several of these members, they abstained. On appeal, they argued that no preponderant evidence of causation had been adduced at trial. However, substantial evidence, mainly in the form of medical (including epidemiological) expertise, provided a sufficient basis on which to ground the conclusion that there were serious, precise and concordant presumptions, unrebutted by the evidence adduced by the appellants. These presumptions made it possible to infer, from both a medical and behavioural perspective, and at the general and individual levels, that the illnesses and dependence of the Blais and Létourneau Class members, as defined by the judge, were caused by the faults committed by the appellants. They also provided the basis for the judge's definition of tobacco dependence.

2. *CONSUMER PROTECTION ACT* (sections 219, 228 and 272 C.P.A.)

[841] The appellants argue that the judge erred at various stages of the analysis of their liability under the C.P.A. Recall that the justice ordered the appellants to pay compensatory damages based on three liability regimes (the general law, the *Charter* and the C.P.A.), regimes which overlap in several aspects, including with respect to the principle of *restitutio in integrum*.

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781 See e.g., Exhibit 30025.1 at 268.

782 Exhibit 601-2012 at 165.

783 See e.g., Exhibit 601-2012 at 134; Exhibit 40499 at 573; Exhibit 30025.1 at 268.

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2.1. Background

[842] The trial judge found the appellants liable under section 272 C.P.A. for both moral damages caused to members of the Blais Class, and punitive damages, the payment of which was ordered in favour of both Classes. To reach that conclusion, he first found that the appellants had made false or misleading representations (s. 219 C.P.A.) and failed to mention an important fact (s. 228 C.P.A.), and then applied the four criteria of absolute presumption of prejudice set out by the Supreme Court of Canada in *Richard v. Time Inc.*[784]

[843] The appellants challenged these conclusions on various fronts, which we will regroup under four principal themes.

[844] First, with respect to the application of the C.P.A. over time, ITL and JTM are of the view that it is impossible to anchor liability on the C.P.A. in favour of all of the members since a portion of the impugned practices of the appellants took place prior to the adoption of the relevant provisions in 1980. Certain members thus allegedly do not have sufficient legal standing under the C.P.A., in particular those who stopped smoking prior to 1980.

[845] Along similar lines, the appellants argue that the public awareness of the toxic nature of tobacco as of January 1, 1980, renders any prohibited practice irrelevant. JTM adds that the ban against advertising in 1989 is tantamount to the cessation of any prohibited practice, and ITL is of the view that the prohibited practices can *a fortiori* be examined solely from 1980 to 1988 and during the interval from December 1995 to April 1997, i.e., the periods when it actually engaged in advertising, which, furthermore, was permitted by law.

[846] Second, the appellants take issue with the characterization of the prohibited practices by the trial judge. JTM is of the view that the judge erred in concluding that its advertising constituted false or misleading representations within the meaning of section 219 C.P.A., insisting on the contradiction between this finding and other findings of the judgment *a quo* to the effect that the appellants had not disclosed information that could, strictly speaking, be deemed false with respect to their products. The general impression test that takes as its benchmark a credulous and inexperienced consumer should necessarily take into account the public knowledge of the toxic nature of tobacco acquired in 1980 and the presence of warnings approved by the government.

[847] On the issue of the failure to disclose important facts (s. 228 C.P.A.), ITL criticizes the judge for not having sufficiently detailed his findings (i) by not mentioning the scope of the important fact at issue, (ii) by failing to proceed with the analysis of the general impression and (iii) by ignoring the warnings. Furthermore, according to JTM, this finding gives rise to absurd results since the appellants are basically being criticized for an "omission within the omission." Finally, it is alleged that the judge provided no explanation of the notion of important fact.

[848] Third, the judge allegedly erred in applying the third and fourth criteria of the presumption of prejudice set out in *Richard v. Time Inc*. With respect to the third criterion, JTM and ITL argue that the judge erred in concluding that all the members were aware of their representations since there is no evidence of the circulation of their advertising materials. Furthermore, JTM calls into

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[784] *Richard v. Time Inc.*, 2012 SCC 8.

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question the analysis of the criterion of sufficient nexus, arguing that no evidence supports the conclusion that it was satisfied. ITL adds that the judge improperly applied the causation rule by imposing an erroneous standard ("capable of influencing a person's decision"). It is of the view that it rebutted the evidence of the fourth criterion in the case of false or misleading representations by the testimony of Dr. Heckman.

[849] Fourth, and finally, according to ITL, section 272 should not apply within the framework of an extracontractual claim on the basis of the principles set out in *Richard v. Time Inc.*, both with respect to compensatory and punitive damages.

[850] In view of these arguments, we propose to analyse the impact of the C.P.A. on class actions based on the following aspects: (A) its adoption and scope, (B) the conditions of the implementation of the remedies set out in section 272 C.P.A., (C) the impact of the presumption of prejudice and (D) the availability of penalties imposed under section 272 C.P.A.

2.2. Analysis

A. Adoption and scope of application of the C.P.A.

[851] The relevant provisions of the C.P.A. entered into force on April 30, 1980.[785] The appellants insist on the fact that the C.P.A. cannot therefore apply to a significant part of the relevant period, i.e., from 1950 until April 30, 1980.

[852] The judge was not unaware of this reality, however, as demonstrated in the excerpt from the judgment where he specifies that the order for punitive damages is based on infringements of the C.P.A. only after April 30, 1980:

> [1024] Quebec law provides for punitive damages under the Quebec Charter and the CPA and we have ruled that in these files such damages are warranted under both. We recognize that neither one was in force during the entire Class Period, the Quebec Charter having been enacted on June 28, 1976 and the relevant provisions of the CPA on April 30, 1980. Consequently, the punitive damages here must be evaluated with reference to the Companies' conduct only after those dates.

[853] Although the judge did not reiterate this in the analysis of moral damages, it is clear that the order arising out of the facts and events triggering liability that occurred during the period from 1950 to April 30, 1980, are based on the general principles of civil liability. Furthermore, the judge applied the reasoning based on the general principles of liability throughout the relevant period. Thus, without going so far as to say that the analysis based on the C.P.A. is not necessary in order to award the appellants moral damages, it is certainly possible to conclude that it overlaps with the general law governing civil liability in this regard for the period from April 30, 1980, until service of the claim in November 1998.

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[785] *Consumer Protection Act*, S.Q. 1978, c. 9; *Proclamation concernant l'entrée en vigueur de certaines dispositions de la Loi sur la protection du consommateur*, (1980) 112 G.O.Q. II, No. 10, 1083.

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[854] The appellants accurately point out that their actions prior to April 30, 1980, cannot be considered under the C.P.A. Excluding a reference to advertising that appeared in 1979[786] and another that apparently appeared in January 1980,[787] the analysis of the trial judge focused on subsequent advertising, although it frequently concerns a temporal continuum of events and failure to act. With respect to the reference to the 1979 and 1980 advertisements, this error is inconsequential because the judge also referred to other advertising after April 30, 1980.[788] We note that he could just as easily have cited a myriad of other examples.[789]

[855] Furthermore, the appellants argue that since the C.P.A. entered into force after the date of public knowledge, established as being January 1, 1980, for the Blais Class, the judge erred in concluding that prohibited practices had been committed since the appellants were not required to disclose what everyone was deemed to know, i.e., that tobacco products could cause the diseases at issue. As will be discussed later on, the obligation of the merchant to refrain from making false or misleading representations exists notwithstanding the state of knowledge of the consumer.[790]

B. Conditions of application of the remedy set out in section 272 C.P.A.

[856] The orders handed down against the appellants for the period subsequent to April 30,1980, are based on section 272 C.P.A., in addition to the *Charter* and the C.C.Q. That provision provides:

> **272.** If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,
>
> (a) the specific performance of the obligation;
> (b) the authorization to execute it at the merchant's or manufacturer's expense;
>
> **272.** Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, un règlement ou un engagement volontaire souscrit en vertu de l'article 314 ou dont l'application a été étendue par un décret pris en vertu de l'article 315.1, le consommateur, sous réserve des autres recours prévus par la présente loi, peut demander, selon le cas:
>
> a) l'exécution de l'obligation;
> b) l'autorisation de la faire exécuter aux frais du commerçant ou du fabricant;

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786 Judgment *a quo* at para. 535, referring to Exhibit 152.

787 Judgment *a quo* at para. 535, referring to Exhibit 40436.

788 Judgment *a quo* at para. 535, referring to Exhibits 1381.9 (1983), 1240B (1997), 1240C (1997), 1381.33 (1988), 1532.4 (1984), 40479 (1982), 573C (1983), 771A (1987) and 771B (1985).

789 There are multiple examples among the hundreds of samples of advertising material filed in the Court record: Exhibits 1381.1-1381.107, 1500.1, 1500.2 et 1501.1-1534.11.

790 The Court notes that the date of public knowledge for the two Classes should not have been set prior to March 1, 1996. See paras. [650] *et seq.* above.

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(c) that his obligations be reduced;	c) la réduction de son obligation;
(d) that the contract be rescinded;	
(e) that the contract be set aside; or	d) la résiliation du contrat;
(f) that the contract be annulled,	e) la résolution du contrat; ou f) la nullité du contrat,
without prejudice to his claim in damages, in all cases. He may also claim punitive damages.	sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.

[857] In *Richard v. Time Inc.*,[791] Justices LeBel and Cromwell reviewed the conditions giving rise to the remedies set out in section 272 C.P.A. They first analyzed the interest required to exercise these remedies. The consumer who is victim of the breach of an obligation imposed by the C.P.A. upon a merchant must have contracted to procure a good or a service related to the breach of the obligation (s. 2 C.P.A.). Without a contract there is no remedy under section 272 C.P.A., even to claim only punitive damages.

[858] The Supreme Court in *Richard v. Time Inc.* set out four criteria to give rise to the presumption of prejudice and the granting of the remedies set out in section 272: (1) that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act, (2) that the consumer became aware of the representation constituting a prohibited practice, (3) that the consumer's becoming aware of the representation resulted in the formation, amendment or performance of a consumer contract, and (4) that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract.[792]

[859] It should be noted that the expression "absolute presumption of prejudice," generally used to characterize the impact of these criteria, but also the mechanism of application of the section 272 remedies, does not refer to prejudice in the usual meaning of the word in civil liability matters, but to the fraudulent impact on the consumer triggered by the merchant's breach of its obligations. We shall return to this point

[860] In what follows, each criterion will be analyzed in order to examine the proper scope for the appeals, and for each of them, to dispose of the appellants' arguments with respect to the evidence accepted by the trial judge.

i. Violation of an obligation imposed by Title II of the C.P.A.

[861] The C.P.A. does not refer to the notion of fault, but rather that of noncompliance with the rules governing the making of contracts or the formal requirements of the Act (s. 271 C.P.A.) or the merchant's breach of its obligations (s. 272 C.P.A.).[793] In the latter case, these breaches may

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[791] *Richard v. Time Inc.*, 2012 SCC 8 at para. 104.

[792] *Richard v. Time Inc.*, 2012 SCC 8 at para. 124.

[793] *Vidéotron c. Girard*, 2018 QCCA 767 at para. 50, leave to appeal to SCC refused, 38225 (21 February 2019).

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fall under two categories, either the breach of a contractual obligation (Title I) or breaches that fall under prohibited commercial practices (Title II) and thus most frequently during the pre-contractual phase. It is clear that the existence of this latter category is not subject to the existence of a contract *per se* (s. 217 C.P.A.).

[862] TA merchant's breach of its legal obligations is therefore substituted for fault as the primary component triggering its liability within the scheme of the C.P.A. The violation of the law provides the consumer the possibility of relying on the remedy set out in section 272 C.P.A.

[863] Title II sets out a series of prohibited commercial practices. It is established that the notion of general impression set out in section 218 C.P.A. is the criterion that is used to characterize a representation as a prohibited commercial practice. That provision states as follows:

> **218.** To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.
>
> **218.** Pour déterminer si une représentation constitue une pratique interdite, il faut tenir compte de l'impression générale qu'elle donne et, s'il y a lieu, du sens littéral des termes qui y sont employés.

[864] The analysis required by this criterion is undertaken in relation to a normal consumer "in the abstract, that is, without considering the personal attributes of the consumer."[794] The general impression triggered by a representation is neither the "rushed or partial reading" nor the "the minute dissection of the text" of an advertisement, but particularly and above all a "reading over [of] the entire text."[795] As noted by the Supreme Court of Canada in *Richard v. Time Inc.*, this is a high standard for the merchant, but nevertheless, it is not an absolute standard, nor is it absolutely inflexible: "the legislature intended to ensure that consumers could view commercial advertising with confidence rather than suspicion."[796] Thus, the criterion of general impression necessarily calls for an objective or *in abstracto* approach, and its reference point is the general impression left by a representation on a credulous and inexperienced consumer. Where the general impression is not true to reality, this amounts to a prohibited practice.[797]

[865] How do these principles apply to this case?

[866] Following his review of the evidence, the judge came to the conclusion that the appellants engaged in two types of prohibited commercial practices, either by failing to mention important facts (s. 228 C.P.A.) or by making false or misleading representations (s. 219 C.P.A.). Since the appellants challenge these findings, it is appropriate to examine them individually. However, because the judge ruled that the appellants did not falsely attribute any special advantage to

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794 *Richard v. Time Inc.*, 2012 SCC 8 at para. 49.
795 *Richard v. Time Inc.*, 2012 SCC 8 at para. 56.
796 *Richard v. Time Inc.*, 2012 SCC 8 at para. 60.
797 *Richard v. Time Inc.*, 2012 SCC 8 at para. 78.

cigarettes in their representations and that their conduct did not violate paragraph 220(*a*) *C.P.A.*, it is not necessary to address that aspect.

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a. Failing to mention an important fact (s. 228 C.P.A.)

[867] Quebec consumer law legislation prohibits merchants from failing to mention a fact that is "important." Section 228 states:

228. No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.	**228.** Aucun commerçant, fabricant ou publicitaire ne peut, dans une représentation qu'il fait à un consommateur, passer sous silence un fait important.

[868] Prior to examining what constitutes an important fact, it is important to properly define the very broad scope of the concept of "representation." This concept includes much more than just traditional advertising campaigns, whether for example by radio or in print. Section 216 C.P.A. lists in a non-exhaustive manner acts of communication, behaviour and omissions:

216. For the purposes of this title, representation includes an affirmation, a behaviour or an omission.	**216.** Aux fins du présent titre, une représentation comprend une affirmation, un comportement ou une omission.

[869] The notion of representation thus embraces all forms of communication by a merchant, manufacturer or advertiser that are likely to reach consumers, and it is necessary to give the notion of representation a broad interpretation.[798] Moreover, the notion is not limited to pre-contractual representations[799]

[870] The appellants submit that the interpretation of section 228 C.P.A. adopted by the judge gives rise to an absurd result insofar as it is tantamount to saying that there was an "omission within the omission." In other words, because as of 1989 (the date of coming into force of the 1988 federal Act), they were prohibited from engaging in advertising, they cannot be now criticized for a representation made to a consumer on the ground of having omitted to disclose an important fact.

[871] The literal and joint reading of sections 216 and 228 C.P.A. can in fact produce a result that appears incoherent if taken out of context. It goes without saying that when a good or a service is unknown to consumers, it is difficult to criticize a merchant for an omission in the

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[798] *Richard v. Time Inc.*, 2012 SCC 8 at para. 44; Luc Thibaudeau, *Guide pratique de la société de consommation* (Cowansville, Qc.: Yvon Blais, 2013) No. 47.6.

[799] *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333 at para. 48.

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complete absence of any explicit representation in the public sphere. The analysis proves necessarily different, however, where it is a question of a hazardous product such as in this case. In fact, some might argue that it is impossible that the appellants failed to mention important facts during the period of prohibition against advertising because they were muzzled and prevented from engaging in any form of advertising by law. This assertion, however, does not take into account the fact that the idea of "representation" is truly a broad notion that comprises the marketing of cigarette packages even during the period of prohibition against advertising.

[872] Furthermore, where a good or service is the object of various forms of representation over the years and constitutes a good consumed by a significant part of the population, as is the case with cigarettes, it is not necessary that the omissions be linked to a statement or precise conduct. The manufacturer must actively alert the public if it acquires important information concerning the danger of a product offered to the public, even more so where the product creates a toxic dependence, and must disclose this without delay (which is furthermore consistent with the obligation set out in the second paragraph of article 1473 C.C.Q.). This obligation is fully justified in view of the informational disequilibrium that underlies certain obligations of the manufacturer, who is better informed than the consumer on the properties of the goods and services that it offers to the public. This duty is all the more justified in a context where the manufacturer is investing significant sums in "research." The C.P.A., by its eminently social character, which is now fully recognized,[800] commands such an approach.

[873] The argument that an omission can exist solely in the presence of a statement by the merchant is unfounded in the context of this case, where we find over the years numerous public statements made by the appellants, not to mention their advertising of tobacco products. It is clear that the appellants did not merely forget to disclose an important fact – the judge concluded that they knowingly failed to disclose important facts in their advertising and by their policy of silence.[801] The appellants have not established that these conclusions of the trial judge are tainted by palpable and overriding errors.

[874] The notion of important fact set out in section 228 C.P.A. has a very broad scope that covers the decisive elements of the consumer's consent. It includes the safety of a good and its quality, as the Court of Appeal noted in *Fortin v. Mazda Canada inc*., a matter concerning the defective locking system of vehicles sold to consumers :[802]

> [TRANSLATION]
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> [139] With all due respect for the judge, I am of the view that the "important fact" in section 228 C.P.A. does not aim solely to protect the physical safety of the consumer. It also encompasses all the fundamental elements of the contract

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800 *Richard v. Time Inc.*, 2012 SCC 8 at para. 119.

801 Judgment *a quo* at paras. 269, 271, 337, 523, 574 and 631.

802 *Fortin c. Mazda Canada inc.*, 2016 QCCA 31. On the issue of the determinative effect of an important fact on consent, see also *Amar c. Société des loteries du Québec*, 2015 QCCA 889 at para. 49. See also *Vidéotron c. Union des consommateurs*, 2017 QCSC 738, at para. 97. Moreover, this is the approach preferred by Prof. Masse: C. Masse, *C.P.A. : analyse et commentaires*, *supra* note 445 at 862.

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> likely to interfere with an informed choice. ...
>
> [140] The "important fact" referred to in section 228 C.P.A. therefore deals with the determinative elements of the contract of sale, such as the price, warranty, payment terms, quality of the good, nature of the transaction and <u>any other decisive considerations with respect to which the consumer has agreed to contract with the merchant</u>.
>
> [Emphasis added; references omitted.]

[875] This excerpt demonstrates that the quality of the good and considerations related to risk for the consumer, arising from the normal use of the good, may enter into account.

[876] Considering that the judge concluded that the appellants were aware since the 1950s of the risks of developing the diseases at issue and the addictive properties of tobacco, it goes without saying that their duty to disclose these risks persisted as of April 30, 1980, under the C.P.A.

[877] The evidence retained by the judge, notably in the analysis of the common questions,[803] allowed him to rule that the appellants had failed to frankly disclose such information to the ordinary smoker, and although the judge did not specify it in his analysis of liability under the C.P.A., the concerted action of the appellants within the CTMC, their resistance to warnings, their challenging of scientific reports and their advertising and sponsorship were all occasions where, in these representations, including omissions as contemplated by section 216 C.P.A., they failed to disclose important facts following the coming into force of the C.P.A. By doing so they acted in a manner to confirm the impression that the knowledge of risk was still uncertain. Worse, they provided misleading information where their representatives glossed over both the risks of developing diseases but also that of addiction. The appellants did not seriously call into question their policy "of silence." These findings of the judge do not give rise to appellate intervention.

[878] The appellants submit that the judge erred by imposing the duty to disclose a fact that had been known since January 1, 1980. In fact, the justice concluded that on January 1, 1980, it was known by a vast majority of the Quebec population that tobacco use could trigger the diseases at issue. The Appellants submit that a fact cannot be characterized as important if it is known to consumers. With respect, they are mistaken. The importance of a fact concerning a good or a service as contemplated by section 228 C.P.A., does not flow from the state of knowledge of consumers. For example, one might be surprised to read a sign in a service station which warns against the accidental flammability of gas, a fact which is, however, well known to consumers. It is not hard to understand that this danger is nevertheless an important fact with regard to this product.

[879] Even supposing that the appellants are not wrong on this point, the failure to mention the addictive nature of tobacco in the Appellants' advertising or in their sponsorship activities, in conjunction with the policy of silence,[804] negates this argument.[805] The ordinary consumer,

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[803] Judgment *a quo* at para. 37-642

[804] Judgment *a quo* at paras. 56, 271, 337, 523, 574 and 631.

[805] See paras. [636] *et seq.* above.

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whether a smoker or not, has to be warned that the product he or she is purchasing is a product both likely to cause the diseases at issue and that it is addictive. It is thus evident that by not mentioning the risk of addiction in its advertising or warnings that appeared on cigarette packages up until 1994, the appellants failed to disclose an important fact. The fact that the warnings gradually became part of federal law changes nothing of the fact that the appellants were silent on the issue of addiction, an important and even vital fact.

[880] Finally, the Appellants' criticism that the judge failed to specify what they had to disclose is also groundless. It is clear, upon an overall reading of the decision, that the judge was of the view that the appellants should have, for several years, publicly recognized the significant health risks presented by the consumption of cigarettes. This emerges from paragraph 512 of the judgment:

> [512] In sections II.D.5 and 6 of the present judgment, we hold that the Companies were indeed guilty of withholding critical health-related information about cigarettes from the public, i.e., important facts. Since a "representation" includes an omission, the Companies failed to fulfil the obligation imposed on them by section 228 of Title II of the CPA. We also hold that their failure to warn lasted throughout the Class Period, including some twenty years while the relevant portions of the CPA were in force.
>
> [Emphasis added, reference omitted.]

[881] It is worth repeating that the appellants had to disclose not only the risks of developing the diseases at issue, but also the risk of becoming addicted to cigarettes. The question of addiction − an expression that they furthermore had difficulty in recognizing and using during the hearing before this Court − is an important fact that they should have disclosed well prior to the imposition of warnings concerning addiction as of 1994.[806] Certainly, the judge's reasons were succinct in this regard, but the appellants have not demonstrated any reviewable error on the failure to mention an important fact.

[882] There remains the question raised by the appellants of whether the judge erred by not clearly specifying whether the prohibited practices continued after 1998, i.e., after advertising became prohibited, and if so, and whether they continued during the remainder of the relevant period. This will be dealt with at paragraphs [893] *et seq.* below.

b. False or misleading representations (s. 219 C.P.A.)

[883] The second type of prohibited practice alleged against the appellants is that they made false or misleading representations by presenting positive situations in their advertisements that gave the impression that cigarettes are not dangerous.

[884] False or misleading representations are prohibited by section 219 C.P.A.:

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[806] Judgment *a quo* at para. 110; the judge refers to Exhibit 40003E-1994, i.e., the *Tobacco Products Control Regulations, amendment*, SOR/93-389, regulation made under the *Tobacco Products Control Act*, S.C. 1988, c. 20.

219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.	**219.** Aucun commerçant, fabricant ou publicitaire ne peut, par quelque moyen que ce soit, faire une représentation fausse ou trompeuse à un consommateur.

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[885] Quebec law contains several occurrences of the tandem expression "false or misleading." The statutes[807] and regulations[808] that make use thereof often create penal offences prohibiting "false or misleading statements" or providing "false or misleading information."

[886] In the C.P.A., the legislator was careful to distinguish between false representations and misleading representations. While the notion of false representations requires no precision due to the clarity of the meaning that must be attributed to it, the notion of misleading representations deserves some commentary.

[887] Since the term "*trompeur*/misleading" is not defined in the C.P.A., we must refer to its ordinary meaning. *Le Grand Robert de la langue française* defines it by referring to the verb "*tromper*/mislead"), the primary meaning of which is [TRANSLATION] "to induce error with respect to facts or intentions by using lies, dissimulation and cunning."[809] The Académie française, in the 8th edition of its dictionary − the 9th edition has no entry for "*trompeur*" indicates that "*tromper*/mislead" means:[810]

> [TRANSLATION]
>
> To induce into error by artifice. *Mislead the purchaser on the quality of merchandise, mislead adroitly, flagrantly. Mislead boldly, brazenly. This merchant misled us. The most refined were misled. He misled his father.* Absolutely. *He is unable to mislead.*

[888] The *Shorter Oxford English Dictionary* defines the term *misleading*, used in the English version of the law as "[t]hat leads someone astray, that causes error; imprecise, confusing, deceptive."[811]

[889] If to mislead means to induce into error, it is obvious that the implementation of representations in which information or an image conceals a fact, reports a false reality or yet

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807 See e.g., the *Tobacco Control Act*, CQLR c. L-6.2, s. 54; the *Act to promote access to justice through the establishment of the Service administratif de rajustement des pensions alimentaires pour enfants*, CQLR, c. A-2.02, ss. 24(1) and (2); the *Act respecting transparency measures in the mining, oil and gas industries*, CQLR, c. M-11.5, s. 41(2); the *Act respecting immigration to Québec*, CQLR, c. I-0.2, s. 3.2.1.

808 *Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1, s. 122; *Regulation respecting snow elimination sites*, CQLR, c. Q-2, r. 31, s. 4.

809 *Le Grand Robert de la langue française*, *supra* note 473, sub verbo "*trompeur*" and "*tromper*."

810 Académie française, *Dictionnaire de l'Académie française*, 8th ed., Tome second (Paris: Librairie Hachette, 1932−1935) sub verbo "tromper."

811 *Shorter Oxford English Dictionary,* 6th ed., vol. 1 (Oxford: Oxford University Press, 2007, sub verbo "misleading."

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again glosses over certain facts, may constitute, depending on the circumstances, a misleading representation. The failure to mention an important fact may, under certain circumstances, be misleading and thus overlap with the notion of misrepresentation.

[890] The appellants' claim according to which the public knowledge of the hazards of tobacco neutralizes the prohibited practices must be set aside. It adds a ground of defence to the law that the law does not recognize. The aim of protecting the public from legislation calls for a generous interpretation of the scope of prohibited practices. The prohibition does not involve variable geometry, based on the merchant's ability to demonstrate the consumer's knowledge of a danger, thereby releasing it from its obligations to adopt lawful commercial practices. Moreover, notwithstanding the public nature of information, it is possible that a merchant will mislead the consumer in relation to this information by a representation, just as it may expose the consumer to information which is unequivocally false.

[891] An analysis of the appellants' innumerable advertisements filed as evidence led the judge to conclude that an important part of them, of the "lifestyle" variety, associated tobacco products with social or sporting activities, highlighting young people apparently brimming with health. He found that the advertising was misleading in this sense as it concealed the harmful and toxic effects of the product on the health of consumers and instead presented smoking in a positive light.[812]

[892] This conclusion, in the absence of a palpable and overriding error, is sheltered from the intervention of the Court of Appeal. The appellants failed to make any such demonstration. It is certainly not unreasonable to conclude that the presence of warnings in small letters at the bottom of these advertisements does not counter the general impression it gives, as contemplated by section 218 C.P.A. In distinguishing between advertisements that he characterized as "neutral" and the misleading advertisements in paragraphs 534 and 535 of his judgment, the justice analyzed the evidence as was incumbent upon him and committed no reviewable error in this regard.

c. End of the prohibited practices

[893] The appellants allege that the prohibited practices did not continue until the end of the relevant period and that the judge was unfounded in so finding. The judge's findings in this regard warrant some particulars. He did in fact implicitly conclude that there were prohibited practices during the period from the coming into force of the 1980 C.P.A. until service of the fall 1998 claims. An overall reading of his reasons support this conclusion.[813] It should also be noted that the judge did not ignore the cessation of advertising between 1989 and 1995.[814] His finding that the claims for punitive damages until 1995 were prescribed[815] also grounds the conclusion that, in his view, the prohibited practices persisted from 1995 until the fall of 1998.

[894] In order to properly frame this issue, it is necessary to recall the chronology of events and the legislation over the final two decades of the 20th century and then analyze the advertising

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812 Judgment *a quo* at para. 535.
813 Judgment *a quo* at paras. 541 and 1024.
814 Judgment *a quo* at para. 420.
815 Judgment *a quo* at para. 900.

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practises from 1988 to 1998.

[895] The initial warnings on cigarette packages appeared as of 1972 and were the result of Voluntary Codes agreed upon between the members of the Canadian tobacco industry, including the appellants under their corporate forms at that time. The Voluntary Codes were implemented as a reaction to a growing expectation of oversight of the industry by the legislator. The 1972 warnings specified, without elaboration, "danger ... increases with use." Then in 1975, it contained a recommendation to avoid inhaling smoke.[816] The subsequent Codes maintained these warnings while modifying their size on occasion and at other times prescribing the recommended content of cigarettes in tar and nicotine.[817]

[896] As discussed above, in 1988, the *Tobacco Products Control Act*[818] was adopted, including section 9 that provided for certain labelling rules including the addition of messages related to health. Paragraph 11(1)(*a*) of its Regulation required cigarette manufacturers to print new warnings on cigarette packages as of October 31, 1989:[819]

> (i) "Smoking reduces life expectancy. L'usage du tabac réduit l'espérance de vie."
>
> (ii) "Smoking is the major cause of lung cancer. L'usage du tabac est la principale cause du cancer du poumon."
>
> (iii) "Smoking is a major cause of heart's disease. L'usage du tabac est une cause importante de la cardiopathie."
>
> (iv) "Smoking during pregnancy can harm the baby. L'usage du tabac durant la grossesse peut être dommageable pour le bébé.

[897] Several requirements ensure the visibility of these warnings, notably with respect to their size and the use of contrasting colours.[820] It should be noted here that these messages do not contain any disclosure of the risk of contracting all of the diseases at issue, nor, furthermore, the danger of developing an addiction to cigarettes. Among the diseases at issue, only lung cancer is referred to.

[898] As discussed above,[821] the Regulation[822] enacted under the *Tobacco Products Control Act*[823] was amended in 1993 in order to modify the content of the warnings, which became more severe. Thus, as of September 12, 1994, eight warnings appeared, including "Smoking can kill you / *Fumer peut vous tuer*" and "Cigarettes are addictive / *La cigarette crée une dépendance*."

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816 Judgment *a quo* at para. 110.

817 See in this regard various Voluntary Codes and regulations: exhibits 40005C-1972, 40005D-1972, 40005G-1975, 40005H-1975, 40005K-1975, 40005L-1976, 40005M-1984, 40005N-1985 40005O-1995 and 40005P-1995. See also para. [504] *et seq.* above.

818 *Tobacco Products Control Act*, S.C. 1988, c. 20, s. 9(1)(*a*).

819 *Tobacco Products Control Regulations*, SOR/89-21, ss. 11(1)(*a*). See also para. [530] above.

820 *Tobacco Products Control Regulations*, SOR/89-21, ss. 4, 15(*a*) and 15(*d*).

821 See para. [540] above.

822 *Tobacco Products Control Regulations, amendment,* SOR/93-389, s. 4(1).

823 *Tobacco Act*, S.C. 1997, c. 13.

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Each of the eight warnings had to appear on 3% of the packs of each of the brands produced during a year, thereby likely ensuring a rotation of messages and dissemination deemed to be adequate.

[899] On September 21, 1995, the Supreme Court of Canada invalidated the *Tobacco Products Control Act* in part,[824] without suspending the declaration of invalidity. The new *Tobacco Act*[825] of 1997 and its Regulation entered into force only towards the end and after the end of the relevant period.[826] In the interim, the Voluntary Codes of 1995 and 1996[827] ensured the presence of warnings on packs. These warnings dealt in particular with addiction, lung diseases, cancer and mortality.[828]

[900] In short, the warnings about lung cancer appeared on October 31, 1989, and the warnings on addiction on September 12, 1994. These warnings persisted after the invalidation of the federal legislation by the Supreme Court of Canada. More “complete” warnings thus existed from September 12, 1994, until the end of the relevant period.

[901] It is thus possible that the prohibited practice of failing to mention an important fact − in this case, the risk of addiction − had ceased when the warnings on addition appeared on September 12, 1994. It is not necessary to rule on this aspect, however, since, as we will see, the misrepresentations resumed after the *Tobacco Products Control Act*[829] was invalidated by the Supreme Court of Canada in 1995.

[902] Even presuming that the warning on addiction that appeared since September 12, 1994, put an end to one type of prohibited practice, the only relevant question is whether the appellants continued to engage in prohibited practices between September 12, 1994, and the service of the claims in 1998. Based on the findings of the Court with respect to the appellant’s civil liability pursuant to the general law, the question is relevant only in regard to the imposition of punitive damages in the two matters.

[903] As the judge concluded, the appellant’s advertising practices amounted to false or misleading representations.[830] As he also concluded, the advertising campaigns ceased as of 1989, when the *Tobacco Products Control Act*[831] and its Regulation came into force, and were resumed at the time of the partial invalidation of that statute.[832] Advertisements were thus made from 1980 to 1988 and from 1995 to 1998.

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824 I.e., sections 4 (advertising), 8 (brands) and 9 (non-attributed messages related to health) and sections 5 and 6, which are inseparable. See *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1995] 3 S.C.R. 199.

825 *Tobacco Act*, S.C. 1997, c. 13.

826 *Tobacco Act*, S.C. 1997, c. 13. The law was adopted on April 25, 1997. It was amended thereafter on December 10, 1998, by the *Act Amending the Tobacco Act*, S.C. 1998, c. 38, which included several provisions that came into force after the end of the relevant period.

827 See exhibits 40005O-1995, 40005P-1995 and 40005S-1996.

828 See a sample advertisement in Exhibit 40005Q-1995; see para. [548] above.

829 *Tobacco Act*, S.C. 1997, c. 13.

830 Judgment *a quo* at para. 536.

831 *Tobacco Act*, S.C. 1997, c. 13.

832 Judgment *a quo* at para. 523.

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[904] The judge did not err in finding that prohibited practices existed until the end of the relevant period. Certainly, the frequency of the prohibited practices and their scope were affected by the federal legislation and the Voluntary Codes and are not comparable to the warnings of the 1980s. It nevertheless remains that it is sufficient to note that the appellants, after the invalidation of the law, deemed it appropriate to continue advertising a hazardous and addictive product in a misleading manner, to come to the conclusion that the judge did not err.

[905] The appellants have failed to demonstrate that the judge committed an error in concluding that prohibited practices existed during the period from 1995 to 1998. Thus, even presuming that the prohibited practices ceased on September 12, 1994, due to the addition of warnings on addiction − which has not been demonstrated and which will be addressed in further detail when assessing quantum of punitive damages − they were resumed in 1995. In fact, the appellants did not call into question the judge's factual finding that they adopted a policy of silence when, combined with their advertising campaigns and sponsorships,[833] was tantamount to the commission of two types of prohibited practices imputed to them. In accordance with section 218 C.P.A., the general impression given to an inexperienced consumer by this conjunction of omissions and acts of communication, failure to inform and sustained advertising campaigns is characterized by a laissez-faire attitude and a presentation of cigarettes that is positive, whereas a more alarmist tone would clearly have been more appropriate in the mid-1990s. This general impression is not consistent with reality.

d. Summary

[906] The judge thus correctly decided that the appellants engaged in prohibited practices as contemplated by the C.P.A. commencing on April 30, 1980. The appellants have failed to demonstrate on appeal that the prohibited practices irremediably ceased in 1989 or in 1994. More significantly, the prohibited practices did not cease during the three years preceding the filing of the class actions.

ii. Knowledge of the prohibited practices

[907] The appellants argue that the judge erred in concluding that the evidence demonstrated that the members of the Blais and Létourneau Classes had personal knowledge of the prohibited practices to a certain degree, if the Court concluded that these practices did in fact exist.

[908] According to the judge, the consumers were aware of misleading practises arising out of the "lifestyle" type advertisements. He found that, according to experts Lacoursière and Flaherty, the members came across articles denouncing the risks associated with tobacco[834] in the media. He concluded that advertisements found in the same media were probably also seen by the members.

[909] Furthermore, with respect to the failure to disclose important facts as within the meaning

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833 Judgment *a quo* at para. 535. The judge listed certain examples of advertisements and sponsors without distinction (see exhibits 1240B and 1240C, which the judge erroneously designated as exhibits 1040B and 1040C).

834 Judgment *a quo* at paras. 513 and 537.

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of section 228 C.P.A., the judge ruled that one cannot by definition have knowledge of something that does not exist. Thus, he considered the second criterion to be proved for the two types of prohibited business practices.

[910] The appellants' argument concerning the "omission within the omission" having been set aside, we can only conclude that the reasoning of the judge with respect to knowledge of the appellants' omissions is exempt from any reviewable error because they are inseparable from the representations made to the members, which contain insufficient information concerning the product.

[911] Furthermore, the appellants criticize the judge for having set aside the expert reports of the defence's experts Lacoursière and Flaherty, but using certain aspects of them in favour of the plaintiffs, and argue that the evidence does not allow for this because the experts did not offer opinions on the visibility of advertisements in the media that they examined. They conclude by emphasizing the fact that no member came to testify concerning his or her knowledge of advertisements and even less so about the impact of them on his or her decision to smoke.

[912] It was open to the judge, in his analysis of the evidence as a whole, to accept all or part of the expert opinions adduced into evidence.[835] The exercise of the judge's discretionary power in weighing the evidence discloses no error calling for the intervention of this Court.

iii. Contracts subsequent to the prohibited practices

[913] Both the trial judgment[836] and the appellants analyzed the third criterion set out in *Richard v. Time Inc.* for the purposes of the application of the remedy set out in section 272 C.P.A. by examining whether the conclusion of the contract *results* from the prohibited practice. This angle of analysis should be set aside, however, because it does not correspond to that retained by the Supreme Court of Canada in *Richard v. Time Inc.* and, if retained, would neutralize the effect of the absolute presumption of prejudice.

[914] This confusion comes from a discrepancy between the French version of the grounds of the Supreme Court of Canada and their translation into English.[837] In paragraph 124 of this leading case, the Supreme Court of Canada formulated the third criterion of the analysis by requiring in French that "*la formation, la modification ou l'exécution d'un contrat de consommation [soit] subséquente à [la] prise de connaissance"* of the prohibited practice. The English version, however, differently requires that "the consumer's seeing that representation resulted in the formation, amendment or performance of a consumer contract."[838] It is worth citing paragraph 124 of that case in its entirety:

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835 *Lévesque v. Hudon*, 2013 QCCA 920 at paras. 69 and 75.

836 Judgment *a quo* at para. 515 and 538.

837 In the English text of the judgment of the Supreme Court published in the Supreme Court Reports, it is specified that this is the "English version of the judgment of the Court delivered by LeBel and Cromwell JJ." The French text indicates "*Le jugement de la Cour a été rendu par les juges LeBel et Cromwell*" ([TRANSLATION] "The judgment of the Court was rendered by LeBel and Cromwell JJ." (*Richard v. Time Inc.*, 2012 SCC 8).

838 *Richard v. Time Inc.*, 2012 SCC 8 at para. 124.

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[124] This absolute presumption of prejudice presupposes a rational connection between the prohibited practice and the contractual relationship governed by the Act. It is therefore important to define the requirements that must be met for the presumption to apply in cases in which a prohibited practice has been used. In our opinion, a consumer who wishes to benefit from the presumption must prove the following: (1) that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act; (2) that the consumer saw the representation that constituted a prohibited practice; (3) that the consumer's seeing that representation resulted in the formation, amendment or performance of a consumer contract; and (4) that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract. This last requirement means that the prohibited practice must be one that was capable of influencing a consumer's behaviour with respect to the formation, amendment or performance of the contract. Where these four requirements are met, the court can conclude that the prohibited practice is deemed to have had a fraudulent effect on the consumer. In such a case, the contract so formed, amended or performed constitutes, in itself, a prejudice suffered by the consumer. This presumption thus enables the consumer to demand, in the manner described above, one of the contractual remedies provided for in s. 272 *C.P.A.*

[124] L'application de la présomption absolue de préjudice présuppose qu'un lien rationnel existe entre la pratique interdite et la relation contractuelle régie par la loi. Il importe donc de préciser les conditions d'application de cette présomption dans le contexte de la commission d'une pratique interdite. À notre avis, le consommateur qui souhaite bénéficier de cette présomption doit prouver les éléments suivants : (1) la violation par le commerçant ou le fabricant d'une des obligations imposées par le titre II de la loi; (2) la prise de connaissance de la représentation constituant une pratique interdite par le consommateur; (3) la formation, la modification ou l'exécution d'un contrat de consommation subséquente à cette prise de connaissance, et (4) une proximité suffisante entre le contenu de la représentation et le bien ou le service visé par le contrat. Selon ce dernier critère, la pratique interdite doit être susceptible d'influer sur le comportement adopté par le consommateur relativement à la formation, à la modification ou à l'exécution du contrat de consommation. Lorsque ces quatre éléments sont établis, les tribunaux peuvent conclure que la pratique interdite est réputée avoir eu un effet dolosif sur le consommateur. Dans un tel cas, le contrat formé, modifié ou exécuté constitue, en soi, un préjudice subi par le consommateur. L'application de cette présomption lui permet ainsi de demander, selon les mêmes modalités que celles décrites ci-dessus, l'une des mesures de réparation contractuelles prévues à l'art. 272 *L.p.c.*

[Emphasis added.]

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[915] What impact can be attributed to the discrepancy between the judgment rendered in French and its translation into English?

[916] Several factors confirm the importance of attributing to the third criterion a temporal dimension as implied in the French version, rather than causal; In other words, requiring that the formation of the contract be subsequent to, rather than resulting from, knowledge of the prohibited practice.

[917] First, in *Richard v. Time Inc.*, the Supreme Court of Canada, applying the four criteria to the facts of the matter, clearly used the temporal dimension of the third criterion, this time both in French and in English. That complies with the meaning of the word "subsequent" used in paragraph 124 of the judgment. Indeed, paragraph 141 states:

[141] ... He then had to prove that he had seen the representation constituting a prohibited practice before the contract was formed, amended or performed	[141] [...] Il lui faut ensuite prouver qu'il a pris connaissance de la représentation constituant une pratique interdite avant la formation, la modification ou l'exécution du contrat […].

[Emphasis added.]

[918] Furthermore, if it were necessary to attribute causal significance to knowledge on the formation or amendment of the contract, not only would the fourth criterion of the test be neutralized, but the entire presumption itself would be as well. In fact, as we will see, the fourth criterion requires a rational connection between the practice and the object of the contract. To require this connection – here by a vaguely causal hypothesis – between the practice and the contract itself would render the fourth criterion useless and redundant. Furthermore, to require such a connection at this stage would negate all effects of the presumption, which in fact aims to prevent the manufacturer from arguing that the consumer was not induced into error by the prohibited practice.

[919] The third criterion thus concerns a chronological sequence of the prohibited practice and the conclusion of the contract, rather than the causal effect of the prohibited practice.[839]

[920] Contracts were entered into between each smoker who purchased a pack of cigarettes pack after April 30, 1980, and the tobacconists, convenience stores, grocery stores and, at a certain point in time, pharmacies who sold cigarettes. This observation appears obvious to us, although not all the members of the Class can make such claim, only those who smoked after

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[839] *Vidéotron c. Girard*, 2018 QCCA 767 at paras. 69 and 76, leave to appeal to SCC refused, 38225 (21 February 2019). See also Pierre-Claude Lafond, *Droit de la protection du consommateur : Théorie et pratique* (Montreal, Thomson Reuters, 2015) at para. 735; Luc Thibaudeau, "Going Back in Time" (2018) 441 *Colloque national sur l'action collective : Développements récents au Québec, au Canada et aux États-Unis* 51 at 58 and 64 [*Développements récents*].

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April 30, 1980. Since the appellants' prohibited practices continued after April 30, 1980, until 1998, it can be concluded that the vast majority of contracts are subsequent to the prohibited practices, which allows us to conclude that the third criterion set out in *Richard v. Time Inc.* has been met.

[921] It should be noted that the members who no longer smoked as of April 30, 1980, and prior to the end of the prohibited practices do not have the legal interest required to exercise the recourse under 272 C.P.A. because they cannot claim to have acquired a good related to the appellants' prohibited practises. In the same manner, the members who did not smoke 12 pack years after the prohibited practices were committed or who, *a fortiori*, did not become dependent after 1980, cannot claim medical causation and therefore seek damages for their injury.

[922] That has no impact on the admissibility of their application pursuant to the general law governing civil liability. It could nevertheless have justified a restricted definition of the Blais Class had the Court of Appeal excluded the appellants' liability under the general law for members who did not have the required interest under the C.P.A. That is not the case, however.

iv. Sufficient nexus

[923] Finally, the consumer seeking one of the recourses provided for at section 272 C.P.A. must demonstrate the existence of a "sufficient nexus ... between the content of the representation and the goods or services covered by the contract."[840] The notion of sufficient nexus does not appear in the C.P.A. In *Richard v. Time Inc.*, LeBel and Cromwell JJ. explained that this sufficient nexus has to exist between the content of the representation on the one hand, and the good that is the object of the contract, on the other. It should be pointed out that the judges then paraphrased this criterion by explaining that the "the prohibited practice must be one that was capable of influencing a consumer's behaviour with respect to the formation, amendment or performance of the contract."[841]

[924] It should be noted that the reasons in *Richard v. Time Inc.* clearly imply that the verification of the existence and this rational nexus should be the object of an objective, and not a subjective, analysis. The proximity at issue is concerned with the connection between the representation and the good. This representation must be "capable" of influencing the consumer − it is not necessary in all cases that it *did* actually in fact influence the consumer. The word "capable" as employed by the Supreme Court of Canada means something that it *can do*, not that it *did do* any action or *had* any impact.[842] It is undoubtedly a notion that is within the immediate proximity of the ability, and not the realisation of that ability.

[925] To conclude otherwise here would annihilate the practical impact of the presumption of prejudice, as we will see below. The presumption of prejudice is tantamount to a presumption that the prohibited practice had a fraudulent effect on the decision to conclude a contract or of unavailability of the defence of absence of prejudice. Requiring the consumer to prove, at the

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840 *Richard v. Time Inc.*, 2012 SCC 8 at para. 124 [emphasis added].

841 *Richard v. Time Inc.*, 2012 SCC 8 at para. 124 [emphasis added].

842 According to *Le Grand Robert de la langue française*, *supra* note 473, "*susceptible*" ([TRANSLATION] "capable" means [TRANSLATION] "that has the capacity, a latent capacity, a possibility of occasional use (for things) whereas *able* implies a permanent and acknowledged capacity."

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fourth step, that the representation actually had the effect he or she is alleging would be equivalent to requiring that he or she prove the fraudulent effect of the practice to be able to benefit from the presumption. That would then consequently amount to demanding that the consumer adduce evidence of the *effect* of the presumption he or she intends to invoke, thereby reducing the exercise of *Richard v. Time Inc.* to a vicious circle.

[926] Recently, this Court noted in *Vidéotron c. Girard*,[843] that it is the sufficient nexus between the good and the prohibited practices that must be considered. The hypothetical conduct of the consumer is not relevant in this analysis. Only the sufficient possibility that the representation influenced the conduct of the consumer in the abstract.

[927] ITL refers to the judgment of this Court in *Dion v. Compagnie de services de financement automobile Primus Canada*[844] in support of its argument that the criterion of sufficient nexus has not been met. In that case, merchants were alleged to have invoiced fees for mortgage registrations without having detailed all the components, thus constituting a prohibited practice under section 227.1 C.P.A. The trial judge concluded that no sufficient nexus was demonstrated. The Court of Appeal did not consider this an error and dismissed the appeals. The current appeals may be distinguished from the appeals in that case.[845]

[928] There is no reason to depart from the clear and succinct explanation of the fourth criterion provided by the Supreme Court of Canada in *Richard v. Time Inc.*, which clearly requires that the analysis of the fourth criterion not be carried out according to the characteristics of the individual, but solely by focusing on the rational connection between the good and the representation.[846]

[929] In this case, it was open to the judge to conclude that the appellants' unlawful representations, which were seen by the consumers, were *capable* of influencing their decision to acquire the product, because the content of these representations were inextricably related to the product sold.

[930] The judge concluded that the majority of the appellants' advertisements for their products since 1980 aimed to present their cigarettes in a favourable light.[847] He also concluded that the advertisements conveyed a positive message:

> [535] As a general rule, the ads contain a theme and sub-message of elegance, adventure, independence, romance or sport. As well, they use attractive, healthy-looking models and healthy-looking environments, as seen in the following exhibits:

[931] The advertisements listed by the judge after that excerpt from the judgment all convey a positive image unrelated to cigarettes (surfing, the transporting of wood, cycling, etc.) on which is superimposed the image of a pack of cigarettes, partially opened with several cigarettes sticking

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[843] *Vidéotron c. Girard*, 2018 QCCA 767 at paras. 70–73, leave to appeal to SCC refused, 38225 (21 February 2019).

[844] *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333.

[845] In *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333, an admission of the absence of sufficient nexus had been made; that decision, in the context does not call into question *Richard v. Time Inc.*

[846] See e.g., Thibaudeau, *Développements récents*, *supra* note 835 at 58.

[847] Judgment *a quo* at para. 533.

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out and ready to be smoked. If one considers both the false or misleading representations and the failure to mention an important fact, it is clear that the content of the representations has a sufficient nexus with the cigarettes. The judge did not err in finding that there was a sufficient nexus.

[932] Furthermore, certain statistics adduced into evidence[848] demonstrate that tobacco use decreases to the same degree that awareness of the risks of the product increase. This proof is in no way necessary to conclude that the final criterion of the approach advocated by the Supreme Court of Canada is met since the sufficient nexus must be analyzed on the objective basis of *ability* – i.e., the possibility of influence by the representation on the consumer – and not materiality – i.e., the fact that the representation did in fact have an impact on the consumer. It nevertheless remains that they confirm that the representations are capable of having an impact on the conduct of consumers and reinforces the judge's finding.

[933] Finally, it should be noted that the expert opinion of Dr. Soberman, according to which the advertising strategies of the companies and more particularly JTM did not aim to convince non-smokers to smoke but solely to convince smokers to smoke one cigarette brand rather than another was dismissed by the judge in these terms:

> [431] The Court cannot accept Dr. Soberman's view, although much of what he says, in the way he phrases it, is surely true. It is simply too unbelievable to accept that the highly-researched, professionally-produced and singularly-attractive advertising used by JTM under RJRUS, and by the other Companies, neither was intended, even secondarily, to have, nor in fact had, any effect whatsoever on non-smokers' perceptions of the desirability of smoking, of the risks of smoking or of the social acceptability of smoking. The same can be said of the effect on smokers' perceptions, including those related to the idea of quitting smoking.
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> [432] His testimony boils down to saying that, where a company finds itself in a "mature market", it loses all interest in attracting any new purchaser for its products, including people who did not use any similar product before. This flies so furiously in the face of common sense and normal business practice that, with respect, we must reject it.

[934] The appellants did not demonstrate that this conclusion contains a reviewable error.

[935] In summary, the appellants in no way demonstrated that the judge erred in finding that the conditions of application of the recourses under section 272 C.P.A. were met. On the contrary, he adopted a view of the third criterion that benefited them. It follows that the irrebuttable presumption of prejudice or fraudulent effect of the prohibited practices applies in this case. Let us now consider the consequences of this irrebuttable presumption.

C. Scope of the irrebuttable presumption of prejudice

[936] After finding that the presumption of prejudice applied, the judge concluded that the

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[848] See exhibits 987.1 at 2 and 40495.33 at 14.

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remedies under section 272 C.P.A. were available.[849] In a separate section of the judgment, he also concluded that there was a causal link between the civil faults of the appellants and the cigarette smoking of the members.[850] It is appropriate to note, once again, that the Court rejects the idea that the respondents had the burden of demonstrating the existence of "conduct causation" pursuant to the general law. It is thus appropriate to discuss, from the perspective of the C.P.A., the precise scope of the presumption of prejudice and its consequences on the issue of causation.

[937] A review of the older case law of this Court provides an account of the genesis of the absolute presumption of prejudice. It should be noted that the Court wrote as early as 1995 in *Nichols c. Toyota Drummondville (1982) inc.*, that [TRANSLATION] "contrary to what is possible if the claim is based on section 271, the merchant sued under section 272 cannot raise the defence of absence of prejudice incurred by the consumer to seek dismissal of the claim."[851] A few years later, in *Turgeon c. Germain Pelletier Ltee*[852], the Court characterized the presumption set forth at section 253 C.P.A. as a [TRANSLATION] "presumption of fraud," underlining furthermore that, in the facts of that case, the prohibited practices [TRANSLATION] "amounted to fraud." Although we do not make any finding on the presumption of section 253, it is important to observe the proximity of the concepts of prohibited practices and fraud, and the immediate parallels traced by the Court between fraud and the language used in section 253. This conceptual proximity is far from foreign to the presumption of prejudice set out in section 272 C.P.A..

[938] How is the presumption of *prejudice* to be understood?

[939] Recall that the word prejudice is not meant here as a constitutive component of the three elements of civil liability. It stands to reason that proof of the four criteria cannot be deemed proof of a prejudice that can be compensated by the award of damages.

[940] Rather, it is necessary to understand the presumption of prejudice as an irrebuttable presumption of the *prejudicial effect* of the prohibited practice on the consent of the consumer. If we wish to align this presumption with classical civil law concepts, we could identify its field of action as being, in a contractual claim, the fraudulent impact of the prohibited practice on the *consent* of the consumer, or yet again, the *error caused by the fraud* (art. 1401 C.C.Q.). In extracontractual matters, the presumption of prejudice allows for proof of the civil fault. These conceptual approximations, although of assistance in explaining, bring very little to the analysis, however.

[941] Practically speaking, it appears more appropriate to translate this absolute presumption of prejudice by the non-availability of the defence of absence of prejudice. Once the criteria are met, a merchant simply can no longer argue that the prohibited practice it has committed did not have any impact on the conclusion of the contract. In summary, it is thus an irrebuttable presumption that the prohibited practice fraudulently incited the consumer to conclude or amend a contract.

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[849] Judgment *a quo* at paras. 517 and 541.
[850] Judgment *a quo* at paras. 809 and 817.
[851] *Nichols c. Toyota Drummondville (1982) inc.*, [1995] R.J.Q. 746 (C.A.) at 749.
[852] *Turgeon c. Germain Pelletier Ltee*, 2001 R.J.Q. 291 (C.A.) at paras. 47–48.

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[942] The general concept of causation under the rules of civil liability also cannot be directly transposed into the framework of a recourse under section 272. The legislator decided to alleviate the burden of proof of the consumer who demonstrates a failure of the manufacturer or merchant with respect to its obligations. The demonstration of the second, third and fourth criteria set out in *Richard v. Time Inc.* replaces the evidence of what has been characterized in this case as "conduct causation" and allows the consumer to obtain remedial measures. Stated otherwise, once it is demonstrated that the consumer is aware of the prohibited practice, that the consumer contract is subsequent to it and that there is a sufficient nexus between the representation and the good purchased, reparation becomes possible, subject of course to establishing quantum in the case of a claim for compensatory damages.

[943] The following excerpts of the judgment of the Supreme Court of Canada in *Richard v. Time Inc.* concerning the criteria of application of section 272 support this interpretation of the presumption:[853]

> [124] ... Where these four requirements are met, the court can conclude that the prohibited practice is deemed to have had a fraudulent effect on the consumer. In such a case, the contract so formed, amended or performed constitutes, in itself, a prejudice suffered by the consumer. This presumption thus enables the consumer to demand, in the manner described above, one of the contractual remedies provided for in s. 272 C.P.A.
>
> …
>
> [127] The use by a merchant or a manufacturer of a prohibited practice can also form the basis of a claim for extracontractual compensatory damages under s. 272 *C.P.A.* A majority of the Quebec authors and judges who have considered this issue have taken the view that fraud committed during the pre-contractual phase is a civil fault that can give rise to extracontractual liability (Lluelles and Moore, at p. 321; *Kingsway Financial Services Inc. v. 118997 Canada inc.*, 1989 CanLII 13530 (Que. C.A.)). Proof of fraud thus establishes civil fault. However, because of the specific nature of the *C.P.A.* the procedure for proving fraud is different from the one under the *Civil Code of Québec*.
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> [128] This difference stems from the fact that, where the recourse provided for in s. 272 *C.P.A*. is available to a consumer, his or her burden of proof is eased because of the absolute presumption of prejudice that results from any unlawful act committed by the merchant or manufacturer. This presumption means that the consumer does not have to prove that the merchant intended to mislead, as would be required in a civil law fraud case. According to the interpretation proposed by Fish J.A. in *Turgeon,* a consumer to whom the irrebuttable presumption of prejudice applies has also succeeded in proving the fault of the merchant or manufacturer for the purposes of s. 272 *C.P.A.* The court can thus award the consumer damages to compensate for any prejudice resulting from that extracontractual fault.

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[853] *Richard v. Time Inc.*, 2012 SCC 8.

[Emphasis added.]

[944] Thus, the merchant cannot argue that its breach of the C.P.A. was of no effect on the consumer's decision to contract, and still less, require the consumer to establish such an effect.

[945] In this case, regardless of the classification and terminology under the general law governing civil liability, the scheme of section 272 C.P.A. has the effect of providing irrebuttable evidence that the appellants' practices, including their silence, caused the consumers to purchase cigarettes. In these class actions, this is tantamount to what has been identified as conduct causation. In the context of the C.P.A., the respondents are correct in pleading that there are not two types of causation. In regard to the C.P.A., conduct causation is nothing other than the fraudulent effect of the appellants' prohibited practices. Because this fraudulent effect is presumed, the appellants' argument concerning conduct causation is inadmissible under the C.P.A.[854]

[946] The judge's conclusions appear to support this interpretation of the presumption, at least in part, in particular when he stated:

> [497] It thus appears that the only practical effect of this presumption is to ease the consumer's burden of proof concerning fraud: "the consumer does not have to prove that the merchant intended to mislead, as would be required in a civil law fraud case." [*Op. cit*., *Time*, Note 20, at paragraph 128.]

[947] It is true that this is an effect of the presumption, but it is not its sole effect. It is sufficient for the purposes of this matter to state that the judge did not err in concluding that it gave rise to the penalties provided set out in section 272. For the remainder, his omission to give full effect to the presumption of prejudice is inconsequential, because he concluded that under the general law, the faults committed by the appellants caused the tobacco use of the members. There is thus no reason to intervene on this aspect.

D. Penalties imposed on the appellants pursuant to section 272 C.P.A.

i. Availability of moral damages

[948] Section 272 *in fine* allows for the award of damages to compensate moral prejudice. Since the conditions giving rise to the action have been fulfilled, the judge could award moral damages under the C.P.A. to compensate the prejudice incurred by the members of the Blais Class pursuant to the prohibited practices of the appellants.

[949] Contrary to what ITL argues, section 272 C.P.A. applies to both contractual and extracontractual matters.[855]

[950] That being the case, an inconsequential hurdle must be raised here.

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[854] The Court has already concluded that the manufacturer's liability under the general law does not require the respondents to establish "conduct causation".

[855] *Richard v. Time Inc.*, 2012 SCC 8 at paras. 127−128.

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[951] As we have concluded, the general law allows for full compensation of the prejudice established by the trial judge. Pursuant to the principle of *restitutio in integrum*, the C.P.A. adds nothing to the scope of this liability but is superimposed thereupon without covering it entirely.

[952] Had the Court dismissed the basis for liability under the general law and the *Charter,* solely the prohibited practices committed as of April 30, 1980, could have caused the tobacco use of the members or their addiction. In this hypothesis, the appellants would solely be liable under the C.P.A. towards those members who had smoked the critical dose of 12 pack years after April 30, 1980, because the fraudulent effect of the prohibited practices could not have been presumed before the coming into force and effect of the C.P.A. In other words, it would have been necessary for each member to establish consumption of 12 pack years throughout the period of commission of the prohibited practices. A member who smoked six pack years prior to 1980 and six pack years after 1980 could no longer claim medical causation and thus the appellants' liability. *A fortiori*, it would have been necessary to prove that a member had become dependent – thus that he or she had smoked for four years, according to the terms established by the judge – following the prohibited practices, i.e., between April 30, 1980, and the end of the prohibited practices in 1998.

[953] Based on the conclusions under the law of general law, however, it is sufficient here to note that the appellants are liable for the moral damages caused to certain members of the Blais Class pursuant to the C.P.A. Due to the principle of full compensation in law for liability, this conclusion has no impact, either upwards or downwards, on the quantum that the appellants are required to pay to the members.

ii. Availability of punitive damages

[954] Section 272 *in fine* allows the consumer to seek punitive damages, and the judge did not err in this regard. The appellants' arguments questioning the suitability of ordering their payment and the assessment of their quantum are dealt with in section IV.5 of this judgment.

2.3. Summary

[955] The judge committed no reviewable error in finding the appellants liable under the C.P.A. The C.P.A. scheme, which is distinct from the general law, nevertheless overlaps with it, without, however, covering the claims of the members of the Blais Class in their entirety, given that the prohibited practices were committed solely after the coming into force of the C.P.A. This hurdle, of which the judge was aware, has no impact on these appeals since the principle of *restitutio in integrum* requires compensation of no more and no less than the prejudice of the members, and the general law is sufficient in this regard. In this sense, the judgment is not vitiated by any palpable and overriding error, nor by any error in law.

[956] The judge was correct in concluding that the criteria of the irrebuttable presumption of prejudice were met. The existence of prohibited practices, to which the consumers were exposed and that preceded the conclusion of consumer contracts, is sufficient, in the presence of a rational connection between the practices and the cigarettes, to conclude that there was a violation of the C.P.A. and a fraudulent effect on the consent of the consumers. Because the appellants' liability has been retained under the general law, the presumption has no impact in this case, except to render possible a claim in punitive damages by the members of the two class

actions.

3. *CHARTER OF HUMAN RIGHTS AND FREEDOMS*

3.1. Background

[957] The judge concluded that the appellants were also liable for the moral damages caused to the members of the Blais Class pursuant to the *Charter*, and for punitive damages in both cases.[856] He concluded that the appellants' faults constituted unlawful interference with the right to life, personal security and integrity of the members, justifying the award of compensatory damages. On the basis of *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*,[857] the judge found that the appellants, without wishing to cause the diseases of their clients, acted with full knowledge of the immediate and natural or extremely probable consequences of their acts, therefore justifying the award of punitive damages.

[958] While the judge found that there was unlawful interference with the right to life, personal security and integrity,[858] he also referred, in a separate section of the judgment *a quo*, to the violation of the right to freedom, dignity and inviolability.[859] The judge's reasons are succinct with respect to these latter violations; we will restrict ourselves to analyzing the alleged interference with the right to life, security and integrity.

[959] Beyond the arguments that overlap those that the appellants have already advanced in regard to the general law – the absence of fault and causation – and that we have already disposed of, the appellants challenge the judge's findings from four vantage points.

[960] First, ITL challenges the issue of the coming into force of the *Charter*. In its view, the judge erred by not taking into account the coming into force of this statute and its impact on liability. Furthermore, because the *Charter* came into force during the relevant period, the constitutive components of the appellants' civil liability were allegedly not proved for all of the members. JTM advances a similar argument, further to which the members who started smoking prior to the coming into force of the *Charter* were not victims of unlawful interference within the meaning of section 49 of the *Charter,* because it was their decision to start smoking that allegedly caused the prejudice.

[961] Second, ITL is of the view that the judge erred by characterizing its actions as unlawful interference. It submits that he did not consider the impact of ITL's conduct on the members, but only its conduct, which constitutes an error. Moreover, it argues that the knowledge of the risks by the members as of January 1, 1980, defeats the argument of unlawful interference. JTM adds to this last argument that no member of the Blais Class was a victim of any interference because the *Charter* came into force only after the smoking commencement date (January 1, 1976). In the Létourneau file, the Class should be substantially reduced because only the members who started smoking between June 28, 1976, and the smoking commencement date (March 12,

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856 Judgment *a quo* at paras. 476–488.

857 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 11.

858 Judgment *a quo* at para. 484.

859 Judgment *a quo* at para. 183.

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1992) are victims of an interference.

[962] Third, ITL takes issue with the intentional nature of the interference.

[963] Fourth, JTM argues that punitive damages are not autonomous and that the judge therefore erred by ordering their payment in the Létourneau file.

[964] We will analyze these arguments by focusing on (A) the field of application of the *Charter* and its coming into force, before analyzing the issue of the (B) unlawful interference and (C) their intentional nature.

3.2. Analysis

A. Field of application and coming into force of the Charter

[965] Sections 1 and 49 of the *Charter*, which are at the heart of these appeals, do not modify the principles of the general law, and it is now established that recourse under paragraph 1 of section 49 does not establish a claim in compensatory damages, distinct from the claim under former article 1053 C.C.L.C., now governed by article 1457 C.C.Q.[860]. Sections 1 and 49 nevertheless confirm the importance of the rights set out therein as a result of their entrenchment in the *Charter*.[861]

[966] The provisions of the *Charter* at issue came into force on June 28, 1976.[862] ITL argues that the judge erred by ignoring this reality and applying the *Charter* to the entire relevant period.

[967] It is incorrect.

[968] It is clear upon reading the following excerpts from the judgment that the judge was fully aware that the *Charter* did not apply throughout the entire relevant period:

> [488] We look in detail at the criteria for assessing punitive damages in Chapter IX of the present judgment. At that time we also consider the fact that the Quebec Charter was not in force during the entire Class Period, having come into force only on June 28, 1976.
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> [1024] Quebec law provides for punitive damages under the Quebec Charter and the CPA and we have ruled that in these files such damages are warranted under both. We recognize that neither one was in force during the entire Class Period, the Quebec Charter having been enacted on June 28, 1976 and the relevant provisions of the CPA on April 30, 1980. Consequently, the punitive damages here must be evaluated with reference to the Companies' conduct only after those

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860 *Béliveau St-Jacques v. Fédération des employées et employés*, [1996] 2 S.C.R. 345 at para. 118–124; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9 at para. 23.

861 *Québec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3 at para. 32.

862 *Proclamation concernant l'entrée en vigueur de certaines dispositions de la Charte des droits et libertés de la personne*, (1976) 108 G.O.Q. II 3875.

dates.

[Emphasis added.]

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[969] Like the situation that prevailed for the C.P.A., the appellants are entitled to affirm that their acts or omissions preceding June 28, 1976, cannot constitute unlawful interference within the meaning of the *Charter* and that consequently, the pack-years smoked prior to that date cannot be included in the calculation of a Member's critical dose of smoking as defined in the judgment *a quo*.

[970] In view of the findings in regard to the general law, however, the coming into force of the *Charter* has no impact on the members' legal interest or on the appellants' liability in their regard and the assessment of compensatory damages, because the general rules of civil liability applicable throughout the entire relevant period are sufficient to justify the compensation awarded by the judge.

[971] Because the judge did not commit a reviewable error in this regard, the Court also need not rule on the existence of fundamental rights prior to the coming into force of the *Charter,* which is far from being excluded.[863]

[972] Obviously, a different conclusion with respect to civil fault based on the standards of the general law in conjunction with liability retained pursuant to the *Charter* would have perhaps required a redefinition of the Blais Class, but that is not the case.

[973] This response to the appellants' arguments on the application of the *Charter* and the full reparation of the prejudice under the general law precludes JTM's argument that the members who started smoking prior to the coming into force of the *Charter* were not victims of unlawful interference.

[974] In summary, the judge correctly took into account the coming into force of the *Charter* in 1976.

B. Unlawful interference with the right to life, personal security and inviolability

[975] The first paragraph of section 1 of the *Charter* protects the rights at issue in these appeals, i.e., the right to life, personal security and inviolability.

1. Every human being has a right to life, and to personal security, inviolability and freedom.	**1.** Tout être humain a droit à la vie, ainsi qu'à la sûreté, à l'intégrité et à la liberté de sa personne.

[976] It is now widely accepted that the finding of an unlawful interference with a right or

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[863] *Béliveau St-Jacques v. Fédération des employées et employés*, [1996] 2 S.C.R. 345 at para. 118. See also Louis LeBel, "La protection des droits fondamentaux et la responsabilité civile" (2004) 49 R. de D. McGill 231 at 235–240; Albert Mayrand, *L'inviolabilité de la personne humaine* (Montreal, Wilson & Lafleur: 1975) at para. 2.

freedom protected by the *Charter* leads, subject to proof of causation and prejudice, to the defendant's civil liability. In principle, that means that the grounds of defence recognized in civil liability are open to the defendant, including the assumption of known risks by the victim. This argument was dealt with in the section of this judgment concerning fault.

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i. The right to life, personal security and inviolability

[977] The right to life guaranteed by section 1 of the *Charter* and also protected by article 3 C.C.Q., materializes most frequently at the time when its object −- the very life of the person protected −- ends. Thus, removing life is clearly an interference with this right,[864] subject to the consequences of the loss of legal personality on the compensation of the prejudice. An interference with the right to life may also consist in conduct that increases the risk of dying, for example the danger to life associated with an unreasonable and unjustified waiting time caused by a dysfunctional aspect of the health system,[865] or yet again, in certain circumstances, a prohibition against medical aid in dying.[866]

[978] The right to personal security of the person is also set out under section 1 of the *Charter*. Under Quebec law one can align the rights to life and inviolability in the sense that a factual situation that threatens a person physically in a serious manner, without necessarily threatening his or her life, may constitute an interference with his or her personal security. This Court has previously, for example, authorized the anonymous designation of a party who had been the subject of serious threats in order to protect the party's right to personal security.[867] It also upheld a decision finding that the aggressive intervention of a tactical squad constituted an interference with the right to life, personal security and inviolability of persons who were killed or wounded.[868] The case law regarding section 7 of the *Canadian Charter* also assists in defining the scope of this right. For example, the Supreme Court found that the act of indirectly prohibiting the hiring of bodyguards through a prohibition against living off the avails of prostitution,[869] or yet again the imposition of unnecessarily complex procedures prior to a therapeutic abortion constituted interference with personal security within the meaning of section 7.[870] In the same manner, an interference with personal security may result from circumstances that incite a person to reasonably fear for his or her life or that threaten his or her right not to be subject to violence, injuries or danger.

[979] Finally, the fundamental right to inviolability is guaranteed by section 1 of the *Charter*, as well as being a right of personality expressly recognized since January 1, 1994, by articles 3 and 10 C.C.Q. Inviolability was first formally recognized in private law in 1971 by the addition of

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[864] *Augustus v. Gosset*, [1996] 3 S.C.R. 268 at para. 62; *de Montigny v. Brossard (Succession)*, 2010 SCC 51 at para. 59.

[865] *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35 at para. 28 and 40, in which the Court stated *inter alia*: "With regard to certain aspects of the two charters, the law is the same. For example, the wording of the right to life and liberty is identical. It is thus appropriate to consider the two together."

[866] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 62−-63. It should be noted that that appeal was decided pursuant to the *Canadian Charter*.

[867] *Association pour l'accès à l'avortement, Re,* J.E. 2002-928, 2002 CanLII 63780.

[868] *Roy c. Patenaude*, [1994] R.J.Q. 2503.

[869] *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

[870] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (in particular the reasons of Beetz J).

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article 19 C.C.L.C.[871] Legal commentary recognizes that integrity and inviolability are, in this context, neighbouring concepts and sometimes difficult to separate, as the first protects the right to remain whole and constitutes the [TRANSLATION] "ultimate connection that unites the person with his or her body;"[872] the second prohibits interference by third parties with the person and [TRANSLATION] "appears as a method of safeguarding his or her dignity."[873] Furthermore, the very language of section 1 of the *Charter* testifies to the close relationship between integrity and inviolability by expressing in French the right to integrity, but in English, the right to *inviolability*. We note finally that it is now clear under Quebec law that the right to integrity protects both physical and psychological integrity.[874] For a court to find an interference with the right to integrity, it is necessary for that interference to leave some sequelae.[875]

[980] As noted above, it is not necessary to rule on the existence of these fundamental rights prior to the enactment of the *Charter*, which existence is not excluded. It is sufficient to reiterate that the right to inviolability was formally recognised in 1971 with the adoption of article 19 C.C.L.C.[876]

[981] Keeping in mind the meaning to assign to the rights guaranteed by section 1 of the *Charter*, one inescapably comes to the conclusion that the judge's findings set out in paragraph 484 of his reasons are well-founded in law, and do not, contrary to the submissions of ITL, sidestep the impact of the wrongful and unlawful conduct of the appellants on the members. The judge stated:

> [484] Given the consequences of these faults on smokers' health and well-being, this constitutes an unlawful interference with the right to life, security and integrity of the Members over the time that they lasted. Compensatory damages are therefore warranted under the Quebec Charter.
>
> [Emphasis added.]

[982] ITL has not established any palpable and overriding error here. In fact, one cannot isolate this excerpt without considering the remainder of the judgment *a quo*. With respect to the Blais Class, it is sufficient, to reach this conclusion, to read the numerous paragraphs of the judgment listing the consequences of the diseases at issue upon the members, their life, their health and

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871 Article 19 C.C.L.C. (S.Q. 1971, c. 84, art. 2) stated:

19. The human person is inviolable. No one may cause harm to the person of another without his consent or without being authorized by law to do so.	**19.** La personne humaine est inviolable. Nul ne peut porter atteinte à la personne d'autrui sans son consentement ou sans y être autorisé par la loi.

872 Édith Deleury & Dominique Goubau, *Le droit des personnes physiques*, 5th ed. (Montreal: Yvon Blais, 2014) at para. 100.

873 Deleury & Goubau, *supra*, note 872.

874 See e.g., *Cinar Corporation v. Robinson*, 2013 SCC 73 at para. 115.

875 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 at paras. 96−97; *Godin v. City of Montreal*, 2017 QCCA 1180 at para. 31.

876 Art. 19 C.C.L.C. (S.Q. 1971, c. 84, art. 2). See also the references cited, *supra* note 859.

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their well-being.[877] For example, when addressing the impact of cancers of the larynx and pharynx, the judge stated:

> [991] Death ultimately ends the torture, but at what price? At page 8 of his report, Dr. Guertin writes that "the patients who die from a relapse of their original cancer will experience a death that is atrociously painful, unable even to swallow their saliva or to breathe" (the Court's translation).

[983] Or yet again, in the case of emphysema:

> [999] On the impact of COPD, and thus emphysema, on the quality of life a person afflicted with it, Dr. Desjardins' report (Exhibit 1382) indicates that:
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> ...
>
> • A person with emphysema can expect to suffer from a persistent cough, spitting up of blood, loss of breath and swelling in the lower members (pages 26-28).
>
> …
>
> [1000] Added to the above, of course, is the likelihood, or rather the near certainty, of a premature death (pages 18 and 19). The anticipation of that cannot but contribute to a loss of enjoyment of life.

[984] In the case of members of the Létourneau Class, the judge also analyzed the impact of addiction on the members.[878] He stated:

> [944] Thus, based on Dr. Negrete's second report, we hold that dependent smokers can suffer the following moral damages:
>
> • The risk of a premature death is the most serious damage suffered by a person who is dependent on tobacco (Exhibit 1470.2, page 2);
>
> • The average indicator of quality of life is lower for smokers than for ex-smokers, especially with respect to mental health, emotional balance, social functionality and general vitality (page 2);
>
> • There is a direct correlation between the gravity of the tobacco dependence and a lower perception of personal well-being (page 2);
>
> • Dependence on tobacco limits a person's freedom of action, making him a slave to a habit that permeates his daily activities and restricts his freedom of choice and of decision (pages 2-3);

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877 Judgment *a quo* at paras. 979−984, 989−991 and 999−1001.

878 Judgment *a quo* at paras. 944−-945.

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[985] The appellants have not succeeded in demonstrating that the judge's findings of violations of the right to life, integrity and personal security are erroneous. In fact, the evidence allowed the judge to find that these rights had been violated by the appellants in that they increased the risk of death of the members and interfered with their integrity by causing lengthy and painful physical and psychological sequelae. This argument is thus destined to fail. The judge properly considered the impact on the members of the appellants' conduct, and it has not been demonstrated that there was any error in law or any palpable and overriding factual error that would justify the intervention of the Court in this regard.

[986] The finding that the appellants infringed the right to life, personal security and integrity of the members of the two Classes is unassailable.

ii. Unlawfulness of the interference

[987] Section 49 requires that an interference with the rights and freedoms protected by the *Charter* be unlawful in order to give rise to compensation for the prejudice:

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.	**49.** Une atteinte illicite à un droit ou à une liberté reconnu par la présente Charte confère à la victime le droit d'obtenir la cessation de cette atteinte et la réparation du préjudice moral ou matériel qui en résulte.
In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.	En cas d'atteinte illicite et intentionnelle, le tribunal peut en outre condamner son auteur à des dommages-intérêts punitifs.

[988] The notion of unlawfulness of the interference has been interpreted as meaning that the interference in question must be wrongful as contemplated by the general rules of civil liability. In *Béliveau St-Jacques v. Fédération des employées et employés*, Gonthier J. stated:[879]

> It is thus clear that the violation of a right protected by the *Charter* is equivalent to a civil fault. The *Charter* formalizes standards of conduct that apply to all individuals. The legislative recognition of these standards of conduct has to some extent exempted the courts from clarifying their content. This recognition does not, however, make it possible to distinguish in principle the standards of conduct in question from that under Art. 1053 *C.C.L.C.*, which the courts apply to the circumstances of each case. The violation of one of the guaranteed rights is therefore wrongful behaviour, which, as the Court of Appeal has recognized, breaches the general duty of good conduct (see *Association des professeurs de Lignery v. Alvetta-Comeau*, 1989 CanLII 1247 (QCCA) [1990] R.J.Q. 130). The

[879] *Béliveau St-Jacques v. Fédération des employées et employés*, [1996] 2 S.C.R. 345 at para. 120. See also *Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. at para. 116.

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> fact that an interpreter of the Charter first has to clarify the scope of a protected right in light of a specific provision does not make this exercise any different from the one that involves deducing a specific application from the principle recognized in Art. 1053 *C.C.L.C.* Moreover, the first paragraph of Art 1457 of the *Civil Code of Québec*, S.Q. 1991, c. 64, now takes care to specify that rules of conduct the violation of which results in civil liability may derive from the law: ....
>
> [Emphasis added.]

[989] It is beyond doubt that the *Charter* introduced standards of conduct relevant to civil liability in Quebec law. It should also be specified that the C.C.Q. imposes on every person the duty to abide by "the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another / *les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui*" (art. 1457 C.C.Q.).[880]

[990] Thus, in order to determine whether conduct is wrongful as understood in the general law, the standards laid down by the *Charter* are relevant. As indicated by Dalphond J.A. in *Genex Communications inc. c. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*: [TRANSLATION] "a breach of the standards of conduct prescribed by the *Charter* constitutes a civil fault as contemplated by art. 1457 C.C.Q."[881]

[991] In summary, the requirement of an unlawful interference set out in the first paragraph of section 49 requires, first, the finding of an unjustified violation of the right protected by the *Charter*. Furthermore, the unlawful interference requires a demonstration that the interference results from wrongful conduct.

[992] The Court rejects the argument that the judge committed a reviewable error by ruling that the appellants' conduct constituted an unlawful interference within the meaning of section 49 of the *Charter*.

[993] In this case, the judge's finding[882] that each of the appellants committed unlawful interference has not been disrupted by the arguments advanced on appeal. The wrongful nature of the interference is based on the appellants' failure to comply with their duty to inform,[883] until the dates of public knowledge in each matter. Those determinations are sufficient to conclude that the appellants committed unlawful interference during the entire period from the enactment of the *Charter* until the end of the relevant period.

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[880] Also recall the preliminary provision of the C.C.Q.:

The Civil Code of Québec, in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property.	Le Code civil du Québec régit, en harmonie avec la Charte des droits et libertés de la personne (chapitre C-12) et les principes généraux du droit, les personnes, les rapports entre les personnes, ainsi que les biens.

[881] *Genex Communications inc. c. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201 at para. 129.

[882] Judgment *a quo* at para. 484.

[883] Under the double aspect of the failure to inform and active disinformation.

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[994] As for the unlawfulness of the interference seen from the perspective of the violation of the standards included in the *Charter* itself, it emerges that the standard of conduct arising from section 1 of the *Charter* requires every person not to conduct himself or herself so as to offer to the public a product that is likely to cause death (right to life), that substantially increases the risk of mortality (the right to personal security), or that affects health and forces a person to undergo invasive and painful medical treatment (the right to integrity), while trivializing the mortal and addictive nature of the product. The different standards of conduct that arise from the *Charter* certainly required the appellants to refrain from engaging in advertising that represented cigarettes in a positive manner, sponsoring sporting or artistic activities, or acting in a manner that sowed confusion in the mind of the public.

[995] The trial judge's factual determinations therefore allowed him to conclude that the interference committed by the appellants was unlawful within the meaning of the first paragraph of section 49 of the *Charter* as of the date of its coming into force.

[996] Furthermore, the Court is of the view that the members' knowledge of the dangers of tobacco is not exculpatory in the determination of the unlawfulness of the interference. This is a defence available under the general law, which we have already discussed. Knowledge of the dangerousness of tobacco has the same consequence it has under the general law, i.e., depending on the circumstances, the exoneration or the sharing of liability.

[997] Furthermore, on this same topic, one can certainly question the concurrent application of the *Charter* and the C.P.A., an issue which the judge did not address. A merchant who violates its obligations towards the consumer, and in so doing, violates a right enshrined by the *Charter* commits a interference with a right that could be characterized as unlawful, because the interference arises out of conduct that does not comply with the rules of conduct incumbent upon it, in this case, pursuant to the C.P.A. In this context, presuming that it is not open to the merchant to invoke the consumer's knowledge under the C.P.A., it is also not open to the same merchant to do so in regard to the same unlawful interference under section 49 of the *Charter*.[884]

[998] It should be recognized that the fundamental rights and freedoms enshrined in the *Charter* have preponderant value in the Quebec judicial order; that the C.C.Q. governs relations between persons in harmony with the *Charter* and that the C.P.A. is a statute of public order of protection. It follows that the harmonious interaction of all these rules does not exclude that the standards of public order prescribed by the C.P.A. can constitute relevant rules of conduct in accordance with article 1457 C.C.Q. for the guarantee and implementation of rights promulgated and protected by the *Charter.*

C. Intentional interference

[999] The extraordinary nature of punitive damages in Quebec civil law requires that their award result from an express provision of law, as provided by article 1621 C.C.Q. The second

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[884] It should be noted that the respondents did not raise the argument that it would be inappropriate to apportion liability pursuant to the C.P.A. or the *Charter* for the periods following their respective coming into force.

paragraph of section 49 of the *Charter* authorizes the award of punitive damages where the unlawful interference with rights or freedoms protected by the *Charter* is intentional.

[1000] It was settled during the hearing that the analysis of intent should focus on the consequences of the injurious misconduct and not on the conduct itself.[885] The case law requires proof (i) that the author of the interference wished to cause the consequences of the wrongful interference or (ii) that he or she was aware of the immediate and natural or extremely probable consequences of his or her misconduct.[886]

[1001] Although the autonomous nature of punitive damages was previously a somewhat controversial subject, it is now well established, contrary to what JTM argues, that punitive damages may be awarded without requiring a successful principal claim in compensatory damages. In *de Montigny v. Brossard (Succession)*, the Supreme Court ruled that except where dealing with a public indemnification scheme "there is no reason not to recognize the autonomous nature of exemplary damages" and that "[i]f the autonomy of the right to exemplary damages conferred by the *Charter* is denied ... this amounts to making the implementation of *Charter* rights and freedoms subject to the rules applicable to civil law actions."[887], which is not consistent with the principle of priority of the *Charter* in the Quebec legal system. There is no doubt that punitive damages are available in this case, even in the Létourneau action.

[1002] Furthermore, given the autonomy of the claim in punitive damages, we can question what the applicable burden of proof is, since it is not necessary to demonstrate that material or moral damages result from the unlawful and intentional interference. In a context such as the Létourneau matter, where solely punitive damages are awarded, is it necessary to establish a causal connection as is the case where compensatory damages are awarded?

[1003] At first glance, the requirement of an unlawful interference presumes that the victim of the violation has established a nexus between the wrongful actions of the defendant and the right or freedom protected by the *Charter* that was interfered with, even if such interference is neither quantified, nor quantifiable. In fact, the notion of unlawful interference refers, as we have just indicated, to the violation of a right that results from conduct infringing a standard of conduct.[888]

[1004] Characterizing the nexus between the fault and the interference with a right as "causal" gives rise to confusion. In *Montréal (Ville) v. Lonardi*,[889] in a judgment written by Gascon J., the Supreme Court has recently noted that a causal connection is not necessary *per se* in the case of an award of punitive damages: "[o]n this point, I note that, while it is true that a fault that is not causally connected to the damage in question cannot ground an obligation to make reparation for the injury, it can nonetheless form the basis for an award of punitive damages."

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885 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 at para. 121.

886 See e.g., *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at para. 164; *Cinar Corporation v. Robinson*, 2013 SCC 73 at para. 118; *de Montigny v. Brossard (Succession)*, 2010 SCC 51 at para. 68; *Ville de Québec v. Association des pompiers professionnels de Québec inc.*, 2017 QCCA 839 at para. 105; *Agence du revenu du Québec v. Groupe Enico inc.*, 2016 QCCA 76 para. 166–167.

887 *de Montigny v. Brossard (Succession)*, 2010 SCC 51 at para. 45.

888 *Québec (Curateur public) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 at para. 116.

889 *Montréal (City) v. Lonardi*, 2018 SCC 29 at para. 80.

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[1005] Notwithstanding the autonomy of punitive damages, it remains nevertheless necessary to establish a connection, different from a causal connection, between the conduct of the defendant and the interference with the right or freedom of the victim. Once the proof of this connection has been established, it remains only to be determined whether the unlawful interference was intentional, notwithstanding the fact that the consequences on the victim of the interference may not be quantified or quantifiable.

[1006] None of the arguments raised on appeal convinces us that the judge committed a reviewable error in his assessment of the intentional nature of the unlawful interference with the rights of the members of the two Classes.

[1007] The appellant ITL cites the following excerpt from the reasons of the trial judge in support of its claim that the judge improperly applied the criterion set out in *St-Ferdinand* case:

> [485] On the second question, we found that the Companies not only knowingly withheld critical information from their customers, but also lulled them into a sense of non-urgency about the dangers. That unacceptable behaviour does not necessarily mean that they malevolently desired that their customers fall victim to the Diseases or to tobacco dependence. They were undoubtedly just trying to maximize profits. In fact, the Companies, especially ITL, were spending significant sums trying to develop a cigarette that was less harmful to their customers.
>
> [Emphasis added.]

[1008] However, ITL was careful not to refer to the following paragraph of the judge's reasons, which refer to the remarks of L'Heureux-Dubé J. in *St- Ferdinand*:

> [486] Pending that Eureka moment, however, they remained silent about the dangers to which they knew they were exposing the public yet voluble about the scientific uncertainty of any such dangers. In doing so, each of them acted "with full knowledge of the immediate and natural or at least extremely probable consequences that (its) conduct will cause". That constitutes intentionality for the purposes of section 49 of the Quebec Charter.
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> [Reference omitted.]

[1009] It can be understood from this excerpt from the reasons that according to the trial judge, the conduct of each of the appellants meets the criterion of subjective knowledge of the immediate and natural consequences *and* that of objective knowledge of the extremely probable consequences of its actions. Either way, a global reading of the judge's reasons on the appellants' actions after June 28, 1976, certainly supports his conclusion that each of the appellants was fully aware, at least as of the coming into force of the *Charter*, of the immediate and natural consequences, or yet again the extremely probable consequences, of its actions and omissions. There is no error here.

[1010] In fact, in our view, this case appears even more patent than several textbook cases including *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-*

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Ferdinand.[890]. For the purpose of these appeals, it is sufficient to reiterate some of the judge's findings of fact. The appellants have known since the 1950s of the dangers inherent in cigarettes,[891] but they nevertheless continued to present cigarettes positively in their advertising campaigns subsequent to the coming into force of the *Charter* on June 28, 1976, until the end of the relevant period, with the exception of certain short periods.[892] They failed to disclose the danger of contracting the diseases at issue on their cigarette packages until October 31, 1989, and of becoming addicted to tobacco until September 12, 1994.[893] They maintained what the judge properly characterized as a policy of silence and conspired within the CTMC to delay raising public awareness.[894] These findings are examples of the trial judge's findings of fact.

[1011] Several elements of evidence in the court records demonstrate both the appellants' knowledge and their concerted efforts to prevent consumer awareness of the dangers. It is sufficient to recall the reaction of the CTMC, of which the Appellants were members, to the publication of a key report on addiction by the Surgeon General of the United States in 1988. The judge stated:

> [466] Rather than embracing its findings, the industry, centralizing its attack through the [Canadian Tobacco Manufacturers' Council], chose to make every effort to undermine its impact. The May 16, 1988 memo to member companies capsulizing the CTMC's media strategy with respect to the report (Exhibit 487) merits citation in full:
>
> > It has been agreed that the CTMC ... will handle any media queries on the [Surgeon-General's] Report on Nicotine Addiction.
> >
> > The comments fall into three broad categories:
> >
> > 1- The report flies in the face of common sense -
> >
> > - Thousands of Canadians and millions of people all over the world stop smoking each year without assistance from the medical community.
> >
> > - How can you describe someone who lights up a cigarette only after dinner as an "addict"?
> >
> > - The word addiction has been overextended in the non-scientific world: some people are "addicted" to soap operas, to chocolate and to quote Saturday's Montreal Gazette, "to love".
> >
> > 2- The S-G's Report is another example of how the smoking issue has been politicized. This is another transparent attempt to make smoking socially unacceptable by warming up some old chestnuts. We don't think the S-G is adding to his credibility by trading on the public confusion between words like "habit" and "dependence" and "addiction".

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890 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211.

891 Judgment *a quo* at paras. 70, 72, 138, 566, 567, 612 and 622.

892 Judgment *a quo* at paras. 420 and 535.

893 Judgment *a quo* at para. 110.

894 Judgment *a quo* at para. 523.

> 3- The S-G's Report also trivializes the very serious illegal drug problem in North America. It is (ir)responsible to suggest that to use tobacco is the same as to use Crack? (sic)
>
> [467] This posture was continued in the CTMC's reaction to the passage of the *Tobacco Products Control Act* later in 1988. In a letter to Health Canada in August, it vigorously opposed adding a pack warning concerning addiction, stating that "(c)alling cigarettes 'addictive' trivializes the serious drug problems faced by our society, but more importantly, the term 'addiction' lacks precise medical or scientific meaning".
>
> [Emphasis added; references omitted.]

[1012] By jointly opposing the scientific evidence advanced by a public authority and comparing the report of the Surgeon General to an attempt to make smoking socially unacceptable “by warming up some old chesnuts,” the appellants have clearly shown the specific intent and state of mind at issue in *St- Ferdinand*. In fact, according to a factual conclusion that has not been successfully challenged, the appellants had been aware at that time for nearly forty years of the addictive properties of tobacco. This concerted decision of the CTMC is but one example of their state of mind. This conduct goes beyond mere recklessness or negligence − which, as we know since *St-Ferdinand* are not sufficient − but indicates that the appellants acted “in full knowledge of the ... at least extremely probable consequences” of their actions. The appellants can no longer feign ignorance of the scientific and statistical evidence gathered in 1988.

[1013] More specifically, these factual findings show that the appellants could not have been unaware of the extremely probable consequences of their denials on persons who would become addicted to tobacco, including all the members of the Létourneau Class as defined and on smokers who would develop one of the diseases at issue. They understood that this marketing strategy had the consequence of throwing individuals into the path of addiction, causing mortal illness or exposing them to high risks of developing such diseases. By doing so, they certainly interfered in an unlawful and intentional manner with the right to life, personal security and inviolability of the members of the two Classes. All of the evidence retained by the trial judge, including his finding on the policy of silence, sufficiently warrants this conclusion.

[1014] The judge committed no error justifying the intervention of the Court by characterizing the interference as intentional.

3.3. Summary

[1015] In the absence of a reviewable error in the judgment *a quo*, the order to pay compensatory damages to members of the Blais Class under the *Charter* does not warrant intervention on appeal. The right to life, personal security and inviolability of the members of the two Classes have been infringed by the appellants in a wrongful and unlawful manner because the standards of conduct established by the general law have been violated. As the judge indicated, the interference continued from the coming into force of the *Charter* until the end of the relevant period covered by the claims. We recall that this finding is in no way necessary to warrant full compensation of the prejudice in view of the judge’s conclusion under the general law.

[1016] The judge did not commit any reviewable error by finding that the interference was

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intentional, and, as a result, it was open to him to order the payment of punitive damages in the two matters. The assessment of their quantum will be addressed in section IV.5 of this judgment given that the C.P.A. and the *Charter* overlap in part with respect to the objectives of punitive damages and the acts that must be analyzed to establish their quantum.

4. PRESCRIPTION

4.1. Prescription of compensatory damages

A. *Background*

[1017] It should be noted at the outset that the trial judge did not award compensatory damages in the Létourneau action and that this finding was not challenged on appeal.

[1018] As for prescription of compensatory damages in the Blais action, the appellants JTM and ITL[895] mainly challenge the claims of persons who, according to the appellants, the trial judge erroneously added to the Class in his July 3, 2013, decision amending the description of the Classes.[896]

[1019] More specifically, they argue that the claims of persons diagnosed with a particular disease between the date of the authorization judgment (February 21, 2005, the appellants' implicit cut-off date for Class membership) and July 3, 2010, (three years before the judgment amending the Class) are prescribed. They also argue that persons not covered by the initial action do not benefit from any suspension or interruption of prescription

[1020] The trial judge rejected those claims, ruling instead that it is in the interests of justice that persons who acquire an interest in an ongoing class action, subsequent to the authorization judgment, be included in it rather than being forced to bring separate actions.

[1021] The judge held that the persons thus added to the class benefited from the suspension of prescription set out in article 2908 C.C.Q.[897] Relying primarily on the reasons of Gascon J., then of the Superior Court, in *Marcotte v. Fédération des caisses Desjardins du Québec*,[898] he was of the view that when the judge authorizing the action considers it advisable not to stipulate a cut-off date in the description of the class, the suspension of prescription set out in article 2908 C.C.Q. may last until such a date is required, one way or another, depending on the circumstances.

[1022] In this case, the trial judge stated that the lack of a closing date is readily explained by the long latency period of the diseases in question, making it clear that the number of diagnoses would continue to increase among those who smoked the critical dose before November 20, 1998. As a result, those persons should have the opportunity to join the class action, without

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895 RBH relied on the arguments of ITL and JTM.

896 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2013 QCCS 4904.

897 Judgment *a quo* at paras. 857−858.

898 *Marcotte c. Fédération des caisses Desjardins du Québec*, 2009 QCCS 2743, main appeal allowed and cross- appeal dismissed by *Fédération des caisses Desjardins du Québec v. Marcotte*, 2012 QCCA 1395, appeal to the Supreme Court allowed in part by *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57.

having to institute a new action or lose their right to claim damages.

[1023] JTM reiterates that modification of the description of the class requested after commencement of the trial cannot be authorized, because it would contravene article 1013 f.C.C.P., an argument rejected by the trial judge on the ground that, on the contrary, article 1022 f.C.C.P. allows the court to amend the class at any time.

[1024] Finally, ITL claims that, given the knowledge date fixed by the trial judge regarding the dangers related to smoking (January 1, 1980), the trial judge should have required the respondents to establish that it was impossible for them to act within the meaning of article 2904 C.C.Q. with respect to the claims related to a safety-defect and to the failure to inform.

B. *Analysis*

[1025] The following articles of the C.C.Q. set out the prescription mechanisms specific to class actions by providing for the interruption of prescription following institution of the authorized action (art. 2897) and suspension of prescription as of the authorization proceedings (art. 2908):

2897. An interruption which results from the bringing of a class action benefits all the members of the group who have not requested their exclusion from the group.	**2897.** L'interruption qui résulte de l'exercice d'une action collective profite à tous les membres du groupe qui n'ont pas demandé à en être exclus.
2908. An application for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the application.	**2908**. La demande pour obtenir l'autorisation d'exercer une action collective suspend la prescription en faveur de tous les membres du groupe auquel elle profite ou, le cas échéant, en faveur du groupe que décrit le jugement qui fait droit à la demande.
The suspension lasts until the application for leave is dismissed, the judgment granting the application for leave is set aside or the authorization granted by the judgment is declared lapsed; however, a member requesting to be excluded from the action or who is excluded therefrom by the description of the group made by the judgment on the application for leave, a judgment in the course of the proceeding or the judgment on the action ceases to benefit from the	Cette suspension dure tant que la demande d'autorisation n'est pas rejetée, que le jugement qui y fait droit n'est pas annulé ou que l'autorisation qui est l'objet du jugement n'est pas déclarée caduque; par contre, le membre qui demande à être exclu de l'action, ou qui en est exclu par la description que fait du groupe le jugement qui autorise l'action, un jugement rendu en cours d'instance ou le jugement qui dispose de l'action, cesse de profiter de la suspension de la prescription.

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suspension of prescription.

In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.	Toutefois, s'il s'agit d'un jugement, la prescription ne recommence à courir qu'au moment où le jugement n'est plus susceptible d'appel.

[Emphasis added.]

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[1026] It is clear from article 2908 C.C.Q. that the suspension initially benefits persons who fall within the description of the class as it appears in the conclusions of the application for authorization of the class action. Persons excluded as a result of a more restrictive description of the class in the authorization judgment will cease to benefit from the suspension of prescription as of that judgment.

[1027] It should be noted that the legislator does not provide for what happens if the description expands the class. This may seem self-evident given the *ultra petita* rule, but the significant powers of the authorizing judge, whose role also includes protection of the members, allow him or her to describe a broader class than the one defined in the conclusions of the application for authorization.[899]

[1028] It could be argued in this case that the suspension of prescription extends to "new" members only as of the authorization judgment. They cannot argue that they refrained from bringing an individual action because they believed they benefited from the class action being authorized.

[1029] In any event, the wording of article 2908 C.C.Q. indicates, at least implicitly, that the suspension continues until the judgment ruling on the class action, and also provides that a judgment rendered in the course of the proceedings or the final judgment could amend the description of the class to exclude members previously covered by the action.

[1030] Finally, section 27 of the T.D.R.A. establishes a rule that derogates from the general law in regard to the prescription period applicable to class actions seeking damages for tobacco-related injury:

27. An action, including a class action, to recover tobacco-related health care costs or damages for tobacco-related injury may not be dismissed on the ground that the right of recovery is prescribed, if it is in progress on 19 June 2009 or brought within three years following that date.	**27.** Aucune action, y compris une action collective, prise pour le recouvrement du coût de soins de santé liés au tabac ou de dommages-intérêts pour la réparation d'un préjudice lié au tabac ne peut, si elle est en cours le 19 juin 2009 ou intentée dans les trois ans qui suivent cette date, être rejetée pour le motif que le droit de recouvrement est prescrit.
Actions dismissed on that ground before 19 June 2009 may be revived within three years following that date.	Les actions qui, antérieurement au 19 juin 2009, ont été rejetées pour ce motif peuvent être reprises, pourvu seulement qu'elles le soient dans les trois ans qui suivent cette date.

[1031] This provision, found to be constitutionally valid,[900] shows the legislator's clear intention to

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899 *Société des loteries du Québec (Loto-Québec) c. Brochu*, 2007 QCCA 1392 at para 6.

900 *Imperial Tobacco Canada Ltd. v. Québec (Procureure générale)*, 2015 QCCA 1554, leave to appeal to

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avoid dismissal of the actions described therein for any reason related to the passage of time, provided that the actions were commenced before June 19, 2012, without having to demonstrate an inability to act within the meaning of article 2904 C.C.Q. As will be seen below, claims arising between the 2005 authorization judgment and the March 2012 cut-off date are included in the class action initiated in 1998. As such, they benefit from both the rules of section 27 T.R.D.A. and the general law providing for the suspension of prescription in a class action.

[1032] In this case, an initial observation is in order: the description of the Blais Class in the application for authorization to institute the class action served on November 20, 1998, does not set any specific timeframe guidelines. The description is as follows:

> [TRANSLATION]
>
> All persons who are or have been victims of cancer of the lungs, larynx or throat or who suffer from emphysema after having inhaled cigarette smoke for a prolonged period of time;
>
> And the successors and heirs of deceased persons who otherwise would have been part of the class.

[1033] It should be noted that the use of the expression “are or have been victims” is, at the very least, ambiguous and does not preclude the description from being prospective in scope.

[1034] The judgment authorizing the action,[901] handed down on February 21, 2005, by Jasmin J. notes that the proposed description is [TRANSLATION] “much too vague,” which compromises the exercise of the right to be excluded from the Class. After that finding, Jasmin J. reformulated the description of the Blais Class as follows:

> [TRANSLATION]
>
> All persons residing in Quebec who had lung, larynx or throat cancer or emphysema <u>when the motion was served</u> or who have developed lung, larynx or throat cancer or emphysema <u>since the motion was served</u> after directly inhaling cigarette smoke and smoking a minimum of 15 cigarettes per 24-hour period over a prolonged and uninterrupted period of at least five years, as well as the successors of any person who met the above-mentioned requirements and who has died since the motion was served.
>
> [Emphasis added.]

[1035] Aside from the particulars regarding the required level of smoking, the new description did not eliminate the temporal ambiguity. On the contrary, by specifying that the Class includes not only persons affected by one of the diseases stipulated when the request for authorization to institute the action was served, but also those who had since then been diagnosed with the disease, if there is no a cut-off date, any smoker who meets the smoking criteria and who

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SCC refused, 36741 (5 May 2016).

[901] *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, J.E. 2005-589, 2005 CanLII 4070 (Sup. Ct.).

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develops such a disease after the authorization judgment may consider himself included in the action.

[1036] On April 4, 2013, the respondents filed a motion to amend the description of the Blais and Létourneau Classes in response to the evidence adduced by the plaintiffs. In addition to the critical dose of smoking, which the respondents wished to specify, the motion alleged the need to limit the eligibility period for the Blais Class by specifying a cut-off date.

[1037] On July 3, 2013, the trial judge amended the description of the Blais Class.[902] He established the critical dose of smoking at five pack/years and stated that this condition had to be satisfied before November 20, 1998, the date of service of the application for authorization.

[1038] The trial judge also agreed to set the cut-off date for joining the class as the first day of the trial, namely March 12, 2012, as requested by the respondents. He did not accept the appellants' position that the date of the authorization judgment, February 21, 2005, was the cut-off date for Class membership and could not be exceeded. It should be borne in mind that, according to the trial judge, there is nothing to prevent the addition to the Class of persons who are in a similar situation to the initial members, but whose interest arose after the authorization judgment. In the trial judge's view, such an amendment promotes access to justice, while avoiding the multiplication of long and costly actions based on the same facts.

[1039] The description of the Class was therefore amended on July 3, 2013,[903] to read as follows:

> [TRANSLATION]
>
> The class is composed of all persons residing in Quebec who satisfy the following criteria:
>
> 1) To have smoked, before November 20, 1998, a minimum of 5 pack/years of cigarettes made by the defendants ....
>
> 2) To have been diagnosed before March 12, 2012, with:
>
> a) Lung cancer or
>
> b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx, or
>
> c) Emphysema.
>
> The class also includes the heirs of the persons deceased after November 20, 1998, who satisfied the criteria mentioned herein.

[1040] The description of the Class remains the same in the judgment *a quo* (with a few linguistic nuances), the only difference being that the smoking dose is increased to 12 pack/years.

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902 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp*., 2013 QCCS 4904.

903 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp*., 2013 QCCS 4904 at para. 83

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[1041] This brief overview of the changes in the description of the Blais Class shows that any time until the July 3, 2013, judgment, a person who met the smoking condition and developed one of the diseases in question could reasonably believe that he or she belonged to the Blais Class and did not have to institute an individual action to avoid losing his or her rights because of the passage of time.

[1042] Thus, the apparent logic of the appellants' argument that the right of action of smokers diagnosed with a specified disease after the February 21, 2005, authorization judgment is prescribed goes against the spirit of the legislative provisions in question. It should be reiterated that they provide for the suspension and interruption of prescription for class actions (arts. 2908 and 2897 C.C.Q.), for the publication of the description of the class and any amendments thereto during the proceedings (arts. 1005, 1006, 1022 and 1045 f.C.C.P.). The legislator's intention to protect the rights of class members, as described in the authorization judgment and in any subsequent decision amending the composition of the class, is clear. In addition, publicity surrounding the composition of the class gives the persons concerned the opportunity to verify if they are included in the action, with the corollary right to be excluded.

[1043] In this context, the description of the Blais Class in the February 21, 2005, authorization judgment, published in accordance with the law, did not include any temporal restriction suggesting that a smoker diagnosed with one of the diseases in question after that date should sue the appellants individually. On the contrary, as soon as the disease was diagnosed, he or she could legitimately consider himself or herself part of the class.

[1044] The judge was correct in applying the principle stated by Gascon J. in *Marcotte c. Fédération des caisses Desjardins du Québec*.[904] Gascon J. explained that absent a cut-off date in the initial description of the class, there was no basis for concluding that the action was prescribed:

> [TRANSLATION]
>
> [427] As for the new members who would henceforth be added as a result of transactions made and invoiced after the date of the authorization judgment, the Court is of the view that Desjardins' argument should not be accepted. The description of the class included in the authorization judgment and the wording of the notices to subsequent members defeat it.
>
> [428] In either case, the description of the class did not include a specific cut-off date with regard to the end of the period in question. However, in accordance with article 2908 C.C.Q., the suspension of the prescription period applies in favour of the class described by the judgment authorizing the application. Furthermore, according to article 2897 C.C.Q., the interruption resulting from the institution of a class action benefits the class members who have not asked to be excluded from the action.

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[904] *Marcotte c. Fédération des caisses Desjardins du Québec*, 2009 QCCS 2743, main appeal allowed and cross-appeal dismissed by *Fédération des caisses Desjardins du Québec v. Marcotte*, 2012 QCCA 1395, appeal to the Supreme Court allowed in part by *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57. In our view, the principle stated by Gascon J. in the Superior Court reflects the state of the law.

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> [429] As the Court pointed out in its March 14, 2008, decision, and as the Court of Appeal recommended in *Société des loteries du Québec c*. *Brochu*, it is true that the need to include a cut-off date in the description of a class is obvious. However, its absence in the authorization judgment or in the notices to members may not be interpreted in such a way as to adversely affect the members who are the subject of it.
>
> [430] If this description was incorrect or incomplete, it was the responsibility of the parties, primarily Desjardins, to ensure that it was clarified to avoid any ambiguity. This clarification occurred only in March 2008, after Mr. Marcotte's application to amend.
>
> [431] In the meantime, the description of the class in the authorization judgment and the notices to members indicated that it would be open from April 17, 2000, with no specific cut-off date.
>
> [432] According to the Court, any doubt in this regard must operate in favour of the class members. This is particularly necessary regarding the content of the notice to members, approved by the authorization judgment, which is the method of communication chosen to inform members.
>
> [433] In matters of the prescription and extinction of a right, the party invoking it, i.e., Desjardins, has the burden of proof. In this case, the ambiguity resulting from the absence of a cut-off date in the initial description of the class does not support the conclusion that there is preponderant evidence supporting Desjardins' position.
>
> [434] There is no reason to conclude that there are rights of action in this case that are prescribed due to a "presumed" July 5, 2004, cut-off date for the description of the class, where neither the authorization judgment nor the notices to members specify it.

[1045] The above comments may be transposed to this case. The ambiguity resulting from the absence of a cut-off date in the description of the Blais Class does not support the conclusion that the claims of persons diagnosed with a specified disease since the service of the application for authorization became prescribed on February 21, 2005.

[1046] Furthermore, as this Court noted in *Société des loteries du Québec (Loto-Québec) c. Brochu*, this approach is consistent with the public interest objectives of class action proceedings, and with the role of the court in protecting the rights of absent persons:[905]

> [TRANSLATION]
>
> [6] Once the class action is authorized, the new philosophy embodied in civil procedure as a result of the 2003 reform has increased the extent of intervention of the judge responsible for managing the case so that he or she can get to the essential phase of inquiry and hearing on the merits. The trial judge specially

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[905] *Société des loteries du Québec (Loto-Québec) c. Brochu*, 2007 QCCA 1392.

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> assigned for this purpose is best placed to decide questions concerning the action's termination date and the composition of the class. The Code also entrusts that judge with the role of protecting absent persons and consequently grants him or her a significant measure of discretion.
>
> ...
>
> [8] In this case, the appellant failed to demonstrate that the trial judge exercised this
> discretion inappropriately. The solution he applied respects the twofold objective of promoting access to justice and avoiding the multiplicity of remedies. By amending the description of the class, he did not alter the purpose of the class action, which is to determine whether users of video lottery terminals have become pathological gamblers because the appellant made available to them devices that could cause this disorder without proper warning. He simply added to the initial action the claim of those who had the same problems at a later time, thus avoiding the institution of a new class action for the sole purpose of covering the period of more than five years since the action was authorized.
>
> [9] The reasoning proposed by the appellant would have the effect of requiring persons who have the same interest as the original class, but respecting a later time, to institute other class actions, thereby wasting judicial resources, sterilizing the institution and weakening its social vocation.
>
> [Emphasis added; References omitted.]

[1047] In addition to the fact that the above passage recognizes that the trial judge may expand the group, the Court reaffirms the importance of avoiding a multiplicity of actions and promoting access to justice.

[1048] The argument to the effect that members whose right of action has not arisen cannot be included in the class covered by the authorization judgment specifically disregards the description of the class and the initial temporal ambiguity. It would also be unfair to deprive people of their rights on the grounds that the description in the authorization judgment was incorrect, as Gascon J. pointed out. It was up to the appellants to raise this issue promptly if they perceived it as a difficulty. They did not do so.

[1049] In short, it was not until July 3, 2013, that members of the Blais Class were excluded on the grounds that their illness was diagnosed after March 12, 2012, and that they would lose the benefit of the suspension and potential interruption of prescription under articles 2908 and 2897 C.C.Q. Until judgment amending the description of the Class to specify a cut-off date, the definition of the Class included all smokers who had developed one of the specified diseases, without any temporal restriction. As Gascon J. noted, any doubt in that regard must operate in favour of the class members.

[1050] JTM's argument based on article 1013 f.C.C.P., can be rejected summarily. The trial judge rightly held that article 1022 f.C.C.P. allows the court to amend the class at any time, even on its own initiative. This conclusion is in keeping with the principles established in *Société des*

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loteries du Québec (Loto-Québec) c. Brochu,[906] in which the Court proposed a broad interpretation of the third paragraph of article 1022 f.C.C.P. and advocated a flexible approach to amending the description of a class. Such an approach, which may be transposed to this case, is consistent with the principles and objectives underlying the very existence of the class action: access to justice and the sound management of judicial resources.

[1051] Lastly, ITL's argument based on the inability to act must also be summarily rejected, as it is incompatible with section 27 T.R.D.A., as interpreted above.[907]

4.2. Prescription of punitive damages

A. Background

[1052] The trial judge held that the T.R.D.A. does not apply to the prescription of punitive damages, and he applied the three-year prescription period (art. 2925 C.C.Q.).[908] In the Blais action, he held that claims that occurred before November 20, 1995, three years before service, are prescribed.[909] In the Létourneau action, he held that none of the claims are prescribed, because the members were not aware of their cause of action before the addiction knowledge date (March 1, 1996), which was when prescription started to run. As the action was served on September 30, 1998, none of those claims are prescribed.[910]

[1053] The appellants frame the argument on appeal primarily by challenging the accuracy of the addiction knowledge date, arguing that prescription had run with respect to almost all the punitive damages in both actions.

[1054] In the Blais action, JTM asserts that all the causes of action are prescribed. In regard to the C.P.A., it argues that no prohibited practice could have been committed after the harmful nature of the product became known (January 1, 1980) and that the causes of action arose when a member started smoking. As regards the *Charter*, it argues that only the claims of members who satisfy the following three conditions are not prescribed: (1) the member was unaware of the harmful nature of tobacco, (2) the member became addicted to it before 1980 and (3) the member was diagnosed with one of the diseases in question after November 20, 1995. According to ITL, it was up to the respondents to prove that it was impossible for them to act between the knowledge date (January 1, 1980) and the three years before service (November 20, 1995).

[1055] In the Létourneau action, JTM and ITL challenge the knowledge date (March 1, 1996). They are of the view that the date is incorrect because of the addiction warnings printed on cigarette packages as of September 12, 1994. They claim that the trial judge erred in postponing

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906 *Société des loteries du Québec (Loto-Québec) c. Brochu*, 2007 QCCA 1392.

907 See para. [1031] above.

908 Judgment *a quo* at para. 897.

909 Judgment *a quo* at para 900.

910 Judgment *a quo* at paras 887−890. The judge nevertheless noted the respondents' admission to the effect that the claims for punitive damages that arose before September 30, 1995, are prescribed. Strictly speaking, however, this is of no consequence because the trial judge held that all the causes of action arose after September 30, 1995.

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the knowledge date by 18 months so that the warnings would have time to have full effect on awareness of the addiction. The prescription starting point would therefore be September 12, 1994, − the date of the mandatory publication of warnings on cigarette packages that cigarettes are addictive. The class members should therefore be deemed to be aware of the product's safety defect described in the warnings as of that date.

[1056] JTM further claims that using the knowledge date as the date the cause of action arose is an error of law, because a cause of action arises the same time as the violation of the legislation that makes punitive damages available. It therefore follows that, in the case of the C.P.A., the cause of action would have arisen when a member started smoking, whereas in the case of the *Charter*, it would have arisen when the members became addicted to tobacco. It would therefore be up to the members to establish that their cause of action is not prescribed by proving that it was impossible for them to act. Alternatively, the trial judge acknowledged that well before September 1994, large segments of the population knew that cigarettes create dependency, which would negate the members' purported inability to act before the knowledge date.

[1057] Lastly, and more generally, it is argued that claims arising between 2005 and 2010 due to the redefinition of the Classes are prescribed. This argument was rejected for the reasons set out in section IV.4.1 dealing with compensatory damages, and the same reasoning applies to punitive damages. As for the argument that the trial judge took into account acts committed by the appellants during the prescribed period to establish the quantum of punitive damages, the Court will address this in the assessment of the quantum (section IV.5).

B. Analysis

[1058] These actions, insofar as they concern punitive damages, are prescribed by three years (art. 2925 C.C.Q.). The T.R.D.A. does not apply to punitive damages since they are not compensatory and are therefore not "damages for tobacco-related injury / dommages-intérêts pour la réparation d'un préjudice."[911] Section 1 T.R.D.A. also confirms that the scope of that statute is limited to damages for injury. This reading of the T.R.D.A. has not been contested here.

[1059] Article 2925 C.C.Q. therefore applies to the claims for punitive damages, as the judge held, since the part of the action involving punitive damages can be likened to an action to enforce a personal right:

2925. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise determined.	**2925.** L'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est pas autrement fixé se prescrit par trois ans.

[1060] With respect to the C.P.A., it should be noted that section 273 applied until December 13, 2006. Since repealed, it also prescribed a three-year prescription period, which began to run as of the formation of the contract in question.

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[911] Section 27 T.R.D.A. [emphasis added]. The idea of reparation, explicit in the French text, is implicit in the English text.

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[1061] Extinctive prescription of a right of action runs as of the day that right of action arose (art. 2880, para. 2 C.C.Q.). In an extracontractual action for compensatory damages, a right of action arises as of the day the holder had reasonably sufficient knowledge of the elements constituting his or her right of action.[912] In the context of a claim for punitive damages, knowledge of the elements which constitute the right of action also marks the starting point for prescription. In the more specific case of section 273 C.P.A., which stipulated that an action based on the C.P.A. is prescribed "by three years reckoning from the making of the contract," it has also been held that prescription does not begin to run as of the making of the contract if the consumer is unaware of the elements on which his action is based.[913] In this sense, section 273 called for the same approach as the general law.

[1062] The difficulty of these appeals lies rather in the duality of the legislative provisions that justify the order for punitive damages − the C.P.A. and the *Charter* − as well as in the identification of the facts generating liability, which differ based on the legislative provisions and the files, and which extend over a long period of time.

i. Blais file

[1063] In the Blais file, the judge held that the claims for punitive damages that arose as of November 20, 1995, i.e., three years before service,[914] were not prescribed. This conclusion will be analyzed under the *Charter* and then under the *C.P.A.*

a. Charter

[1064] Analysed under the *Charter*, the issue of prescription for punitive damages does not pose a significant problem. It is well known that a right of action arises [TRANSLATION] "the first day the holder of the right could have taken action to assert it."[915] The unlawful and intentional interference with the right to life, personal security and inviolability of the Blais Class materialized when any of the diseases in question was diagnosed. At that time and thereafter is when their right to life was in jeopardy and that the members suffered from several cases of interference with their inviolability or personal safety. Before their diagnosis, the members did not have sufficient knowledge of the unlawful and intentional interference committed by the appellants to take an action for punitive damages pursuant to the second paragraph of section 49 of the *Charter*.

[1065] The data used to determine the number of members of the Blais Class come from Dr. Siemiatycki and are broken down to indicate the number of class members per year based on the disease each one contracted. Those figures were accepted by the judge, and he did not commit any reviewable error in ruling that prescription was not a bar to the claim for punitive damages.

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912 *ICQ Algérie c. Duquette*, 2018 QCCA 160 at para. 7; *Rosenberg c. Canada (Procureur général)*, 2014 QCCA 2041 at para. 8; *Dufour c. Havrankova*, 2013 QCCA 486 at para. 3; Céline Gervais, *La prescription* (Cowansville, Qc.: Yvon Blais, 2009) at 106−107.

913 *Service aux marchands détaillants ltée (Household Finance) v. Option Consommateurs*, 2006 QCCA 1319 at paras. 13−16 and 21.

914 Judgment *a quo* at paras. 900−-901.

915 *Gouin Huot v. Équipements de ferme Jamesway inc.*, 2018 QCCA 449 at para. 6.

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[1066] Three details warrant the Court's attention.

[1067] First, it is true that the description of the Blais Class includes persons who were diagnosed before 1995 and whose claims for punitive damages would be prescribed. However, Dr. Siemiatycki's data did not account for those persons in the total number of members of the Blais Class. Moreover, that is of no importance since those members − no more than any other member of the Blais Class − were not accounted for in the calculation of the quantum of punitive damages. As we will see, the determination of the quantum of punitive damages is not directly based on the exact number of members, although the impact of the infringement on large segments of the population may form part of the analysis.

[1068] Secondly, this reasoning also applies to members who received their diagnosis between January 1, 1995, and November 19, 1995, inclusively. Although Dr. Siemiatycki's data about the number of diagnoses for the year 1995[916] are not broken down by day or month, it is clear that the majority of the members of the Blais Class have a claim for punitive damages that arose after November 20, 1995.

[1069] Thirdly, the Court must reject JTM's argument according to which only members who meet the following three conditions have claims that are not prescribed: (1) the member was unaware of the dangers of smoking, (2) the member became addicted before 1980 and (3) the member developed one of the diseases in question after November 20, 1995. On the contrary, prescription runs as of the time the unlawful and intentional interference, i.e., the diagnosis, crystalized, which necessarily occurred after 1995.

[1070] In short, the judge did not commit a reviewable error in ruling that prescription is not a bar to an action for punitive damages based on the *Charter*.

b. C.P.A.

[1071] Under the C.P.A., punitive damages may be awarded when all the criteria of the irrebuttable presumption of harm in section 272 are met and the member has sufficient knowledge, for example, of the fraudulent or misleading nature of the representations or that a material fact has been omitted. A Member's right of action arising assumes that he or she was aware of the elements comprising the appellants' liability. It is therefore wrong to claim, as JTM does, that prescription began to run when a member started smoking by purchasing his or her first pack of cigarettes following a false or misleading or incomplete representation. On the contrary, *each* pack of cigarettes purchased by a member as of the coming into force of the C.P.A. constitutes a potential pending cause of action.

[1072] There is a major obstacle here to the appellants' claims.

[1073] It must be noted that the *Charter* clearly allows the appellants to be ordered to pay the total amount of $90,000 to punish the unlawful and intentional interference. Even assuming the judge committed an error relating to the prescription of punitive damages granted under the C.P.A., it is therefore not decisive. The *Charter* is sufficient to set aside this ground of appeal.

[1074] But there is more.

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[916] See Exhibit 1426.7, tables D1.2 and D3.1 at 2−5.

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[1075] Prescription is a defence,[917] and the burden of proof is on the appellants. According to the judge, they proved that the members knew of the dangers of smoking as of January 1, 1980. Even if we accept that date,[918] it would be appropriate to ask if that is sufficient. Under the C.P.A., they had to show that the causes of action arose before November 20, 1995. The appellants' position is based on the hypothesis that the knowledge date coincides with sufficient knowledge of *all* the elements constituting the cause of action, including that of the misleading and incomplete nature of the representations. The demonstration of that coincidence has not been made. Although it may be relevant to the quantification of the punitive damages, it is not established that knowledge of the danger is the only element that marks when the cause of action arose. Some would say that, if that were the case, it would be a blank check to mislead consumers by questioning their knowledge of information, thereby encouraging the commission of prohibited practices.

[1076] Regardless, the Court reiterates that the analysis of prescription based on the *Charter* is more than enough to dismiss this ground of appeal. Similarly, the contracts entered into during the three years preceding the summons constitute causes of action that are not prescribed under section 273 C.P.A. and which certainly allow, alone or in conjunction with the *Charter*, an order to pay $90,000 in punitive damages. Again, assuming the judge committed an error, it is therefore not decisive.

[1077] To summarize, the judge did not propose a different analysis for the prescription of punitive damages based on the elements triggering liability depending on whether the *Charter*, the C.P.A. or both apply. Nonetheless, the fact remains that the conclusion he draws in paragraph 900 on the prescription of punitive damages is free of any reviewable error insofar as the claims under the *Charter* are more than enough to grant the symbolic sum of $90,000.

ii. Létourneau file

[1078] According to the judge, none of the claims for punitive damages is prescribed in the Létourneau file because all the causes of action arose on March 1, 1996, when it became known that smoking was addictive.[919]

[1079] The Court has concluded that the judge did not commit a reviewable error in ruling that knowledge of the addiction caused by smoking occurred on March 1, 1996. That is sufficient to reject this ground of appeal.

[1080] The evidence adduced in the file allowed the judge to conclude that, after more than four decades of sustained disinformation about various aspects of smoking, the 1994 warning did not put an immediate and irreversible end to public uncertainty regarding addiction. Moreover, as the judge noted, the evidence[920] indicates that the appellants did not completely cease their

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917 *Montréal (Service de police de la Ville de) (SPVM)*, 2016 QCCA 430 at para. 44.

918 Recall that the Court finds that the date the judge should have identified is that of March 1, 1996.

919 Judgment *a quo* at para. 888.

920 It is inevitable that, in a judgement disposing of actions such as those before us where the evidence is disproportionate to files that are generally before the courts, a judge will make a selection and refer only to certain exhibits that are representative of the file. In doing so, the judge referred to several exhibits concomitant or subsequent to September 30, 1995. See the Judgment *a quo* at para. 265 (note 149, Exhibit 20063.10 at 154), para. 535 (Exhibits 1240B and 1240C, erroneously identified as

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disinformation practices after 1994, which is an obstacle to the idea that public knowledge was acquired instantaneously when the warnings appeared on September 12, 1994. Much more than a harmless habit, addiction is a serious health disorder that is at the opposite end of the spectrum from the image projected in the appellants' ads and sponsorships. The decision to set the knowledge date at March 1, 1996, is supported by the evidence, and the Court must defer to it. Accordingly, the judge's conclusion that the Létourneau action is not prescribed is unassailable.

[1081] The following should be noted, however. Both the appellants and the respondents argued that knowledge of addiction constitutes the starting point for the prescription period applicable to punitive damages in the Létourneau file. In so doing, however, the parties seem to have forgotten that mere knowledge of information does not necessarily constitute proof of all aspects of a right of action. Even assuming that date is incorrect, we therefore consider that this ground of appeal should be rejected, for the following reasons.

a. C.P.A.

[1082] Analysed based on the C.P.A., the right of action seeking punitive damages in the Létourneau file arises every time the criteria of *Richard v. Time Inc.*[921] are satisfied. Contrary to what the appellants claim, when the first cigarette was smoked or when a member became addicted to smoking is of no importance since the member did not necessarily have sufficient knowledge at the time of all the elements constituting his or her right of action, including the misleading nature of the representations. It is incorrect to claim that the members of the Létourneau Class should have brought their action against the appellants as soon as a contract was made, while the appellants were bending over backwards to maintain their ignorance.

[1083] To prevail with respect to the prescription of punitive damages, the appellants had the burden of proving not the knowledge of addiction, but the fact that the members of the Létourneau Class could exercise their action under the C.P.A. more than three years before they did so. There is no issue here of the members' inability to act, which it was up to them to prove, or of a *fin de non recevoir*, an argument the judge dismissed, but a clear case of the appellants not having proved that the members could have taken their action earlier.

[1084] Incidentally, we note that, despite the foregoing, the definition of the Létourneau Class requires that each member be addicted to smoking and therefore smoked daily during the four years preceding the action. As a corollary, it is admitted that the conditions of *Richard v. Time*

Exhibits 1040B and 1040C) and para. 1078 (note 476; Exhibit 20063.10 at 154).

He could also have referred to other exhibits that support the hypothesis of the continuation of the campaign of disinformation, and its relative success, after September 12, 1994. See Exhibits 61 (at 3), 401 (at 3), 569, 569A, 569B, 1230-2m, 1337-2m and 21316.184. As described in the judgment authorizing the action (*Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, J.E. 2005-589, 2005 CanLII 4070 at para. 58 (Sup. Ct.)), more than ten years after all the Members allegedly had knowledge, the appellants were *still* denying that smoking was addictive.

Lastly, the judge could have referred to other ads and sponsorships subsequent to 1995. See Exhibits 1240A, 1381.51, 1381.52, 1501.5, 1501.6, 1501.7, 1501.8, 1501.9, 1501.10, 1501.12, 1501.13, 1501.14, 1506.3, 1509.2, 1509.4, 1510.1, 1511.5 and 1513.6.

[921] *Richard v. Time Inc.*, 2012 SCC 8.

Inc.[922] are satisfied for each member during the three-year period preceding service. Each pack of cigarettes smoked during those three years thus constitutes a potential cause of action that is not prescribed.

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b. Charter

[1085] The prescription applicable to punitive damages awarded under the *Charter* follows a similar logic. In the event the judge's conclusion regarding the knowledge date is erroneous, the appellants have not met their burden of proving that the members knew, before September 30, 1995, of the existence of an unlawful and intentional interference with their right to life, personal security and inviolability. The appellants have not proven, for example, when it became known that they intentionally worked to delay as much as possible the time the addictive nature would become known. That shortfall is fatal.

[1086] The judge was certainly not proposing a different analysis of prescription depending on whether the C.P.A., the *Charter* or both apply. However, his conclusion that none of the claims of the members of the Létourneau Class is prescribed is free of error.

4.3. Summary

A. Claims for compensatory damages

[1087] Section 27 T.R.D.A. neutralizes the effect of prescription such that none of the claims for compensatory damages of members of the Blais Class is prescribed. The claims of members of the Blais Class who were diagnosed between 2005 and 2010 are not prescribed either because they benefited from the combination of the suspension and interruption of prescription provided by articles 2908 and 2897 C.C.Q. respectively.

B. Claims for punitive damages

[1088] In the Blais file, the true cause of action in terms of punitive damages could not have arisen before each member was diagnosed. That was when the unlawful and intentional interference with the Member's fundamental rights materialized, and he or she could bring an action against the appellants for punitive damages under the *Charter*.

[1089] Regarding the punitive damages granted under the C.P.A., the appellants did not succeed in showing that there was a decisive error in the trial judgment. But even assuming the judge was mistaken on this point − which has not been established − an error in the application of the C.P.A. would not have any effect insofar as his conclusion under the *Charter* is more than sufficient for the order to pay $90,000.

[1090] In the Létourneau file, the judge also did not commit a reviewable error in ruling that no

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922 *Richard v. Time Inc.*, 2012 SCC 8.

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claim was prescribed. The appellants did not show that there was a reviewable error relating to the March 1, 1996, knowledge date. It was up to them to prove when the members of the Létourneau Class had sufficient knowledge of the elements constituting their cause of action under the *Charter* and the C.P.A., and they did not do so.

5. ALLOCATION AND QUANTUM OF PUNITIVE DAMAGES

5.1. Main Appeal

A. Background

[1091] Considering that punitive damages are awarded under both the *Charter* and the C.P.A., the judge evaluated their quantum.[923] He established the amount jointly for both cases, being of the opinion that they deal with the same acts. He allocates 90% and 10% of the total amount of punitive damages respectively to the Blais and Létourneau Classes to account for the impact of the faults on the rights of the members. To determine the quantum, the judge used the appellants' average annual pre-tax profits and adjusted them according to various criteria, resulting in amounts of $725,000,000 for ITL, $460,000,000 for RBH and $125,000,000 for JTM.

[1092] In the Blais file, the judge reduced the amounts established, given that he had already ordered the appellants to pay nearly $7 billion in compensatory damages. He therefore ordered each of them to pay $30,000, or one dollar for each tobacco-related death in Canada per year.

[1093] In the Létourneau file, in the absence of an order for compensatory damages, the judge maintained the amount of punitive damages he established. He noted ITL's leadership throughout the relevant period by fuelling scientific controversy until the 1990s, destroying documents that could be used in litigation, and being aware of consumer ignorance while doing nothing to remedy it. He therefore established the amount at 150% of average annual profits ($725,000,000) and ordered ITL to pay 10% ($72,500,000). In the case of RBH, the judge considered that there was no justification for going beyond the established annual average of its income ($460,000,000) and ordered it to pay 10% ($46,000,000). With regard to JTM, the judge pointed out that the company artificially reduced its profits through a corporate reorganization, which was an attempt to avoid its obligations. He therefore set its putative annual income at $103,000,000, imposed punitive damages equivalent to approximately 125% of this income ($125,000,000) and also ordered it to pay 10% ($12,500,000).

[1094] The appellants' criticisms of this aspect of the judgment can be grouped under two headings: the absence of justification for the award of punitive damages and the alleged errors in the assessment of quantum.

[1095] In regard to the award of punitive damages, ITL claims that it is of no use to order it to pay them at this time, since all promotional activity is banned in the tobacco industry and it is no longer necessary as a deterrent for any behaviour whatsoever. ITL adds that the judge, in the Létourneau case, used a "back door" approach by ordering the appellants to pay punitive damages. Indeed, in so far as causation and injury have not been established, they claim that no order for punitive damages is be possible. For its part, JTM argues that its conduct does not

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[923] Judgment *a quo* at paras. 1017−1112.

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justify an award of punitive damages because it does not meet the analytical criteria set out in *Richard v. Time Inc.,*[924] which analysis the judge also neglected to perform and which the Court should perform *de novo.*

[1096] As for quantum, ITL claims that the judge erred in determining the amount of punitive damages for both cases jointly. In addition, it argues that the total amount is not rationally related to the objectives of punitive damages and is incorrectly established based on the number of class members in the actions. It adds, supported by JTM, that the judge considered elements prior to the coming into force of the *Charter* and the C.P.A. to establish the quantum. Finally, JTM alleges that the judge committed an error of fact and law by imputing income to it and ignoring the effect of intercorporate contracts in its financial statements.

B. Analysis

[1097] The principles of punitive damages are well known. Any order to pay punitive damages must have a basis in law (art. 1621 C.C.Q.), and their award is the exception rather than the rule.[925]

[1098] In addressing the issue of unlawful violations of the rights of class members in the actions under section IV.4 of the *Charter*, it was determined that the judge did not err in concluding that the violations were intentional, which gives rise to the award of punitive damages under the second paragraph of s. 49 of the *Charter*.

[1099] Since the C.P.A. is silent on the criteria to be considered, “the criteria for awarding punitive damages must be established by taking account of the general objectives of punitive damages and those of the legislation in question.”[926] On this point, Justices LeBel and Cromwell stated in *Richard v. Time Inc.*:

> [158] Under s. 272 *C.P.A.*, punitive damages can be sought only if it is proved that an obligation resulting from the Act has not been fulfilled. However, s. 272 establishes no criteria or rules for awarding such damages. It is thus necessary to refer to art. 1621 *C.C.Q.* and determine what criteria for awarding punitive damages would suffice to enable s. 272 *C.P.A.* to fulfil its function.
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> [159] The objectives of the Act must therefore be identified to ensure that punitive damages will indeed meet the objectives of art. 1621 *C.C.Q.*

[1100] In the case of the C.P.A., more specifically, the legislator’s objectives include rebalancing contractual relations and information inequalities between merchants and consumers, as well as eliminating unfair and deceptive practices.[927]

[1101] For a court to sentence a merchant to pay punitive damages, it must be established that

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[924] *Richard v. Time Inc.*, 2012 SCC 8.

[925] *Richard v. Time Inc.* 2012 SCC 8 at para. 150; *de Montigny v. Brossard (Succession)*, 2010 SCC 51 at para. 48.

[926] *Richard v. Time Inc.* 2012 SCC 8 at para. 154.

[927] *Richard v. Time Inc.*, 2012 SCC 8 at paras. 160−161.

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the obligations imposed by the C.P.A. were not fulfilled.[928] Thereafter, it the objective of prevention must be considered, and it must be determined whether the violations were "intentional, malicious or vexatious" and whether the "conduct [of the merchant] display[s] ignorance, carelessness or serious negligence with respect to [its] obligations and consumers' rights".[929] Although evidence of antisocial behaviour is relevant, it is not strictly speaking, necessary.[930]

[1102] The criteria for determining the quantum are set out in art. 1621 C.C.Q. This article first of all confirms the principle of moderation,[931] meaning that it is essential to avoid awarding an amount that exceeds what is necessary to ensure the preventive function of punitive damages. Among the criteria set out in the second paragraph, which are not exhaustive, the Court must consider i) the seriousness of the fault, by far the most important aspect, which is analyzed according to the wrongful conduct and the impact of that conduct on the victim,[932] ii) the payer's financial situation and iii) the compensation it is already required to pay.

[1103] In addition to the criteria set out in article 1621, the Supreme Court has recognized that the greed of a legal person engaged in anti-social behaviour can be considered,[933] although it is not necessary for the award of punitive damages. It is also possible to take into account the profits gained through the faults, in a case where "compensatory damages would amount to nothing more than an expense paid to earn greater profits while flouting the law".[934] A court may also take account of any sanctions already imposed by other authorities, including criminal or administrative penalties.[935]

[1104] An appellate court may not intervene without reason in this highly discretionary exercise.[936] The Court may intervene in a trial judge's assessment of punitive damages only if there is an error of law or the absence of a rational connection between the amount established and the purposes of punitive damages, namely prevention, deterrence (specific and general) and denunciation.[937]

[1105] The Court will now consider how these principles were applied in this case by the judge.

i. Blais file

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928 *Richard v. Time Inc.,* 2012 SCC 8 at para. 158.

929 *Richard v. Time Inc.*, 2012 SCC 8 at para. 180. See also *Vidéotron c. Girard,* 2018 QCCA 767 at paras. 106–107, leave to appeal to SCC refused, 38225 (21 February 2019).

930 *Bank of Montreal v. Marcotte,* 2014 SCC 55 at paras. 91, 100, 101, 108 and 109.

931 J.-L. Baudouin, P. Deslauriers & B. Moore, *La responsabilité civile*, vol. 1, *supra* note 265 at 444, para. 1-394.

932 See, for example, *Richard v. Time* Inc., 2012 SCC 8 at para. 200; *Vidéotron c. Girard*, 2018 QCCA 767 at para. 106, leave to appeal to SCC refused, 38225 (21 February 2019).

933 *Richard v. Time Inc.*, 2012 SCC 8 at para. 205.

934 *Richard v. Time Inc.*, 2012 SCC 8 at para. 206.

935 *Richard v. Time Inc.*, 2012 SCC 8 at para. 207–208.

936 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 at para. 122; *Vidéotron c. Girard,* 2018 QCCA 767 at para. 90, leave to appeal to SCC refused, 38225 (21 February 2019).

937 *Cinar Corporation v. Robinson*, 2013 SCC 73 at para. 134.

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[1106] Although the appellants do not concede the amount of $90,000 awarded as punitive damages in the Blais file, they do not make any specific argument against this conclusion, relying instead, in essence, on the arguments put forward in the Létourneau file to challenge the award of punitive damages. The judge substantially reduced the amount he would otherwise have imposed on them in this regard, because of the (approximately) $7 billion in compensatory damages he ordered to be paid. In doing so, he scrupulously respected the principle that any amount otherwise payable by them must be taken into account. The appellants do not put forward any arguments specific to the Blais file that would justify the Court's intervention on this point.

ii. Létourneau file

a. Arguments relating to the award of punitive damages

[1107] As to the desirability of ordering the appellants to pay punitive damages, ITL argues that deterrence from any conduct whatsoever is no longer necessary, since promotional activities are now prohibited in the tobacco industry.

[1108] This argument must be dismissed.

[1109] It is by no means established that the prohibition of advertising campaigns and sponsorships since the 1990s and 2000s renders any need for specific deterrence obsolete. As an illustration, the respondents, at the hearing before the Court, relied on an excerpt from an interview held in 2008, in which a JTM officer replied as follows, when asked whether certain cancers in the anatomical region of the throat are caused by smoking: "I don't know for a fact if there is any cancer caused by smoking."[938] Thus, 28 years after the knowledge date chosen by the judge in the Blais file, this JTM officer denied the causal link between smoking and any form of cancer. Although this example is drawn from the issues specific to the Blais file, it is nevertheless relevant in establishing the quantum in the Létourneau file. Indeed, it should be recalled that the quantum of punitive damages was established jointly for both cases, before being distributed, based on the impact of the appellants' faults on the members, between the two Classes.

[1110] For its part, ITL reportedly recognized for the first time that smoking was addictive in 1998, after all residents of Quebec were or had become aware of it by March 1, 1996. Its first public use of the word "cause" in relation to tobacco and health apparently occurred in 2000,[939] i.e., twenty years after the knowledge date chosen by the judge in the Blais file. These examples show that specific deterrence is still relevant.

[1111] In this regard, despite the lapse of time between the addiction knowledge date (March 1, 1996) and the hearing on the merits (2012–2014), the appellants argued before the trial judge that nicotine was no more addictive than chocolate, coffee or shopping.[940] And despite this long interlude, the appellants are still reluctant to use clear language with respect to the issues of dependency in the case under appeal, which coloured their arguments before the Court. The

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938 Exhibit 1721-080626, Examination on discovery of Michel Poirier, June 26, 2018, at 233 [Emphasis added.].

939 See document entitled *ITL's Position on Causation Admission* at 206417 (J.S.).

940 Judgment *a quo* at para. 151.

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Court eventually felt compelled to intervene to clarify the semantics used by a lawyer in the courtroom, who finally reluctantly admitted that he would not object to the use of the term "addiction" to describe the harm referred to in the Létourneau file, not without pointing out, via a detour through the *Diagnostic and Statistical Manual of Mental Disorders*,[941] the lack of relevance of the concept of addiction according to him. At trial and on appeal, it therefore seems all the more paradoxical, even contradictory, to argue that knowledge of addiction took root immediately on September 12, 1994. The appellants have failed to demonstrate the absence of any need for specific deterrence.

[1112] Moreover, ITL forgets here that the objectives of punitive damages are not limited to the deterrence of specific conduct, but also extend to denunciation, prevention and general or societal deterrence, that is, the deterrence of industries that would, as the judge pointed out, face a moral dilemma of the same nature. The judge ordered the payment of punitive damages on the basis of all these objectives[942] and explained his decision in a completely understandable way. He stressed that it was necessary to denounce the conduct of the appellants, who had amassed billions of dollars at the expense of the consumers of their cigarettes.[943] His decision is unassailable.

[1113] Next, ITL claims that the judge used the indirect route of punitive damages to compensate for the lack of compensatory damages in the Létourneau file. It alleges that injury and causation were not proven for all members.

[1114] A brief summary of the judge's conclusions is required here. It is wrong to claim that the judge concluded that there was no injury and no causal link in the Létourneau file.[944] In fact, he concluded precisely the opposite:

> [950] Despite the presence of fault, damages and causality, the Court must nevertheless conclude that the Létourneau Plaintiffs fail to meet the conditions of article 1031 for collective recovery of compensatory damages. Notwithstanding our railing in a later section against the overly rigid application of rules tending to frustrate the class action process, we see no alternative. The inevitable and significant differences among the hundreds of thousands of Létourneau Class Members with respect to the nature and degree of the moral damages claimed make it impossible to establish with sufficient accuracy the total amount of the claims of the Class. That part of the Létourneau action must be dismissed.
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> [Emphasis added.]

[1115] It should be added that it has been established, since the recognition of the autonomy of punitive damages, that it is not necessary to prove fault, causation and prejudice in order to obtain punitive damages; rather, the criteria specific to the attributive provision for this type of damages must be met. The Supreme Court reiterated this in *Montréal (Ville) v. Lonardi*, where Gascon J., for the majority, pointed out that "while it is true that a fault that is not causally connected to the damage in question cannot ground an obligation to make reparation for the

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941 See also *supra* note 175.
942 Judgment *a quo* at para. 1038.
943 Judgment *a quo* at para. 1037.
944 See the judgment *a quo* at paras. 788 and 944.

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injury, it can nonetheless form the basis for an award of punitive damages."[945] The passage from *Montigny v. Brossard (Succession)* cited by the appellant ITL in support of its claim that it is necessary to prove fault, injury and causation is confusing. In that excerpt,[946] the Supreme Court was seeking solely to summarize the statements made fourteen years earlier in the case law. This is by no means a presentation of the law in force.

[1116] This ground of appeal is therefore unfounded.

[1117] Finally, JTM argues that its actions do not meet the applicable criteria for awarding punitive damages set out in *Richard v. Time Inc.*[947] and that the judge failed to analyze them appropriately. They ask the Court to perform the analysis that the judge should have done.

[1118] JTM is wrong. There is no doubt that the judge performed this analysis in writing the following:

> [1020] Specifically under the CPA, the Supreme Court in *Time* examines the criteria to be applied, including the type of conduct that such damages are designed to sanction:
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> > [180] In the context of a claim for punitive damages under s. 272 C.P.A., this analytical approach applies as follows:
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> > • The punitive damages provided for in s. 272 C.P.A. must be awarded in accordance with art. 1621 C.C.Q. and must have a preventive objective, that is, to discourage the repetition of undesirable conduct;
> >
> > • Having regard to this objective and the objectives of the C.P.A., violations by merchants or manufacturers that are intentional, malicious or vexatious, and conduct on their part in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumers' rights under the C.P.A. may result in awards of punitive damages. However, before awarding such damages, the court must consider the whole of the merchant's conduct at the time of and after the violation.
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> [1021] The faults committed by each Company conform to those criteria. The question that remains is to determine the amount to be awarded in each file for each Company and the structure to administer them, should that be the case.
>
> [Emphasis added.]

[1119] It is not sufficient to allege before the Court of Appeal that the judge did not carry out an analysis that he should have, which in fact, albeit succinctly, he did. In any event, there is ample evidence to support the conclusion that JTM's conduct is characterized by malicious and vexatious intent that goes well beyond mere ignorance, recklessness or negligence. In truth, if concertedly concealing information about the harmful nature of tobacco use for nearly two decades to delay public awareness of a key public health issue does not constitute, in

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945 *Montreal (City) v. Lonardi,* 2018 SCC 29 at para. 80.
946 *Montigny v. Brossard (Succession)*, 2010 SCC 51 at para. 40.
947 *Richard v. Time Inc.*, 2012 SCC 8.

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accordance with the legislative objectives specific to the C.P.A., conduct that should be most firmly deterred and denounced, it is hard to see what behaviour would justify the award of punitive damages.

b. Arguments relating to the determination of quantum

[1120] ITL claims that the amount it was ordered to pay does not have the requisite rational connection with the objectives of punitive damages. The amount of $72,500,000 does not, in its view, respect the principle of restraint that guides orders for punitive damages.

[1121] It is true that the total amount that the three appellants were ordered to pay ($131,000,000) far exceeds the amounts generally awarded by the courts for punitive damages. We need only consider *Cinar*[948] ($500,000), *Enico*[949] ($1,000,000), *Markarian*[950] ($1,500,000), *Pearl*[951] ($1,856,250) and even *Biondi*[952] ($2,000,000) to be convinced of this. However, in this case, the seriousness and the impact of the infringing conduct and the prohibited practices are not commensurate with the cases generally considered by the courts and are in a completely different register.

[1122] The notion of a rational connection between the amount of the award and the objectives of punitive damages was explained in *Whiten v. Pilot Insurance Co.*,[953] where Justice Binnie wrote:

> 74 Eighth, the governing rule for quantum is *proportionality*. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). Thus there is broad support for the "if, but only if" test formulated, as mentioned, in *Rookes*, *supra*, and affirmed here in *Hill*, *supra*.

[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[954] 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. Stripping the appellants of a small portion of their annual pre-tax profits, particularly since, as the judge pointed out, compensatory damages and costs could be subject to tax deductions,[955] is an acceptable approach in the Létourneau case. Given the discretionary nature of this determination, the judge's finding deserves deference on appeal. The judge took into consideration relevant factors in determining the quantum by judicial means, and the Court should not intervene in his conclusion.

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948 *Cinar Corporation v. Robinson*, 2013 SCC 73.
949 *Agence du revenu du Québec v. Groupe Enico inc*., 2016 QCCA 76.
950 *Markarian v. Marchés mondiaux CIBC inc.,* 2006 QCCS 3314.
951 *Pearl c. Investissements Contempra ltée*, [1995] R.J.Q. 2697 (Sup. Ct.).
952 *Biondi v. Syndicat des cols bleus regroupés de Montréal (SCFP-301),* 2016 QCCS 83.
953 *Whiten v. Pilot Insurance Co.*, 2002 SCC 18.
954 *Richard v. Time Inc.*, 2012 SCC 8 at para. 206.
955 Judgment *a quo* at para. 1067.

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[1124] ITL also states that the judge based the amount of the punitive damages award on the number of class members, an approach that is prohibited.

[1125] It is true that this approach to determining the amount of punitive damages may, as the Court recently pointed out, be a [TRANSLATION] "distorting, sometimes reducing, sometimes amplifying lens."[956] This is because the establishment of an amount solely on the basis of the number of members does not make it possible to take into account all the criteria of article 1621 C.C.Q., the cardinal principle of which prohibits exceeding the amount that is sufficient to meet the objectives of punitive damages. This approach is generally not appropriate because punitive damages are not intended to compensate members.

[1126] However, when we read the judgment, we see that this is not the approach taken by the judge. While the judge did indicate, for illustrative purposes, what the sentence he ordered on an approximate individual basis amounted to, the totality of the reasons on the quantification of punitive damages shows that this is not the analytical approach he took. He stated this in the following terms: "True, we do not assess punitive damages on the basis of an amount "per member", but viewing them from this perspective does provide a sobering sense of proportionality."[957]

[1127] ITL has not convinced us that a reviewable error has been made in this regard.

[1128] ITL and JTM also claim that the judge took into account events prior to the coming into force of the *Charter* and the C.P.A. to establish the share of punitive damages.

[1129] The judge was aware that he could not use conduct prior to the coming into force of the provisions to determine the amount of damages. He stated:

> [1043] Strictly speaking, we cannot condemn a party to damages for the breach of a statute that did not exist at the time of the party's actions. That said, this is not an absolute bar to taking earlier conduct into account in evaluating, for example, the defendant's general attitude, state of awareness or possible remorse.
>
> [Reference omitted.]

[1130] When analyzing ITL's conduct,[958] the judge did in fact list, in paragraph 1077 of his judgment, some of the company's wrongful acts before the *Charter* came into force, but these are limited to no more than two or three elements prior to 1976: Mr. Wood's initiatives in developing the Declaration of Principles in 1962 and Mr. Paré's defence of cigarettes on behalf of ITL and the CTMC. Some other events reported by the judge occurred just before or after the *Charter* came into force, including ITL's handling of Dr. Green the whistleblower or the use of surveys to probe public awareness, which continued after 1976.

[1131] That being said, the majority of the reprehensible conduct referred to by the judge occurred after the coming into force of the *Charter* and the C.P.A., such as ITL's profound

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956 *Vidéotron c. Girard*, 2018 QCCA 767 at para. 99, leave to appeal to SCC refused, 38225 (21 February 2019).

957 Judgment *a quo* at para. 1081; see also para. 1058.

958 Judgment *a quo* at paras. 1076−1078.

knowledge of its consumers, its lack of effort to warn them of the dangers of tobacco, the steps it took to have documents destroyed by lawyers and the perpetuation of scientific controversy until the 1990s.

[1132] The judge was free to refer to the previous period as an indication of the appellants' state of mind when the *Charter* and the C.P.A. came into force, a state of mind that has not really changed since then. Even if this cannot, as such, justify the award of punitive damages, it is not a reviewable error.

[1133] Moreover, even if the judge had limited his choice to examples subsequent to the coming into force of the two statutes, this is of no consequence, because the evidence on which he relied is largely sufficient to support his conclusions and the record is full of examples that occurred during the relevant period that constitute unlawful and intentional interference with the members' fundamental rights or prohibited and vexatious business practices. In addition to the evidence on which he explicitly relied, additional examples can be cited from the extensive evidence.

[1134] In the case of ITL, the judge noted that the company mandated a law firm in the early 1990s to first store documents and then supervise their destruction in the summer of 1992. This episode is discussed in more detail in section IV.10 of this judgment. The documents consisted of about 100 research reports in its possession that were written by various scientists over time, many of which were from England and Germany. It was agreed that after their destruction, ITL's parent company, BAT, would fax the reports if ITL scientists wanted to consult them. The lawyer appointed by ITL at the time wrote the following on June 5, 1992, to BAT:[959]

> It may be of interest to you to know that Imperial Tobacco Limited, in compliance with its document retention policy, proposes to destroy several documents including the following which you will no longer be able to obtain from Imperial Tobacco Limited, which considers them of no further use to it, though it may at some later date request your assistance in finding copies of them:
>
> ...
>
> RD1789
>
> …

[1135] Exhibit 58.4, a report numbered "RD1789,", is a research report dated March 25, 1981, written by someone named S.R. Massey. The summary of the report indicates:[960]

> Dr. G.B. Gori, formerly of the U.S. National Cancer Institute, introduced the idea of 'critical levels' for smokers daily exposure to six constituents of cigarette smoke. It was argued, on the basis of epidemiological evidence relating to typical pre-1960 U.S. cigarettes, that if certain 'critical levels' were not exceeded, then smokers would show no greater risk of disease or mortality than non-smoker. These 'critical levels' can be used as a basis for calculating the number of

[959] Exhibit 58 at 2 and 3.
[960] Exhibit 58.4 at 1.

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> cigarettes-day, for any given existing commercial brand, which could be smoked without increased risk over that of a non-smoker.
>
> [Emphasis added.]

[1136] A few years later, on September 15, 1998, in a press release issued by ITL's Director of Public Affairs Michel Descôteaux, it was stated:[961]

> [TRANSLATION]
>
> Imperial Tobacco firmly stated today that it did not destroy the original documents relating to scientific studies on the health effects of tobacco use.
>
> The facts surrounding the destruction of the documents reveal a story infinitely simpler, according to the company, than the allegations made with panache. Like any other company, ITL conducts regular reviews of document records it no longer needs. All the studies referred to in the documents filed by the anti-tobacco groups were mere copies of B.A.T. documents. The originals are still in their possession. In addition, in most cases, it is possible to obtain copies easily.
>
> [Emphasis in original.]

[1137] Assuming that this statement is true, it raises the question of why a company must use outside counsel to destroy a simple copy of a research report as part of the "regular review of document records it no longer needs," as it stated in its press release. More generally, this episode, retained by the trial judge, shows the eminently vexatious nature of the appellant ITL's conduct with regard to anticipated litigation. The judge did not err in retaining this episode to increase the punitive damages award against ITL. [962]

[1138] The judge also considered that ITL had played an important role in the CTMC, an organization which, it should be recalled, brought the appellants together in their then corporate form. In considering the role of this organization, it appears that it was involved in public misinformation until the 1990s.

[1139] The CTMC's records also show its strategy of delaying tobacco regulation as much as possible. In the minutes of a meeting held on February 24, 1988, it stated:[963]

> There is a genuine interest on the constitutional issue and there is a possibility for bi-partisan support for "clean up amendments" that would send the Bill back to the Commons. This would fit in with a delay strategy.

[1140] In addition, at the same time, the CTMC controlled the Smokers Freedom Society ("SFS"), an organization aimed, as its name suggests, at promoting the individual freedom of smokers. The minutes of a meeting of the CTMC Board of Directors held on December 10, 1991, specify the content of the funding that the CTMC provided to the SFS.[964] The minutes of a meeting held

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961 Exhibit 57A.

962 See the judgment *a quo* at paras. 361−362, where the judge relates this episode in great detail.

963 Exhibit 333 at 2.

964 Exhibit 433B at 4.

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on March 13, 1990, show that the CTMC exercised power that was more direct than strictly financial.[965]

[1141] In December 1994, when all residents of Quebec were, according to the appellants, deemed to have known about the danger of smoking for 14 years − and some 30 years after the Surgeon General of the United States issued its own conclusions on the dangers of smoking − ITL continued to play the scientific controversy card in its newsletter, *The Leaflet*, a publication intended for its own employees.[966]

[1142] Finally, it should be recalled that ITL pleaded guilty to the criminal offence of assisting individuals between 1989 and 1994 to sell and possess tobacco manufactured in Canada without being packaged and bearing the tobacco stamp required by law, contrary to the *Excise Act.*[967] Criminal history, as noted above, may be a criterion considered under article 1621 C.C.Q.

[1143] In the case of RBH, the judge referred to the efforts of Rothmans, its predecessor, to counter the revelation made in 1958 by Mr. O'Neill-Dunne, but specified that this element was typical of the appellants' conduct and did not justify greater punitive damages.[968] This conclusion, relating to an event prior to the coming into force of the *Charter* and the C.P.A. therefore had no impact on increasing the amount of punitive damages. The judge's error in this respect is therefore not decisive.

[1144] RBH was a member of the CTMC.[969] Moreover, traces of the scientific controversy fuelled by RBH can still be found as late as 1995 in a fax from John McDonald (RBH) to Robert Parker (CTMC) dated April 12, 1995:[970]

> • We should always be in a position to "take on the antis" and be prepared to immediately point out to all concerned any inconsistencies, inaccuracies, falsehoods, etc., made by them!. As I indicated earlier it is in our best interest to effectively prepare rebuttals against the antis' claims, but they must be done rapidly and effectively in the form of letters to the editor or newspaper articles, etc. This, in my mind, should be one of the key mandates and foundation for the communications activities of the CTMC. From this, communication programs and strategies can be developed and enlarged. Should we decide to focus in on one particular issue we will be well versed on all issues and be able to develop into a

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965 Exhibit 433H at 26205 (J.S.).

966 Exhibit 20065.11790: "The facts are that researchers have been studying the effects of tobacco on health for more than 40 years now, but are still unable to provide undisputed scientific proof that smoking causes lung cancer, lung disease and heart disease. The studies that have claimed that smokers have a higher risk than non-smokers of developing some diseases are statistical studies. ... However, many studies suggest no association between the trends in smoking and the trends in lung cancer. For instance, in several countries where the number of cases of lung cancer are still increasing, the increase seems to be in non-smokers, and there is no change or a decline in the number of cases of lung cancer in smokers."

967 *Excise Act,* R.S.C. 1985, c. E-14, s. 240(1)(*a*); see Exhibit 521.

968 Judgment *a quo* at para. 1090.

969 Although it left at some point, its participation in the organization is not disputed (see the judgment *a quo* at para. 475, note 252), and the examples given above on the role of the CTMC apply equally to RBH and the other appellants

970 Exhibit 61 at 3

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full-fledged campaign if deemed appropriate. This, in my opinion, is essential.

[1145] According to that document, even in 1995, a few months after the date on which all Quebec residents were − according to the appellants − deemed to know that cigarettes were addictive, the official position of the CTMC was "adequately reflected"[971] in a report written by David Warburton,[972] which was highly critical of the Royal Society of Canada's 1989 report on addiction.

[1146] In the case of JTM, it should be noted that the judge did not refer to pre-1976 exhibits in the assessment of punitive damages. JTM was also involved in the CTMC.

[1147] In 2008, as previously mentioned, a JTM executive replied, in an examination on discovery, that he was not sure that smoking caused even one type of cancer,[973] which in itself shows the need for specific deterrence.

[1148] In 2010, JTM was also paying a fine of several tens of millions of dollars in connection with a smuggling case to settle a dispute with the Ministère du Revenu du Québec.[974] This criminal history may be taken into account, as we have seen, in the assessment of punitive damages.

[1149] The judge therefore correctly concluded that the three appellants engaged in malicious and vexatious commercial conduct and violated the members' fundamental rights in a wrongful, unlawful and intentional manner. The evidence strongly supports this conclusion. In regard more particularly to vexatious business conduct, let us recall the countless advertisements and sponsorships, of which the judge invoked only a tiny portion, and which are referred to in paragraph [854] of these reasons.[975]

[1150] The amounts awarded in the Létourneau file therefore have a highly significant rational connection with the various objectives of punitive damages, and there is no reason to intervene in this regard.

[1151] On another point, ITL is of the view that the judge erred in first determining the overall quantum of punitive damages on the combined basis of the two Classes and then awarding 90% to the Blais Class and 10% to the Létourneau Class.

[1152] In determining the amount of punitive damages jointly in the two cases, the judge complied with the principles of quantification of punitive damages set out in article 1621 C.C.Q. Indeed, in this matter, the cardinal criterion to be observed is certainly the gravity of the debtor's fault − i.e., the gravity of the prohibited business practices or unlawful and intentional interference

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971 Exhibit 61 at 3.

972 Exhibit 430

973 See paragraph [1109]. It should also be noted that as late as 2012, JTM admitted on its website, with all the caution that characterizes the appellants' admissions over time, that cigarettes are addictive: "Given the way in which many people - including smokers - use the term 'addiction' smoking is addictive" (exhibit 568). See *supra* note 625.

974 The evidence in support of this event was produced under seal. Consequently, it will not be discussed in further detail.

975 See in particular the additional examples, *supra* note 789.

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with the members' fundamental rights. However, as the judge pointed out, these faults are practically the same in both cases; it would have been unfair to punish the appellants twice and would have violated the principle of moderation according to which the minimum amount necessary to ensure the preventive function of punitive damages should not be exceeded (art. 1621 para. 1 C.C.Q.). Moreover, the judge noted that the Létourneau Class could have been a Sub-Class of the Blais file.[976] The Court finds no error in this highly discretionary exercise of quantifying punitive damages, and this ground of appeal must therefore be dismissed.

[1153] The distribution of the overall amount of punitive damages in the two files, i.e., 90% for the Blais Class and 10% for the Létourneau Class, is also a highly discretionary exercise, which is also consistent with the equally important principle that the impact of the misconduct on members' rights must be taken into account. The judge was well aware of this when he wrote:

> [1040] It is also relevant to note that we refuse moral damages in the Létourneau File, whereas in Blais we grant nearly seven billion dollars of them, plus interest. Thus, the reparation for which the Companies are already liable is quite different in each and a separate assessment of punitive damages must be done for each file, as discussed further below.
>
> …
>
> [1083] As between the Classes, the circumstances in Blais justify a much larger portion for its Members. In spite of the fact that there are about nine times more Members in Létourneau than in Blais, the seriousness of the infringement of the Members' rights is immeasurably greater in the latter. Reflecting that, the $100,000 of moral damages for lung and throat cancer in Blais is 50 times greater than what we would have awarded in Létourneau.
>
> [Emphasis added; reference omitted.]

[1154] The judge properly exercised his discretion by considering the seriousness of the impact of the appellants' faults on the rights of the members and by establishing this proportion between the two files. His review of the symptoms and impact of disease and addiction on the lives of members earlier in the judgment[977] provides an adequate basis for his finding on the impact of the appellants' faults and strongly supports the allocation between the cases.

[1155] The appellants have not established a reviewable error in this regard, and this ground of appeal must be dismissed.

[1156] The judge attributed to JTM an annual notional profit of $103,000,000 to take into account the various contractual mechanisms it established in the late 1990s. He considered that this was a way for JTM to protect itself from its creditors, which can be analyzed to establish the quantum of punitive damages, insofar as it is relevant to the criteria set out in article 1621 C.C.Q.

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[976] Judgment *a quo* at para. 1028.

[977] Judgment *a quo* at paras. 940−944, 979−984, 989−991 and 999−1001.

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[1157] This debate has two dimensions.

[1158] The first is whether the judge could consider the contracts entered into by JTM with third parties to determine its actual financial situation. There is no doubt that a judge may, when establishing the patrimonial situation of a debtor under article 1621 C.C.Q., examine a corporate reorganization with a view to uncovering the debtor's actual patrimonial situation. The principle that the debtor's patrimonial situation must be considered is intrinsically linked to the need to sentence the debtor to an amount that could have a dissuasive impact on its conduct. If we could rely only on a mathematical analysis of a company's available annual profits, the very usefulness of punitive damages would be undermined. The mere fact that the contracts between JTM and other entities may be legal or valid for tax purposes, which is not for this Court to decide, does not lead to the conclusion that the Court cannot take them into account when assessing the company's actual assets. The legislator preferred the expression "patrimonial situation / *situation patrimoniale*" to more technical concepts such as assets and liabilities or financial statements.

[1159] That decision in no way contradicts the Superior Court's 2013 decision on the respondents' motion for a safeguard order[978] with respect to payments made by JTM to a related company. The decision constitutes, with respect to punitive damages, at most an *obiter dictum*. However, it is recognized that the doctrine of *res judicata* extends to the grounds of a decision only to the extent that they are essential and intrinsically linked to its operative part,[979] which they are not in that decision.

[1160] The second dimension is whether the judge was entitled to consider this corporate planning in establishing the amount of punitive damages for which JTM is liable at 125% of its putative annual income. In other words, it is necessary to determine whether a judge may consider an attempt by the debtor to evade enforcement of a possible judgment in determining the amount of punitive damages. It should be recalled that the list of criteria set out in article 1621 C.C.Q. is not exhaustive and that the expression "all the appropriate circumstances / *toutes les circonstances appropriées*" can certainly include more general considerations, including the conduct of a potential debtor who seeks to avoid a condemnation.

[1161] The judge accepted the testimony of Mr. Poirier, who unequivocally admitted that the transactions in question were intended to protect JTM from its creditors:[980]

> [1097] Our analysis of this matter leads us to agree with Mr. Poirier who, when reviewing some of the planning behind the Interco Contracts, was asked if "that sounds like creditor proofing to you". He candidly replied: "Yes".

[1162] Therefore, the judge did not err in taking into account JTM's corporate planning. After reviewing the judge's reasons and the evidence in support thereof, which is subject to a confidentiality and sealing order, the Court finds that the judgment *a quo* contains no factual errors on this issue.

[1163] In short, the appellants have not established any flaws in the judgment *a quo* that would

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978 *Quebec Council on Tobacco and Health v. JTI-MacDonald Corp.* 2013 QCCS 6085 at para. 84.

979 *Al Arbash International Real Estate Company c. 9230-5929 Quebec inc.*, 2016 QCCA 2092 at paras. 91−95.

980 Judgment *a quo* at para. 1097.

justify overturning the punitive damages award or altering its quantum. Therefore, their arguments in this respect must be dismissed.

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5.2 Cross-Appeal

[1164] In their cross-appeal, the respondents asked the Court to increase the quantum of punitive damages in the Blais file in the event that the award of moral damages was decreased. In view of the conclusions drawn on the appellants' liability for compensatory damages, this cross-appeal has become moot.

5.3 Summary

[1165] In summary, the appellants have not established any error that would justify the Court's intervention on the award and quantum of punitive damages. The judge's decision in the highly discretionary exercise of determining the amount of punitive damages deserves deference. He complied with the provisions of article 1621 C.C.Q. and the provisions of the *Charter* and the C.P.A. relating to punitive damages. His assessment of the rational connection between the amounts granted and the objectives of deterrence, prevention and denunciation does not warrant intervention.

6. INTEREST AND ADDITIONAL INDEMNITY

[1166] The appellants complain that the judge erred in determining the starting point for calculating the interest and additional indemnity applicable to the amount of compensatory damages he awarded to the members of the Blais Class. The appellant ITL expresses this complaint as follows, at paragraphs 489 and 490 of its argument:

> [The Trial Judge] calculates interest on the moral damages award in the Blais Action from the date of service of the Motion for Authorization. However, he does so in the context of a Class Proceeding where diagnosis of Disease (and thus crystallization of a claim) can occur at any point up to March 12, 2012.
>
> Accordingly, the Trial Judge imposed interest on ITCAN as of 1998 in respect of all claims, notwithstanding the fact that at least a portion of the Class did not even have a claim against ITCAN until some point after this date. This calculation is in error.
>
> [Emphasis in original; references omitted.]

[1167] The appellant JTM raises an identical ground at paragraphs 395 to 397 of its argument, which the appellant RBH shares in paragraph 9 of its argument.

[1168] The respondents concede the point and, recognizing the merits of this complaint, explain its origin in these terms:[981]

> [TRANSLATION]

[981] Respondents' Arguments at paras. 398–399.

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> The appellants argue that interest and the additional indemnity cannot accrue from that date for Members whose illness had not yet been diagnosed.
>
> On the issue of interest, however, Judge Riordan corrected in his judgment, at the respondents' request, a clerical error that was the source of an inconsistency. The respondents admit that they inadvertently misled the judge on that occasion. The appellants are indeed correct in asserting that, for Members whose illness was diagnosed after November 20, 1998, interest and the additional indemnity should accrue only from the date of diagnosis. However, the judge did not err for Members diagnosed between 1995 and 1998.

[1169] To remedy this error, the respondents suggest that Exhibit 1426.7 be used and that the same methodology be followed as that used by the judge to determine the size of the Blais Class and the amount of compensatory damages to be paid to its members. Exhibit 1426.7 contains several tables compiled by the epidemiologist Siemiatycki, an expert retained by the respondents. Based on data from the *Registre des cancers du Québec* and the number of diagnoses listed for each of the diseases in question from 1995 to 2011, the respondents calculated the number of people with lung cancer, throat cancer or emphysema in Quebec for that period and who had smoked at least 12 pack years before the diagnosis. From this number of people, they established capital tranches for each of the years, considering that interest and the additional indemnity must incur from December 31 following the date of diagnosis, as a way to compensate for the lack of evidence on the exact date of each diagnosis.

[1170] The solution proposed by the respondents is appropriate. It follows the methodology by which the judge set the amount of compensatory damages he awarded to the Blais Class at $6,858,864,000. This approach has the advantage of sharing the characteristics of the epidemiological studies mentioned in article 15 T.R.D.A. This gives this assessment sufficient rigour to conclude as the trial judge did.

[1171] Thus, the capital tranches resulting from diagnoses received before January 1, 1998, will bear interest and the additional indemnity from the service of the motion for authorization of the class actions, i.e., from November 20, 1998. For the capital tranches resulting from diagnoses received on or after January 1, 1998, interest and the additional indemnity will be calculated as of December 31, following each diagnosis. For example, the compensatory damages for diagnoses received in 2001 will all bear interest and the additional indemnity as of December 31, 2001.

[1172] Schedule II of these reasons details the amounts determined by the methodology used by the judge in paragraphs 986, 992 and 1004 of the judgment *a quo*, for each of the diseases in question. Once completed and consolidated, the calculation of these amounts gives the following figures, which should be set out in the conclusions of the judgment:

Year of diagnosis	**Capital to be paid**	**Starting date for the calculation of interest and the additional indemnity**
1995	$353,485,440	November 20, 1998
1996	$356,231,040	November 20, 1998
1997	$360,103,040	November 20, 1998

1998	$373,338,240	December 31, 1998
1999	$381,575,040	December 31, 1999
2000	$382,279,040	December 31,2000
2001	$398,541,440	December 31,2001
2002	$402,554,240	December 31,2002
2003	$405,863,040	December 31,2003
2004	$414,240,640	December 31,2004
2005	$416,634,240	December 31,2005
2006	$420,154,240	December 31,2006
2007	$431,629,440	December 31,2007
2008	$447,821,440	December 31,2008
2009	$443,597,440	December 31,2009
2010	$431,207,040	December 31,2010
2011	$438,599,040	December 31,2011
Total :	$6,857,854,080	

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7. APPROPRIATE METHOD OF RECOVERY

[1173] Having concluded that he would grant the respondents' claims in part, the trial judge was required to determine the recovery method that would be appropriate under the circumstances. He did this in paragraphs 911 to 929 of his reasons, noting from the outset that he had elsewhere addressed some of the arguments raised by the appellants' against collective recovery, which will be discussed in this decision.

[1174] It can be seen from the conclusions of the judgment that the trial judge opted for collective recovery in the Blais and Létourneau files. In the Blais file, in addition to punitive damages, he ordered the appellants solidarily to pay a total amount as moral damages, to be paid according to the scale he established for the members of the three Sub-Classes he defined. In the Létourneau file, he ordered each appellant to pay a separate amount as punitive damages, refused to distribute those amounts to the class members, and postponed to a later hearing the determination of the procedure for distributing the total amount of punitive damages.

[1175] To determine the method of compensation (collective recovery or individual claims), the trial judge had to consider, first and foremost, the scope of art. 1031 f.C.C.P., which reads as follows:

> **1031.** The court orders collective recovery if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; it then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is
>
> **1031.** Le tribunal ordonne le recouvrement collectif si la preuve permet d'établir d'une façon suffisamment exacte le montant total des réclamations des membres; il détermine alors le montant dû par le débiteur même si l'identité de chacun des membres ou le montant exact de

not established.

leur réclamation n'est pas établi.

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[1176] The criterion of "total amount of the claims" established "with sufficient accuracy" by the evidence is decisive here.

[1177] The appellants' arguments can be summarized as follows: (a) the number of members in each Class is not known, (b) the nature and severity of individual injury has not been established, (c) it is impossible to determine, with sufficient accuracy, the total amount of the claims against them, since their liability is established on the basis of the knowledge dates, which results in liability shared with an unknown number of members (i.e., 20% for the members and 80% for the appellants), and (d) the respondents failed to establish an amount of damages having a logical connection with the harm suffered and the personal profile of the M embers.

[1178] Arguments (b) and (d) specifically concern the assessment of the harm suffered by the members, an issue that comes up elsewhere in this judgment and that the trial judge considered in detail in paragraphs 957 to 1004 of his reasons. The trial judge further noted that eligibility for the Blais Class is conditional on proof of a medical diagnosis that the potential member is afflicted with one of the diseases in question with the result that the health condition of each member must therefore be submitted into evidence in a timely manner.

[1179] Argument (a) is refuted in paragraphs 974, 978, 987, 988 and 998, in which the evidence presented by Dr. Siemiatycki on new cases identified between 1995 and 2001 in Quebec (82,271 cases of lung cancer, 8,231[982] cases of cancer of the larynx, the oropharynx or the hypopharynx, and 23,086 cases of emphysema) is deemed convincing.

[1180] Argument (c) is addressed in paragraphs 927 and 928, in which the amount to be initially deposited by the appellants is reduced to 80% of the total amount of compensatory damages established – on condition, however, that new deposits may be ordered if this initial amount proves insufficient to meet all the claims found to be valid according to the terms of the judgment.

[1181] Under these conditions, was it appropriate to order collective recovery?

[1182] First, let us review some basic rules regarding the use of this type of recovery.

[1183] Collective recovery means that the court orders all or part of the compensation to be paid to the court clerk or a financial institution and then, if applicable, to be distributed or paid out on individual claims in accordance with the conditions set in the judgment or, under the terms

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[982] Because the judge seems to have made a clerical error, this number should be reduced to 8,223, which represents a difference of $800,000 in capital. The error in question was one of the components of that number, namely the number of cases of larynx cancer, reported as 5,369 by Riordan, J. but as 5,360 or 5,361 by Dr. Siemiatycki (Exhibit 1426.7, Tables D1.2 and D3.1). The difference of one case is attributable to what seems to be another clerical error in totalling the annual numbers for women in Table D1.2. It seems appropriate here to use 5,361 for the number of larynx cancers, which would reduce the number of "throat" cancers from 8,231 to 8,223.

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thereof, by the clerk or the institution in question.[983] If the individual claims method is applied rather than collective recovery, the debtor is not obliged to compensate a class member until that member makes an individual claim. It is worth remembering here that *St. Lawrence Cement Inc. v. Barrette*[984] confirmed, in regard to such damages, that when circumstances allow, the trial judge may fix their quantum on the basis of sub-classes and by using an average for each sub-class, as the trial judge did in this case.

[1184] According to the first paragraph of article 1033 f.C.C.P., if the judgment ordering collective recovery provides for individual liquidation of claims or distribution of a specific amount to each member, articles 1037 to 1040 f.C.C.P. regarding individual claims apply to this second step of collective recovery.

[1185] Recent case law has shed useful light on the principles that must guide the court in matters of collective recovery. In *Marcotte c. Banque de Montréal*, Gascon, J, then of the Superior Court of Quebec, stated the following to say on the subject:[985]

> [TRANSLATION]
>
> [1114] Although collective recovery is effective in terms of ensuring payment of compensation to members and is therefore the rule, while individual recovery remains the exception, the legislator has nonetheless imposed requirements.
>
> [1115] Before ordering collective recovery, the Court must be convinced that the evidence has established, with sufficient accuracy, the total amount of the members' claims. This assessment is based on the evidence submitted. The plaintiff has the burden of proof.
>
> [1116] In that regard, article 1031 C.C.P. does not require that the exact number of members be known or that the value of their individual claims be determined in advance.
>
> [1117] Similarly, given that the article refers to a flexible criterion, namely an amount determined with "sufficient accuracy," the amount need not be known with certainty, and the calculation method need not be perfect. It is enough for the total amount to be reasonably accurate with respect to all the evidence. Therefore, nothing prevents the use of averages, statistics and even balancing.
>
> [Reference omitted]

[1186] The judgment in that case allowed a class action against nine defendants. In each of the nine cases, it ordered collective recovery for some Sub-Classes and individual claims for others. When the defendants appealed, the Court of Appeal reversed the judgment in part and, for grounds beyond the issues examined here, exonerated five of the nine defendants; however, it

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983 Shaun E. Finn, *L'action collective au Québec* (Cowansville, Qc., Yvon Blais: 2016) at 65–66; Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice : impact et évolution* (Cowansville, Qc., Yvon Blais: 2006) at 193.

984 *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at paras 111–112 and 114–116.

985 *Marcotte* c. *Banque de Montréal*, 2009 QCCS 2764.

confirmed the order of collective recovery for the four remaining defendants, against whom it also upheld the initial condemnation, but in part only.[986] Their appeal to the Supreme Court of Canada was subsequently dismissed, and the collective recovery order therefore remained intact.[987]

[1187] The above observations by Gascon, J were repeated in the decision he rendered in *Marcotte c. Fédération des caisses Desjardins du Québec*[988] and are similar to those he made around the same time in *Adams v. Amex Bank of Canada.*[989]

[1188] Clearly, there is a difference between "accuracy" and "sufficient accuracy,"[990] because the expression "with sufficient accuracy" leaves the trial judge some margin of appreciation, and the way it is worded in article 1031 f.C.C.P., seems less satisfactory than the expression that replaced it in article 595 n.C.C.P., namely, "sufficiently precise."[991] Similarly, it is certain that the "total amount" in question in these provisions suggests an assessment of the sum of the members' individual injuries and, as pointed out by the Supreme Court of Canada in *St. Lawrence Cement Inc. v. Barrette*, "the trial judge has considerable discretion in making this assessment in the context of a class action."[992]

[1189] A review of the case law in other actions and class actions shows similarities with a specific case worth examining. In *Curateur public c. Syndicat national des employés de l'hôpital Saint-Ferdinand (C.S.N.),*[993] Robert Lesage J. of the Superior Court was called upon to decide a class action claim for damages brought by the Public Curator following an illegal strike in a hospital. As the curator ex officio, under the *Public Curatorship Act*,[994] of one of the hospital's patients described by the trial judge as "severely mentally deficient," the Public Curator had been given the status of representative of the hospital patients, the great majority of whom were chronically ill and severely handicapped. The alleged harm to the patients resulted from being deprived of care and services due to work stoppages totaling 33 days of inactivity, followed by the discomfort and insecurity this inflicted on the patients.

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986 *Bank of Montreal v. Marcotte*, 2012 QCCA 1396. In this unanimous decision written by Dalphond, J., the Court noted in para. 150: "Further, with respect to the recovery method, the judge has committed no reviewable error by choosing collective recovery, or abused his discretion in this respect (article 1031 *C.C.P.*) (*Saint Lawrence Cement. v. Barrette*, [2008] 3 S.C.R. 392, 2008 SCC 64, paragraphs 112, 113 and 116)."

987 *Bank of Montreal v. Marcotte*, 2014 SCC 55.

988 *Marcotte c. Fédération des caisses Desjardins du Québec*, 2009 QCCS 2743, confirmed on this point by the Supreme Court of Canada in *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57 at paras. 9 and 32.

989 *Adams c. Amex Bank of Canada*, 2009 QCCS 2695, rev'd in part for other reasons by *Amex Bank of Canada v. Adams*, 2012 QCCA 1394, appeal dismissed by *Amex Bank of Canada v. Adams*, 2014 SCC 56.

990 For example, see *Fédération des médecins spécialistes du Québec c. Conseil pour la protection des malades*, 2014 QCCA 459 at para. 69–70.

991 According to the comments of the Minister of Justice regarding new article 595, there does not seem to have been any intention to alter the state of previous law regarding the criterion of "sufficient accuracy" or "sufficiently precise". (Ministère de la justice & SOQUIJ, *Commentaires de la ministre de la Justice, Code de procédure civile, chapitre C-25.01* (Montreal, Wilson & Lafleur: 2015) at 432).

992 *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at para 112.

993 *Curateur public c. Syndicat national des employés de l'hôpital Saint-Ferdinand (C.S.N.)*, [1990] R.J.Q. 359 (Sup. Ct.).

994 *Public Curatorship Act*, R.S.Q., c. C-80.

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[1190] Regarding the difficulty of assessing the compensatory damages[995] sustained by the victims, Lesage J. made the following comments, which remain relevant today:[996]

> [TRANSLATION]
>
> Honorine Abel [for whom the Public Curator was the curator ex officio] belongs to the largest group, namely the severely mentally deficient, with no physical handicap or psychiatric disorder. The physically handicapped and the bedridden, due to their lack of autonomy, suffered more serious inconvenience. On the other hand, it may be assumed that the residents of unit 32, which is mixed psychogeriatric, were able to adapt more easily.
>
> Nonetheless, the harm suffered is of the same nature and must be addressed through a monetary assessment. Any inaccuracies in this assessment cannot, at this point, be significant enough to justify subdividing the class. The greater harm suffered by some patients due to lack of personal care can be compared to the harm suffered by others due to limiting their activities. In other words, those who suffered less physical discomfort probably suffered more frustration, i.e., psychological distress.
>
> Collective recovery shares a feature of the predominant economic and social relations in today's world. Decisions affect the masses. Rights are subject to computerized and standardized forms; exercising those rights often depends on a grid, with no regard for the specifics of a case.
>
> The legislator wanted the interests of a group of people with affinities to be dealt with collectively by the courts. This collective justice counterbalances the impossibility of obtaining compensation through individual proceedings, either because of the complexity or fluidity of the law or because the interests of the class members become diluted. This form of action gives the judiciary a new role in defining a justice system that is accessible, realistic, uniform and curative, in areas where the law exists but its sanction would otherwise be virtually illusory.

[1191] The comments of Lesage J. on the difficulty of assessing compensatory damages of this type – that is, moral damages – were echoed a few years later in a judgment of the Supreme Court that basically confirmed the trial judgment. In the unanimous reasons of the Court, L'Heureux-Dubé J. stated:[997]

> Contrary to the appellants' arguments, the subjective nature of moral prejudice does not in itself constitute grounds for intervening. This Court has in fact pointed this out on several occasions (see the trilogy [*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 R.C.S. 229; *Arnold v. Teno*, [1978] 2 R.C.S. 287; and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2

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995 The expression "moral damages" is not used in the Superior Court judgment.

996 *Curateur public c. Syndicat national des employés de l'hôpital Saint-Ferdinand (C.S.N.)*, [1990] R.J.Q. 359, p. 396 (Sup. Ct.).

997 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 at para. 85.

> R.C.S. 267] and *Snyder v. Montreal Gazette Ltd.*, *supra*) and, as I mentioned earlier, because of the nature of the prejudice, the quantum of moral damages cannot be determined exactly.

[1192] In light of these facts, Lesage J. ordered collective recovery and instructed the defendants to deposit with the clerk the amount of $1,135,750, i.e., individual compensation of $1,750 for each of the 649 victims comprising the class represented by the Public Curator, the composition of which was reviewed by Lesage J. Then, establishing the conditions of the individual claims, he listed the information they had to contain and authorized the prothonotary of the Superior Court to accept or reject the claims, subject to his review, with it being further understood that the prothonotary had to refer certain types of claims, including contested claims, to him.

[1193] The Court of Appeal unanimously dismissed the appeal filed by the union and the Fédération des affaires sociales.[998] The Public Curator's cross appeal on the claim for exemplary damages, which had bend dismissed by Lesage J., was allowed in the amount of $200,000. The Court ordered collective recovery through the deposit of the full amount with the court clerk, to be remitted to the Public Curator [TRANSLATION] "to be used [by the Public Curator] for the benefit of all patients." Nichols and Fish JJ. formed the majority, with Tourigny J. dissenting. In addition, Nichols J. would have allowed the claim of $1750 for each of the forty-odd patients of the medical-surgical and transitional units that Lesage J. had excluded from the class, but Tourigny and Fish JJ. did not share his opinion and dismissed that part of the cross-appeal.

[1194] It was this last judgment that the Supreme Court confirmed in all respects a few years later.[999]

[1195] Conceptually and legally, all the components underlying the implementation of collective recovery in the judgment *a quo* are already present and were fully approved by the Supreme Court of Canada in *St-Ferdinand*: class-wide assessment of the moral prejudice suffered by each class member (or sub-class member as in *St. Lawrence Cement*[1000]), collective recovery and the actual or anticipated (as in the present case) implementation of an individual claim mechanism. If only the legal aspects are considered and not the facts, the difference between the present case and *St-Ferdinand* seems negligible. Of course, the quantum of the damages awarded is of a different magnitude, but that does not change anything in terms of the advisability of ordering collective recovery.

[1196] There is therefore no cause for this Court to intervene, as the trial judge did not commit a reviewable error in preferring to order collective recovery rather than individual claims.

8. INTERLOCUTORY JUDGMENTS AND EVIDENCE

8.1 Background

[1197] The judge rendered several interlocutory judgments concerning the admissibility of

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998 *Syndicat national des employés de l'hôpital Saint-Ferdinand c. Québec (Curateur public)*, [1994] R.J.Q. 2761 (C.A.).

999 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211.

1000 *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.

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evidence, which the appellants challenge on appeal. Before the hearing of the appeals, however, they limited their claims to certain categories of judgments that can be described as follows: (i) those that permitted the introduction into evidence of exhibits by way of a notice under article 403 f.C.C.P., subject to an objection rejected in the judgment *a quo*, which admitted the introduction of exhibits qualified as "2m," i.e., admitted by virtue of the principle of the May 2, 2012, judgment,[1001] and, (ii) decisions or conclusions relating to other exhibits whose admissibility is still contested on grounds of parliamentary privilege or solicitor-client privilege.

[1198] When reduced to its simplest expression, the debate on appeal concerns only the following exhibits: (i) Exhibit 2, *The Leaflet* of June 1969; (ii) Exhibit 25A, a radio interview with Mr. Paul Paré, then President of ITL; (iii) Exhibits 28A and 125A, an eight- page document entitled *Smoking and Health: the Position of Imperial Tobacco*; (iv) Exhibits 154 and 154B-2m, the Policy Statement and its appendices; (v) Exhibit 13372m, a document entitled *Canadians' Attitudes Toward Issues Related to Tobacco Use and Control*; (vi) Exhibits 1395 and 1398, exhibits relating to BAT; and (vii) Exhibit 1702, the so-called Colucci letter.

8.2 Analysis

A. Mootness of the ground of appeal

[1199] Before going any further, it should be noted that the appellants did not even attempt to demonstrate in their arguments that, if the Court were to admit their grounds of appeal in this regard, it would have the effect of reversing the operative part of the judgment *a quo* or reducing the scope of the award for damages. This ground of appeal is therefore moot, and usually the Court must refrain from considering it. There is, however, an exception recognized by the jurisprudence of the Supreme Court and the Court of Appeal that allows the Court, at its discretion, to consider a question that has become moot.

[1200] The landmark decision on the mootness of an appeal is *Borowski v. Canada (Attorney General)*,[1002] rendered by the Supreme Court in 1989. In that case, the appellant challenged the validity of subsections 251(4), (5) and (6) Cr. C., then in effect in regard to abortion. The Supreme Court dismissed the appeal because, prior to the hearing, it had already declared section 251 Cr. C. to be
inoperative in *R. v. Morgentaler*.[1003] It based its dismissal on the concept of the mootness of the appeal, as well as the loss of the appellant's standing, since the circumstances on which the dispute was based had disappeared.

[1201] The Supreme Court described as moot the question whose answer will have no practical effect on the rights of the parties in dispute and called upon the courts, in such a case, to decline to decide the case. To conclude that a question is moot, the Court used the criterion of live controversy. The Supreme Court concluded that the appellant's appeal did not meet this criterion because "[n]one of the relief claimed in the statement of claim is relevant."[1004] It dictated a two-

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[1001] See paragraphs [73] to [75] above.
[1002] *Borowski v. Canada (Attorney general),* [1989] 1 S.C.R. 342.
[1003] *R. v. Morgentaler*, [1988] 1 S.C.R. 30.
[1004] *Borowski v. Canada (Attorney general),* [1989] 1 S.C.R. 342 at 357.

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step analysis when mootness is at stake:[1005]

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

[1202] When the court concludes that a case is moot, however, it may still decide to hear it at its discretion. To this end, the Supreme Court set out the guidelines for this exercise by specifying the three underlying rationales of the mootness doctrine: (i) the adversary system; (ii) the concern for judicial economy; and (iii) the court's role in the law-making process.[1006]

[1203] With regard to the adversary system, the Supreme Court stated that it is a fundamental tenet of the Canadian legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.[1007] It adds that this requirement may be satisfied despite the cessation of a live controversy, if adversarial relationships prevail, for example, as to the collateral consequences of the outcome.[1008]

[1204] With regard to the concern for judicial economy, the Supreme Court stated that there is a need to "ration"[1009] judicial resources among claimants. It noted that the concern for conserving judicial resources will be answered in cases that have become moot if the Court's decision "will have some practical effect on the rights of the parties" notwithstanding that it will not have the effect of determining the controversy which gave rise to the action."[1010] It added that "an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration," but that it is usually preferable to wait and determine the point in a genuine adversarial context.[1011] Finally, the Supreme Court stated that it is warranted to deploy judicial resources to settle a moot issue of national importance, provided there is a social cost in leaving the matter undecided.[1012]

[1205] With regard to the court's role, the Supreme Court called upon the courts to proceed with caution and not depart from the traditional role of resolving disputes and contribute to law-making without intruding into the roles of the executive or legislative branches.[1013] Moreover, the Supreme Court took care to point out that a court should take into account each of the three rationales of the mootness doctrine and that "the presence of one or two of the factors may be overborne by the absence of the third, and vice versa."[1014]

[1206] Since *Borowski v. Canada (Attorney General),* several decisions have been rendered by

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[1005] *Borowski v. Canada (Attorney general),* [1989] 1 S.C.R. 342 at 353.
[1006] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342 at 358–363.
[1007] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342 at 358–359.
[1008] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342 at 359.
[1009] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342 at 360.
[1010] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342 at 360 [Emphasis added.].
[1011] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342 at 360–361.
[1012] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342 at 361–362.
[1013] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342 at 362–363.
[1014] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342 at 363.

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the Supreme Court[1015] and by the country's various appellate courts, including this Court,[1016] in accordance with the mootness doctrine. Without reviewing them all, the principles of *Borowski v. Canada (Attorney General)* remain applicable.[1017]

[1207] The true nature of the two issues in dispute here, formulated in legal terms and ignoring the facts underlying them, warrants this analysis despite their mootness.

B. Parliamentary Privilege

[1208] First, there is the question of the applicability of parliamentary privilege to the 1969 testimony of Mr. Paul Paré before a parliamentary committee,[1018] as chair of the Ad Hoc Committee, and to the publication of an account of his testimony in an internal ITL publication entitled *The Leaflet: Special Report on Smoking and Health*. This publication states that, in their brief before the House of Commons Standing Committee, the companies that were members of the Ad Hoc Committee stated that they "have been and continue to be responsible corporate citizens of Canada" or that "results indicate that tobacco, and especially the cigarette, has been unfairly made a scapegoat in recent times for nearly every ill that man is heir to." Mr. Paré stated that government action would likely have negative effects by limiting the freedom of citizens.[1019]

[1209] This part of *The Leaflet* or document thus contains a form of "report" on the statements made before the parliamentary committee and an analysis of their content. In addition, the document addresses topics that highlight ITL's views on topics that are closely related to its own interests, i.e., the "[b]eneficial effects of smoking recognized by many authorities" and the fact that "[s]cientists challenge "very dogmatic attitude" of anti-cigarette claims."[1020]

[1210] In short, ITL claims that the judge should have made his own account of Mr. Paré's comments subject to parliamentary immunity because his statements were made before a parliamentary committee.

[1211] The judge took the document into account when considering whether ITL had trivialized the risks of tobacco product consumption. He also mentioned that Mr. Paré's testimony was given on behalf of the Canadian tobacco industry. The judge concluded, based partially on this exhibit, that the industry had not complied with its obligation to disclose the risks associated with

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[1015] See for example *R. v. Oland,* 2017 SCC 17; *R. v. McNeil,* 2009 SCC 3; *R. v. Smith,* 2004 SCC 14; *Doucet-Boudreau v*. *Nova Scotia (Minister of Education)*, 2003 SCC 62; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.

[1016] See *Société de l'assurance automobile du Québec c. Propriété Provigo ltée*, 2013 QCCA 1509 (St-Pierre J.A.); *Québec (Procureur général) v. B.S.*, 2007 QCCA 1756; *Velasquez Guzman v. Canada (Citizenship and Immigration)*, 2007 FCA 358; *Gagliano v. Canada (Attorney general)*, 2006 FCA 86; *R. v. Ho*, 2003 BCCA 663; *Mpega c. Université de Moncton*, 2001 NBCA 78; *R. v. Thanabalsignham*, 2018 QCCA 197, leave to appeal to S.C.C., 37984.

[1017] *R. v. Oland*, 2017 SCC 17 at para. 17.

[1018] Then President of ITL.

[1019] Exhibit 2 at 4.

[1020] Exhibit 2 at 2–3.

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the consumption of tobacco products.

[1212] In so doing, did the judge violate parliamentary privilege? The answer is no. The appellants did not even attempt to demonstrate how parliamentary privilege was at stake in the circumstances of this case when ITL voluntarily published Mr. Paré's statements at the same time as a few comments related to his testimony. This omission constitutes a *fin de non-recevoir*.

[1213] The method of analysis established by the Supreme Court in 2005 in *Canada (House of Commons) v. Vaid* requires the court to "ascertain whether the existence and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster"[1021]. If the privilege has not been authoritatively established, the court must go on to the second step.[1022] The court will have to verify whether the claimed privilege meets the necessity test by following a "purposive approach," which consists in determining whether the privilege is necessary for the exercise of a legislative function.[1023] The party who seeks to rely on the privilege has the onus of establishing its existence and scope.[1024]

[1214] In this regard, witnesses before parliamentary committees, like Mr. Paré, are also protected by parliamentary immunities in relation to their testimony.[1025] Among other things, they cannot be sued for damages for the content of their testimony before a parliamentary committee. But in the case at hand, ITL intentionally reproduced extracts from the testimony before the parliamentary committee and commented on them in its internal publication, only to complain afterwards that the judge took them into account.

[1215] It is also necessary to distinguish the impossibility of initiating civil and defamatory libel proceedings against someone who has testified before a parliamentary committee, on the one hand, from, on the other hand, using the account of a company president's testimony in order to establish the company's point of view on the topics addressed.

[1216] In *Ouellet v. R.*,[1026] Associate Chief Justice Hugessen of the Superior Court charged a member of parliament with criminal *ex facie curiae* contempt of court for derogatory comments made outside, but in the foyer of, the House of Commons while the vote call bells were ringing for the members of parliament. The comments concerned an acquittal verdict in connection with a criminal prosecution under the *Combines Investigation Act*.[1027]

[1217] To the same effect, in *Pankiw v. Canada (Human Rights Commission)*,[1028] Justice Lemieux of the Federal Court confirmed the jurisdiction of the Human Rights Tribunal to hear

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[1021] *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 39 [Emphasis added.].

[1022] See, in general, Peter W. Hogg, *Constitutional Law of Canada*, vol. 1, 5th ed. (Toronto, Thomson Reuters, 2007) looseleaf, update No. 2018-1 at. 1-13; see also Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed. (Cowansville, Yvon Blais: 2014) at 329–336; *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at 687, para. 40; *Lavigne v. Ontario (Attorney General)*, 91 O.R. (3d) 750, 2008 CanLII 89825 (ONSC) at para. 48.

[1023] *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 41–46.

[1024] *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 29.

[1025] J.P. Joseph Maingot, *Parliamentary Immunity in Canada* (Toronto, LexisNexis: 2016) at 17, 31, 36–38.

[1026] *Ouellet c. R.*, [1976] C.S. 503.

[1027] *Combines Investigation Act*, R.S.C. 1970, c. C-23.

[1028] *Pankiw v. Canada (Human Rights Commission)*, 2006 FC 1544.

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nine complaints against a member of parliament alleging that the member of parliament had made discriminatory comments about Aboriginal peoples in a brochure known as a householder. The brochure in question was printed and distributed under the auspices and at the expense of the House of Commons. The Speaker of the House of Commons intervened in the dispute and claimed, unsuccessfully, that the Tribunal had no legal or constitutional jurisdiction to hear complaints in connection with the activities of a member of parliament.

[1218] Given these two examples from the case law indicating a restrictive interpretation of parliamentary privilege, it is inconceivable that this privilege would extend to the point of applying in any way to Mr. Paré's comments, which ITL chose to reproduce in *The Leaflet,* with, moreover, what appears to be its own interpretation of Mr. Paré's claims before the committee. It is quite clear that the privilege that ITL claims is in no way necessary for the work of Parliament.

[1219] However, but for this publication by ITL, the fate of its claims might have been different, as demonstrated by the judgment of Justice Conway of the Superior Court of Justice in *Ontario v. Rothmans*.[1029]

[1220] In that case, a lawsuit was filed by the Province of Ontario to recover the costs of tobacco-related health care for Ontario residents. Justice Conway struck from the statement of claim the paragraphs in which the Attorney General alleged, among the repeated false statements of the tobacco companies, their statements before parliamentary committees on the risks associated with smoking. The *ratio decidendi* of his judgment can be found in the following passage:

> [32] Once a person attends and participates in a parliamentary committee proceeding, the absolute privilege applies to his statements made in the course of that proceeding, with the result that the statements cannot be used in a civil action against him. The surrounding circumstances are simply not relevant. In this case, the Crown had pleaded that the defendants made the Presentations to various House of Commons standing committees and federal legislative committees. That is sufficient to invoke the privilege.

[1221] That being said, the judge nevertheless erred when he attributed Mr. Paré's comments published in *The Leaflet* to the other two appellants. There was no evidence that the other two appellants were involved in any way in the dissemination of Mr. Paré's comments in the ITL publication. However, this error is not determinative in regard to their own liability. The record contains numerous pieces of evidence that establish that the three appellants failed to meet their obligation to disclose information known to them by trivializing the harmfulness and other dangers associated with their products.

C. Authenticity and preparation of exhibits

[1222] As for the second question, article 264 n.C.C.P. corresponds to article 403 f.C.C.P. and essentially has the same effect. This judgment, subject to the usual reservations, could therefore be useful in interpreting this article in a fairly specific case.

[1223] In a judgment rendered on May 2, 2012, the judge ruled that the appellants' notice of denial was improper and acknowledged the authenticity of the documents in question. He also

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[1029] *Ontario v. Rothmans et al*, 2014 ONSC 3382.

suggested that ITL had knowledge of their authenticity.[1030]

[1224] Article 403 f.C.C.P. is aimed at speeding up the inquiry so that it focuses only on documents that are genuinely disputed. It provides the following:

403. After the filing of the defence, a party may, by notice in writing, call upon the opposite party to admit the genuineness or correctness of an exhibit. A copy of the exhibit must be attached to the notice, except where the exhibit has already been communicated or in the case of real evidence; in the case of real evidence, the exhibit shall be put at the disposal of the opposite party.	**403.** Après production de la défense, une partie peut, par avis écrit, mettre la partie adverse en demeure de reconnaître la véracité ou l'exactitude d'une pièce qu'elle indique. L'avis doit être accompagné d'une copie de la pièce, sauf si cette dernière a déjà été communiquée ou s'il s'agit d'un élément matériel de preuve, auquel cas celui-ci doit être rendu accessible à la partie adverse.
The genuineness or correctness of the exhibit is deemed admitted unless, within 10 days or such time as the judge may fix, the party called upon to admit its genuineness or correctness serves on the other party a sworn statement denying that the exhibit is genuine or correct, or specifying the reasons why he cannot so admit. However, if the ends of justice so require, the court may, before judgment is rendered, relieve the party of his default.	La véracité ou l'exactitude de la pièce est réputée admise si, dans les dix jours ou dans tel autre délai fixé par le juge, la partie mise en demeure n'a pas signifié à l'autre une déclaration sous serment niant que la pièce soit vraie ou exacte, ou précisant les raisons pour lesquelles elle ne peut l'admettre. Cependant, le tribunal peut la relever de son défaut avant que jugement ne soit rendu, si les fins de la justice le requièrent.
The unjustified refusal to admit the genuineness or correctness of an exhibit may result in a condemnation to the costs resulting therefrom.	Le refus injustifié de reconnaître la véracité ou l'exactitude d'une pièce peut entraîner condamnation aux dépens qu'il occasionne.

[1030] *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCCS 1870, paragr. 26-28.

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[1225] The Court specified that this article cannot be used to prove the genuineness of the content of an exhibit.[1031] It can, however, be used to prove the authenticity of its preparation.[1032] Thus, if the party responds to the formal notice by acknowledging the genuineness of the exhibit, or if it fails to respond to it, the content of the exhibit in question is not necessarily admitted.

[1226] In addition, a comparison with article 264 n.C.C.P. confirms this position. That article provides:

264. A party may give another party a formal notice to admit the origin of a document or the integrity of the information it contains.	**264.** Une partie peut mettre une autre partie en demeure de reconnaître l'origine d'un document ou l'intégrité de l'information qu'il porte.
The formal notice must be notified at least 30 days before the trial. If the document or other evidence has not already been disclosed, a suitable representation of it or, in the absence of such a representation, particulars on how to access it must be attached.	La mise en demeure doit être notifiée au moins 30 jours avant l'instruction; elle est accompagnée d'une représentation adéquate du document ou de l'élément de preuve s'il n'a pas déjà été communiqué ou, en l'absence de telle représentation, d'une indication permettant d'y avoir accès.
The party having been given the formal notice admits or denies the origin or integrity of the evidence in an affidavit giving reasons, and notifies the affidavit to the other party within 10 days.	La partie mise en demeure admet ou nie l'origine ou l'intégrité de l'élément de preuve dans une déclaration sous serment dans laquelle elle précise ses motifs; elle notifie cette déclaration à l'autre partie dans un délai de 10 jours.
Failure to respond to the formal notice is deemed an admission of the origin and integrity of the evidence, but not of the truth of its contents.	Le silence de la partie en demeure vaut reconnaissance de l'origine et de l'intégrité de l'élément de preuve, mais non de la véracité de son contenu.

[Emphasis added.]

[1031] *Vincent c. Joubert*, J.E. 81-890, AZ-81011160 (C.A.).
[1032] *Vincent c. Joubert*, J.E. 81-890, AZ-81011160 (C.A.).

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[1227] Moreover, the Minister's comments on this article confirm that the changes made to the wording are intended to clarify that what is recognized is the preparation or authenticity of the exhibit, but not the truth of its content:[1033]

> [TRANSLATION]
>
> This article reproduces the previous rules in part, but rephrases them to take into account the new procedural context, among other things. The article no longer insists on the concepts of correctness and genuineness of the document but rather refers to the concepts of origin, i.e., its source and integrity. The latter concept, narrowed down by article 2839 of the *Civil Code*, pertains to the fact that the information must not be altered, must be maintained in its entirety and that the medium on which the document is stored provides the required stability and perennity.
>
> Contrary to the previous rule, it is specified that failure to respond to the formal notice is deemed an admission only of the origin and integrity of the document. It seems excessive that it should be deemed an admission of the truth of the information contained in the document. In such a case, it seems appropriate to leave it to the party intending to use the document to prove the value of its content. The court may, when deciding on legal costs, sanction any inappropriate conduct.

[1228] In short, the effect of article 403 f.C.C.P. is therefore limited to proving the authenticity of the preparation of a document[1034] and not the genuineness or correctness of its content. Finally, it is important to point out that there is a case where the Superior Court decided that where it is clear, on a balance of probabilities, that the documents listed in a notice under article 403 f.C.C.P. come from a party and that this party refuses to acknowledge their authenticity, the denial can be struck out.[1035] What is the situation in this case?

[1229] Although the sanction for an unjustified denial is provided for in the third paragraph of article 403 f.C.C.P. − a condemnation to the resulting costs −, a notice of denial remains a procedural act and may as such be dismissed or annulled by the court by virtue of its inherent power to sanction procedural impropriety,[1036] codified in articles 54.1 and following f.C.C.P.*:*

[1033] Ministère de la Justice, *Commentaires de la ministre de la Justice : Code de procédure civile. Chapitre C- 25.01* (Montreal, Wilson & Lafleur: 2015) at 214, art. 264.

[1034] *Lacasse c. Lefrançois*, 2007 QCCA 1015 at para. 64.

[1035] *Schwartz Levitsky Feldman, l.l.p. v. Werbin*, 2011 QCCS 6863.

[1036] *Aliments Breton (Canada) inc. c. Bal Global Finance Canada Corporation*, 2010 QCCA 1369 at para. 36. See also *Fabrikant c. Swamy*, 2010 QCCA 330.

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54.1. A court may, at any time, on request or even on its own initiative after having heard the parties on the point, declare an action or other pleading improper and impose a sanction on the party concerned.

54.1. Les tribunaux peuvent à tout moment, sur demande et même d'office après avoir entendu les parties sur le point, déclarer qu'une demande en justice ou un autre acte de procédure est abusif et prononcer une sanction contre la partie qui agit de manière abusive.

The procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.

L'abus peut résulter d'une demande en justice ou d'un acte de procédure manifestement mal fondé, frivole ou dilatoire, ou d'un comportement vexatoire ou quérulent. Il peut aussi résulter de la mauvaise foi, de l'utilisation de la procédure de manière excessive ou déraisonnable ou de manière à nuire à autrui ou encore du détournement des fins de la justice, notamment si cela a pour effet de limiter la liberté d'expression d'autrui dans le contexte de débats publics.

54.2. If the court notes an improper use of procedure, it may dismiss the action or other pleading, strike out a submission or require that it be amended, terminate or refuse to allow an examination, or annul a writ of summons served on a witness.

54.3. Le tribunal peut, dans un cas d'abus, rejeter la demande en justice ou l'acte de procédure, supprimer une conclusion ou en exiger la modification, refuser un interrogatoire ou y mettre fin ou annuler le bref d'assignation d'un témoin.

...

[…]

[Emphasis added.]

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[1230] Articles 54.1 to 54.6 f.C.C.P. were enacted in 2009 under *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*.[1037] The explanatory notes preceding the preamble of the Act state that the Act allows the courts to "promptly dismiss a proceeding that is improper."

[1231] From the foregoing, it follows that it was open to the judge to annul the appellants' notices of denial provided they were improper. However, were they really?

[1232] The first exhibit that the appellants contest the admissibility of is Exhibit 1337-2m. It is cited by the judge in paragraph 131[1038] of the judgment *a quo* and is a survey conducted in February and March 1996 by Environics Research Group Limited on behalf of the coalition founded by the Heart and Stroke Foundation of Canada, the Canadian Cancer Society and the Canadian Lung Association. In that paragraph, the judge says that since the survey was cited in an expert report of the appellants, that of Professor Duch, its authenticity and genuineness are acknowledged.[1039]

[1233] The appellants claim that the judge erred in acknowledging the genuineness of the content of this survey and relying on it to set the knowledge date in the Létourneau file.[1040] The respondents reply that Professor Duch was supposed to produce the studies referred to in his expert report, but that he failed to do so.[1041] The respondents therefore filed them independently, hence the suffix 2m.[1042]

[1234] The judge did not commit a palpable and overriding error by withdrawing this suffix in paragraph 131 of the judgment *a quo*. The exhibit was properly produced on the basis of the May 2, 2012, judgment,[1043] which allowed documents to be produced for which a notice pursuant to article 403 f.C.C.P. had been sent to the appellants, who improperly refused to acknowledge their genuineness. Moreover, the judge did not err by referring to this survey, among other evidence, to determine the knowledge date of the Létourneau file, since its content was used in Professor Duch's report, and Professor Duch was to produce it, but failed to do so. Finally, it is not the only evidence the judge relied on to determine this date.

[1235] Exhibit 154 is the Statement of Principle that was prepared by ITL in 1962 and signed by the other appellants at the time. According to the appellants, the judge drew a conclusion of

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[1037] *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*, SQ 2009, c. 12.
[1038] Judgment *a quo* at para. 131.
[1039] Judgment *a quo* at para. 131.
[1040] Response of Mtre François Grondin to Mtre Bertrand Gervais, October 3, 2016 (consulted in the Court of Appeal record).
[1041] Respondents' arguments at para. 419.
[1042] Respondents' arguments at para. 419.
[1043] *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCCS 1870.

collusion from this Statement of Principle.[1044] They argue that he erred in admitting this exhibit as evidence without giving it the suffix 2m. In addition, they claim that the judge erred when he concluded there was collusion on the basis of the content of this exhibit and its cover letter and appendix, Exhibits 154A and 154B-2m.

[1236] The respondents reply that Exhibit 154 was produced without any suffix or reservation by the appellant JTM itself under the identification number 40005A-1962.[1045]

[1237] Here again, the appellants are wrong. In fact, Exhibit 154B-2m and Exhibits 154A and 154 (i.e., the complete Policy Statement) were used by the judge to conclude that there was collusion, without verifying whether the content of these exhibits is genuine or whether there were any subsequent developments. Moreover, the judge did not make an overriding and palpable error in the conclusion he reached based on Exhibit 154, as it was produced by the appellant JTM itself. He did not commit an overriding and palpable error when he concluded that collusion had occurred based on Exhibits 154, 154A and 154B-2m, as he did not need to verify the genuineness or correctness of their content. He based himself only on the fact that these exhibits had been acknowledged as authentic. Again, it should be noted that these are not the only exhibits the judge used to conclude that there was collusion. There is ample evidence, particularly on the role of the CTMC, to support this conclusion.

D. Solicitor-client privilege

[1238] The appellants also argue that Exhibit 1702, a letter made public as part of a U.S. judgment ordering it to be made public on the Legacy Tobacco Documents Library website, should not have been considered by the judge, as it remains protected by solicitor-client privilege. The judge rightly concluded that solicitor-client privilege no longer applied because of the public nature of this letter in accordance with the U.S. judgment and owing to its availability on the Internet.[1046] The letter and its content were indeed readily available to all and could not, therefore, be protected by solicitor-client privilege.

8.3 Summary

[1239] Despite the mootness of this ground of appeal, the Court exercises its discretion to analyze the scope of the issues raised. The judge did not err in admitting and drawing conclusions of fact from an internal publication that ITL claimed to be protected by parliamentary privilege. Nor did he err in referring to exhibits which, in some cases, had been admitted under the principle of the May 2, 2012, judgment. Finally, he did not err in accepting the production of the Colucci Letter, which was not protected by solicitor-client privilege.

[1044] Response of Mtre François Grondin to Mtre Bertrand Gervais, October 3, 2016 (consulted in the Court of Appeal record).

[1045] Respondents' arguments at para. 417.

[1046] Judgment *a quo* at paras. 1137−1138.

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9. TRANSFER OF THE OBLIGATIONS OF MTI

9.1. Background

[1240] The judge briefly described JTM's claims that it is not the legal successor of its corporate predecessors in the following paragraphs of the judgment *a quo*:

> [545] JTM was acquired by Japan Tobacco Inc. of Tokyo from R.J. Reynolds Tobacco Inc. of Winston-Salem, North Carolina ("RJRUS") in 1999. RJRUS had owned the company since 1974, when it purchased it from the Stewart family of Montreal. The company, then known as Macdonald Tobacco Inc., had been in business in Quebec for many years prior to the opening of the Class Period.
>
> ...
>
> [1105] Before closing on JTM, the Court will deal with its argument that it never succeeded to the obligations of MTI … .
>
> [1106] Summarily, it argues that, in light of the contracts signed when the RJRUS group acquired it in 1978 and of the dissolution of MTI in 1983, the provisions of the Quebec Companies Act and the applicable case law dictate that "Plaintiffs' right of action, assuming they have any, can only be directed at MTI's directors and not its successor". This applies in its view to "any alleged wrongdoing that could have been committed on or before (October 27, 1978) by MTI".
>
> [Reference omitted.]

[1241] The judge rejected these claims.

[1242] Firstly, in the 1978 Agreement,[1047], R.J. Reynolds Tobacco Company "covenants and agrees to assume and discharge all liabilities and obligations now owing by MTI," including "all claims, rights of actions and causes of action, pending or available to anyone against MTI." The judge stated that he interprets "now owing" in a manner consistent with the detailed evidence that MTI officers had known for a long time that their customers "were being poisoned by its products."[1048] He therefore concluded that future claims that were "available to anyone against MTI" included potential lawsuits, as was already the case elsewhere in the world.

[1243] Finally, the judge found that MTI's legal advisers knew that its dissolution entailed the liability of the directors of a dissolved company. The judge was convinced that these directors had no intention of personally assuming liability for monetary awards resulting from fully foreseeable future lawsuits.

[1047] Exhibit 40596 at 4.

[1048] Judgment *a quo* at para. 1109.

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[1244] JTM claims on appeal that the judge erred in his interpretation of the 1978 Agreement, essentially for three reasons.

[1245] It cites clause 10, which provides that "nothing in this Agreement, express or implied, is intended to confer upon any other person any rights or remedies under or by reason of this Agreement."[1049]

[1246] It also argues that it is impossible to include actions based on retroactive provisions of the T.R.D.A., which would have revived otherwise prescribed remedies among those "now owing" in 1978.

[1247] Finally, JTM is of the opinion that the judge's interpretation is incompatible with the intention of the parties and the unambiguous text of the 1978 Agreement.

[1248] As for the respondents, they note the absence of witnesses to support JTM's proposed interpretation of the Agreement and argue that this interpretation is incompatible with the text of the Agreement. In this regard, they also cite a clause of the 1978 Agreement that demonstrates R.J. Reynolds Tobacco Company's intention to assume "(a) all liabilities whether accrued, absolute, contingent or otherwise ...; [and] (e) all claims, rights of action and causes of action, pending or available to anyone against MTI."[1050]

9.2. Analysis

[1249] Before analyzing this ground of appeal, the standard of review for contractual interpretation must be identified. This standard is the one recently described by the Court in *Administration portuaire de Québec c. Fortin*[1051]:

> [TRANSLATION]
>
> [12] The interpretation of a contract is a question of mixed fact and law when it is based on the search for the common and genuine intention of the parties. Thus, it is a question that, on appeal, is subject to a standard of palpable and overriding error unless the trial judge made some extricable error in principle or law. The Court recently reiterated this principle in *Corbeil Électrique inc. c. Groupe Opex inc. (Ashley Meubles Homestore)*, relying in particular on the Supreme Court of Canada's judgment in *Sattva Capital Corp. v. Creston Moly Corp.*
>
> [Reference omitted.]

[1250] The most important factual element retained by the judge in his analysis is that the

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[1049] Exhibit 40596 at 7.
[1050] Exhibit 40596 at 4 [Emphasis added].
[1051] *Administration portuaire de Québec c. Fortin*, 2017 QCCA 315.

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detailed evidence shows that R.J. Reynolds Tobacco Company and MTI had knowledge in 1978 of the fact that MTI's customers had already been "poisoned" by MTI's products, and that there were therefore reasons to anticipate lawsuits in Canada against tobacco product manufacturers.

[1251] This factual determination is far from being a palpable and overriding error. On the contrary, the judge referred to abundant and uncontradicted evidence heard in support of his conclusion. It follows that the judge made no reviewable error in his interpretation of the 1978 Agreement when he concluded that this action against JTM was foreseen in that Agreement. Nor was there any error of law, "extricable" from the questions of fact, which could have resulted in the application of the standard of correctness to the decision.

[1252] This ground of appeal is therefore dismissed.

10. DESTRUCTION OF DOCUMENTS BY ITL

10.1. Background

[1253] In the context of its discussion of the issue of whether ITL adopted or applied a systematic policy of denial or non-disclosure of the risks and dangers of smoking, the judge took account of certain facts involving its in-house (Mtre Roger Ackman) and outside (Mtre Lyndon Barnes and Mtre Simon Potter) counsel.[1052] He described those circumstances as follows at the end of paragraph 1077 of the judgment:

> • ITL's bad-faith efforts to block court discovery of research reports by storing them with outside counsel, and eventually having those lawyers destroy the documents.

[1254] According to the judge, the questions to be resolved on that front were the following:[1053]

> • Was it ITL's intention to use the destruction of the documents as a means to avoid filing them in trials?
>
> • Was it ITL's intention in engaging outside counsel for that exercise to use that as a means to object to filing the documents based on professional secrecy?
>
> [Reference omitted]

[1255] More specifically, the judge analyzed the role of ITL's counsel at the beginning of the 1990s in the transfer to its sole shareholder in England, BAT, of scientific research documents held by ITL in Canada. At that time, J.K. Wells, in-house counsel of Brown & Williamson (the

[1052] Judgment *a quo* at paras. 357−378.
[1053] Judgment *a quo* at para. 367.

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sole shareholder of which was also BAT), expressed the opinion that the content of those documents would be difficult to explain before Canadian courts.

[1256] Despite the reticence of its research director, ITL nonetheless agreed to their destruction, it being understood that BAT would fax any research document ITL's scientists wanted to see. In this context, during the summer of 1992, at the request of Mtre Ackman, Mtre. Potter and other attorneys from his firm supervised the destruction of about one hundred research documents held by ITL.[1054] At trial, Mtre Ackman was unable to provide a plausible explanation for that destruction or why he involved outside counsel in the process.

[1257] Before the trial in this case, it seems that there were three cases in Canada involving at least one of the Appellants in which the production of documents repatriated to England or destroyed had taken place or might have taken place.

[1258] First, in the context of the constitutional challenge to certain sections of the *Tobacco Products Control Act*[1055] limiting the advertising of tobacco products taken by two tobacco companies against the Attorney General of Canada,[1056] Chabot J. of the Superior Court allowed an objection by ITL to the production of those documents, which they said they were no longer in possession of. ITL's attorney did not tell Chabot J. that ITL could have obtained them according to the agreement with BAT mentioned above. In a letter from Mtre Ackman sent to, among others, the executives of ITL and BAT as well as to Mtre Potter, the judgment allowing the objection was described as "a major victory" for ITL.[1057]

[1259] That said, counsel for the Attorney General of Canada did not consider it necessary to ask for leave to appeal the judgment allowing the objection (art. 29, para. 1(2) f.C.C.P.). It is also true that the absence of those documents before Chabot J. did not affect the final outcome of the constitutional challenge.

[1260] In this regard, the reasons of the majority and dissenting Supreme Court judges recognized, to use the words of LaForest J., that Chabot J. had before him "[a] copious body of evidence ... demonstrating convincingly, and this was not disputed by the appellants,[1058] that tobacco consumption is widespread in Canadian society and that it poses serious risks to the health of a great number of Canadians."[1059] The harmful effects of tobacco

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[1054] The documents in question were nonetheless filed in the Superior Court record. The plaintiffs were also successful in obtaining them in other actions against the tobacco companies, and they were filed in the public archives created by an order of a U.S. court. The list of documents appears in Exhibit 58.

[1055] *Tobacco Products Control Act*, S.C. 1988, c. 20.

[1056] See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Canada (Procureur général)c. R.J.R. - MacDonald inc.*, [1993] R.J.Q. 375 (C.A.); *Imperial Tobacco Ltd. c. Canada (Procureur général)*, [1991] R.J.Q. 2260 (Sup. Ct.).

[1057] Exhibit 68 at 1.

[1058] That is, the appellants JTM and ITL in their corporate form at the time.

[1059] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 30.

products have never been questioned, which no doubt explains the Attorney General of Canada's decision not to pursue the debate about obtaining ITL's research documents before the Court of Appeal.

[1261] The judgment *a quo* then refers to the testimony of Mtre Barnes, who acknowledged that ITL filed an affidavit in order to avoid producing the documents in the Ontario case *Spasic Estate v. Imperial Tobacco Ltd.*[1060] That claim was instituted in May 1997 by Mirjana Spasic for damages related to her addition to products manufactured by two cigarette companies, which she claimed was the source of her lung cancer. Since Ms. Spasic was deceased, her estate took over the case.

[1262] In an amended statement of claim, the estate alleged that the tobacco companies had committed the delict of destruction of evidence.[1061] Writing for the Ontario Court of Appeal, Borins J. summarized the elements of that claim in an interlocutory judgment:[1062]

> It is pleaded that since the1950s, the defendants knew that cigarettes were hazardous and "inherently defective" and that they "engaged in various schemes to conceal, destroy and alter evidence that established their knowledge". The schemes alleged included contrived document retention and destruction policies and plans. It is further pleaded that "as a result of the defendants' participation in such schemes, the plaintiff has been deprived of the opportunity to properly and fully investigate and proved the facts upon which her causes of action are based".

[1263] No judgment on the merits was rendered in that case. According to the information available today, the file was administratively struck from the roll of cases ready to proceed due to the plaintiff's attorneys' failure to comply with the applicable requirements regarding the determination of hearing dates. However, it is still possible for the attorneys to file a motion to be re-inscribed on the roll.

[1264] Lastly, the testimony at trial of Mtre Barnes pointed out the existence of a third case in which he signed an affidavit of production of documents: *Caputo v. Imperial Tobacco Ltd.*[1063] That was an application for authorization to bring a class action in damages against the three appellants in this case, dismissed by Winkler J. (then trial judge and subsequently Chief Justice of Ontario), on the ground that the proposed action did not meet all the criteria in force in that province for the exercise of such an action. Accordingly, the issue of the destruction of documents was never addressed.

[1060] *Spasic Estate v. Imperial Tobacco Ltd.*, 2003 CanLII 32909 (Ont. Sup. Ct. J.).
[1061] In common law, "tort of spoliation".
[1062] *Spasic Estate v. Imperial Tobacco Ltd.*, 49 OR (3d) 699 at para. 4.
[1063] *Caputo v. Imperial Tobacco Ltd.*, 236 DLR (4th) 348 (Ont. Sup. Ct. J).

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10.2. Analysis

[1265] ITL's main argument is that the proof of its conduct in other cases in Quebec and Ontario is irrelevant in the examination of this case. It also argues that the judge failed to take account of the fact that it filed the destroyed documents in 1992 in the Superior Court file in this matter as well as the affidavit of production of documents in *Spasic* in Ontario. What is more, it asserts that there is no proof of a causal connection between the destruction of the documents and a lack of knowledge on the part of the respondents.

[1266] As for the respondents, they argue that ITL was aware, when the documents were destroyed, of the likelihood of disputes alleging its civil liability toward consumers of its products. Accordingly, ITL should have taken the necessary steps to ensure the preservation of the research documents, particularly because, according to the judge:[1064]

> • The documents will be difficult for company witnesses to explain and could allow plaintiffs to argue that scientists in the company accepted causation and addiction;

[1267] The respondents assert, as the judge noted, that the destroyed documents were specifically of the type that the appellants had a duty to make public, particularly to their customers, as part of their obligation to provide information.

[1268] In first instance and on appeal, ITL did not attempt to justify its conduct, an exercise doomed to failure.

[1269] Its defence is based on the lack of relevance and the lack of any effect of its actions on the respondents' ability to prove that they are liable. In this regard, it is partly right: that proof was in the record, and its absence would not have changed the judge's conclusion regarding its civil liability toward the respondents, at least with respect to compensatory damages.

[1270] In addition, their absence did not have any impact on the outcome of two of the three cases in which they could have been introduced.[1065] With regard to the third case, in which the plaintiffs claim the delict of destruction of evidence,[1066] they seem to have failed to do what is required to set a trial date, so no judgment on the merits has been rendered.

[1271] But is the absence of a causal connection between the destruction of research documents and the respondents' ability to make their proof sufficient to conclude that the Court should not take it into account in awarding part of the punitive damages that the judge ordered ITL to pay?

[1272] The answer to that question is no.

[1064] Judgment *a quo* at para. 361.
[1065] See *supra* notes 1052 and 1058.
[1066] See *supra* note 1055.

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[1273] First, the relevance of that evidence must be analyzed based on the preventive objective of punitive damages, namely deterrence, punishment and denunciation,[1067] which differs from the objective of an order to pay compensatory damages.

[1274] Cory J. clearly described this objective on behalf of the Supreme Court in *Hill v. Church of Scientology*,[1068] stating that "where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency", the aim of punitive damages is "not to compensate the plaintiff, but rather to punish the defendant ... [and they] are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner."[1069]

[1275] Before granting punitive damages taking into account these objectives, there must be a rational connection between the facts retained by the court and the granting of such damages. In the case at bar, such a relationship exists: to dissuade similar conduct of the destruction of documents that ITL knew were potentially highly relevant in the anticipated litigation, and a lack of candour before the courts by objecting to proof based on a half-truth, the judge was quite right to conclude that the situation warranted an order to pay punitive damages and that ITL's reprehensible conduct could form part of the analysis of the quantum. The impact of this event on the quantum is dealt with in section IV.5 of these reasons.

[1276] As for the role of this Court, the case law of the Supreme Court is clear: an appellate court may only interfere with the granting or assessment of punitive damages if it finds that there has been an error of law, a palpable and overriding error in the assessment of the evidence, or a serious error in the assessment of the amount.[1070] ITL was unable to demonstrate such errors.

V. CONCLUSION

[1277] On appeal, the appellants failed to demonstrate any errors of law or palpable and overriding errors in the Superior Court judgment, other than on certain minor points. Accordingly, their appeals should be allowed for the sole purpose of correcting a few inaccuracies in the judgment *a quo*, but that judgment should be confirmed in all other respects.

[1278] The Court's intervention covers the starting point for calculating interest on the compensatory damages, which should be revised based on the dates of the members' diagnoses (section IV.6). It also covers a minor detail in the definition of the Blais Class,

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[1067] *Richard v. Time Inc*., 2012 SCC 8 at para. 188.

[1068] *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at para. 196, recently cited with approval by this Court in *Ville de Sainte-Marthe-sur-le-Lac c. Expert-conseils RB inc*., 2017 QCCA 381 at para. 79.

[1069] See also J.-L. Baudouin & P.-G. Jobin, *supra* note 210 at para. 803.

[1070] See *Cinar Corporation v. Robinson*, 2013 SCC 73 at para. 134; *Richard v. Time Inc.*, 2012 SCC 8 at paras. 188−190; *Québec (Curateur public) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 at paras. 122, 125−126 and 129.

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including a linguistic impropriety that must be corrected, and to which the date the Class Period began must be added. Lastly, it covers the correction of an error in the calculation of the number of diagnoses that affected the exact total amount of compensatory damages granted in the Blais file, which drops from $6,858,864,000 to $6,857,854,080 due to the calculations illustrated in section IV.6.[1071]

[1279] With respect to legal costs on appeal, given the very mitigated success of the appeals, it is appropriate to order that legal costs on appeal be granted entirely in favour of the respondents in connection with the main appeal. In view of the fact that the cross-appeal is now moot and the respondents' success on appeal, the cross-appeal will be dismissed without costs.

FOR THE AFOREMENTIONED REASONS, THE COURT, UNANIMOUSLY:

[1280] **ALLOWS** the appeals in part in files n^{os} 500-09-025385-154, 500-09-025386-152 and 500-09-025387-150;

[1281] **REVERSES** the judgment of the Superior Court in part;

[1282] **STRIKES** paragraphs 1208 to 1213 of the judgment and **REPLACES** them with the following paragraphs :

> [1208] **AMENDS** the class description as follows:
>
> | | |
> |---|---|
> | All persons residing in Quebec who satisfy the following criteria: | Toutes les personnes résidant au Québec qui satisfont aux critères suivants : |
> | 1) To have smoked, **between January 1, 1950 and** November 20, 1998, a minimum of 12 pack/years of cigarettes manufactured by the defendants (that is, the equivalent of a minimum of 87,600 cigarettes, namely any combination of the number of cigarettes smoked in a day multiplied by the number of days of consumption insofar as the total is equal to or greater than 87,600 cigarettes). | 1) Avoir fumé, **entre le 1er janvier 1950** et le 20 novembre 1998, au minimum 12 paquets-année de cigarettes fabriquées par les défenderesses (soit l'équivalent d'un minimum de 87 600 cigarettes, c'est-à-dire toute combinaison du nombre de cigarettes fumées dans une journée multiplié par le nombre de jours de consommation dans la mesure où le total est égal ou supérieur à 87 600 cigarettes). |
> | For example, 12 pack/years equals : | Par exemple, 12 paquets/année égale : |
> | 20 cigarettes a day for 12 years (20 X 365 X 12 = 87,600) or | 20 cigarettes par jour pendant 12 ans (20 X 365 X 12 = 87 600) ou |
> | 30 cigarettes a day for 8 years (30 X 365 X | |

[1071] See also, *supra* note 978.

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8 = 87,600) or 10 cigarettes a day for 24 years (10 X 365 X 24 = 87,600); 2) To have been diagnosed before March 12, 2012 with : a) Lung cancer or b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx or c) Emphysema. The group also includes the heirs of the persons deceased after November 20, 1998 who satisfied the criteria mentioned herein.	30 cigarettes par jour pendant 8 ans (30 X 365 X 8 = 87 600) ou 10 cigarettes par jour pendant 24 ans (10 X 365 X 24 = 36 500); 2) Avoir **reçu un diagnostic d'une de ces maladies** avant le 12 mars 2012 : a) ~~un~~ cancer du poumon ou b) ~~un~~ cancer (carcinome épidermoïde) de la gorge, à savoir du larynx, de l'oropharynx ou de l'hypopharynx ou c) ~~de~~ l'emphysème. Le groupe comprend également les héritiers des personnes décédées après le 20 novembre 1998 qui satisfont aux critères décrits ci-haut.

[1209] **CONDEMNS** the Defendants solidarily to pay as moral damages an amount of **$6,857,854,080** plus interest and the additional indemnity **from the dates specified in the following table for each increment of the condemnation:**

Year of diagnosis	Amount in capital	Date from which interests and the additional indemnity are to be calculated
1995	$353,485,440	November 20, 1998
1996	$356,231,040	November 20, 1998
1997	$360,103,040	November 20, 1998
1998	$373,338,240	December 31, 1998
1999	$381,575,040	December 31, 1999
2000	$382,279,040	December 31, 2000
2001	$398,541,440	December 31, 2001
2002	$402,554,240	December 31, 2002
2003	$405,863,040	December 31, 2003
2004	$414,240,640	December 31, 2004
2005	$416,634,240	December 31, 2005
2006	$420,154,240	December 31, 2006
2007	$431,629,440	December 31, 2007
2008	$447,821,440	December 31, 2008

2009	$443,597,440	December 31, 2009
2010	$431,207,040	December 31, 2010
2011	$438,599,040	December 31, 2011
Total :	$6,857,854,080	

[1210] **CONDEMNS** the Defendants solidarily to pay the amount of $100,000 as moral damages to each class member diagnosed with **lung cancer, cancer of the larynx, cancer of the oropharynx or cancer of the hypopharynx** who started to smoke before January 1, 1976, plus interest and the additional indemnity **calculated from the date of service of the Motion for Authorization to Institute the Class Action if the member's disease was diagnosed before January 1, 1998, or from December 31 of the year of the member's diagnosis if the member's disease was diagnosed on or after January 1, 1998**;

[1211] **CONDEMNS** the Defendants solidarily to pay the amount of $80,000 as moral damages to each class member diagnosed with **lung cancer, cancer of the larynx, cancer of the oropharynx or cancer of the hypopharynx** who started to smoke as of January 1, 1976, plus interest and the additional indemnity **calculated from the date of service of the Motion for Authorization to Institute the Class Action if the member's disease was diagnosed before January 1, 1998, or from December 31 of the year of the member's diagnosis if the member's disease was diagnosed on or after January 1, 1998**;

[1212] **CONDEMNS** the Defendants solidarily to pay the amount of $30,000 as moral damages to each member diagnosed with emphysema who started to smoke before January 1, 1976, plus interest and the additional indemnity **calculated from the date of service of the Motion for Authorization to Institute the Class Action if the member's disease was diagnosed before January 1, 1998, or from December 31 of the year of the member's diagnosis if the member's disease was diagnosed on or after January 1, 1998;**

[1213] **CONDEMNS** the Defendants solidarily to pay the amount of $24,000 as moral damages to each member diagnosed with emphysema who started to smoke as of January 1, 1976, plus interest and the additional indemnity **calculated from the date of service of the Motion for Authorization to Institute the Class Action if the member's disease was**

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diagnosed before January 1, 1998, or from December 31 of the year of the member's diagnosis if the member's disease was diagnosed on or after January 1, 1998;

[1283] **CONFIRMS** the judgment of the Superior Court in every other respect;

[1284] **THE WHOLE** with legal costs in favour of the respondents; and

[1285] **DISMISSES** the cross-appeal, without legal costs.

YVES-MARIE MORISSETTE, J.A.

ALLAN R. HILTON, J.A.

MARIE-FRANCE BICH, J.A.

NICHOLAS KASIRER, J.A.

ÉTIENNE PARENT, J.A.

Mtre Deborah Glendinning
Mtre Thomas Craig Lockwood
Mtre Mahmud Jamal
Mtre Alexandre Fallon
OSLER, HOSKIN & HARCOURT
For Imperial Tobacco Canada Ltd.

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Mtre André Lespérance
Mtre Philippe Hubert Trudel
Mtre Bruce Johnston
Mtre Gabrielle Gagné
TRUDEL, JOHNSTON & LESPÉRANCE
Mtre Marc Beauchemin
DE GRANDPRÉ CHAIT
Mtre Gordon Kugler
Mtre Pierre Boivin
KUGLER KANDESTIN
For Conseil québécois sur le tabac et la santé, Jean-Yves Blais and Cécilia Létourneau

Mtre Guy Pratte
Mtre François Grondin
Mtre Patrick Plante
Mtre Kevin Lee LaRoche
BORDEN LADNER GERVAIS
Mtre Catherine Elizabeth McKenzie
IRVING MITCHELL KALICHMAN
For JTI-Macdonald Corp.

Mtre Simon V. Potter
Mtre Michael Feder
Mtre Pierre-Jérôme Bouchard
McCARTHY TÉTRAULT
For Rothmans, Benson & Hedges Inc.

Hearing dates: November 21, 22, 23, 24, 25 and 30, 2016

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SCHEDULES

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SCHEDULE I: Abbreviations and acronyms used

Abbreviation or acronym	**Meaning**
A.I.R.C.C.	*An Act respecting the implementation of the reform of the Civil Code,* CQLR, c. CCQ-1992.
Ad Hoc Committee	Ad Hoc Committee of the Canadian Tobacco Industry
B&H	Benson & Hedges Canada Inc.
BAT	British American Tobacco Inc.
Blais Class	The members of class action 500-06-000076-980, as defined from time to time
C.C.L.C.	*Civil Code of Lower Canada*
C.C.Q.	*Civil Code of Québec*
C.P.A.	*Consumer Protection Act,* CQLR c. P-40.1.
Charter	*Charter of human rights and freedoms,* CQLR, c. C-12.
Class Period	1950-1998
COPD	Chronic obstructive pulmonary disease
"critical dose" of smoking	Dose at which the risk of contracting one of the Diseases exceeds a certain probability threshold.
CTMC	Canadian Tobacco Manufacturers Council (called the Ad Hoc Committee before 1971)
Diseases	Lung cancer, squamous cell carcinoma of the larynx, the oropharynx or the hypopharynx and emphysema.
f.C.C.P.	former *Code of Civil Procedure,* CQLR, c. C-25.
Judgment *a quo*	*Létourneau v. JTI-MacDonald Corp.,* 2015 QCCS 2382.
ITL	Imperial Tobacco Canada Limited (Appellant)
J.S.	joint schedules of the parties (Vol. 1-688)
JTM	JTI-Macdonald Corp. (Appellant)
Knowledge dates (as determined by the judge)	January 1, 1980 (Blais) March 1, 1996 (Létourneau)
LaMarsh Conference	The conference on smoking and health held by Health and Welfare Canada in 1963 and chaired by Judy LaMarsh
Létourneau Class	The members of class action 500-06-000070-983, as defined from time to time
MTI	Macdonald Tobacco Inc.
n.C.C.P.	new *Code of Civil Procedure,* CQLR, c. 25.01.
Pack year	Unit for measuring cigarette consumption; the equivalent of smoking 7,300 cigarettes.
Policy Statement	*Policy Statement by Canadian Tobacco Manufacturers on the Question of Tar, Nicotine and Other Tobacco Constituents That May Have Similar Connotations,* Exhibit 154.
RBH	Rothmans, Benson & Hedges Inc. (Appellant)
RJRM	RJR-Macdonald Corp.
RPMC	Rothmans of Pall Mall Canada Inc.
SFS	Smokers Freedom Society

Abbreviation or acronym	**Meaning**
Smoking dates (as determined by the judge)	January 1, 1976 (Blais) March 1, 1992 (Létourneau)
T.R.D.A.	*Tobacco-related Damages and Health Care Costs Recovery Act,* CQLR, c. R-2.2.0.0.1.
Voluntary Codes	Cigarette Advertising and Promotion Codes (rules adopted by the tobacco industry as of 1972 for the advertising and promotion of cigarettes)
Warnings	The warning notices printed on all cigarette packs sold in Canada

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SCHEDULE II: Basis for calculating interest and the additional indemnity

LUNG CANCER				
Year diagnosed	**Number of diagnoses**	**-12% (immigration)**	**Total moral damages**	**80% factor**
1995	4,124	3,629.12	$362,912,000	$290,329,600
1996	4,179	3,677.52	$367,752,000	$294,201,600
1997	4,269	3,756.72	$375,672,000	$300,537,600
1998	4,431	3,899.28	$389,928,000	$311,942,400
1999	4,493	3,953.84	$395,384,000	$316,307,200
2000	4,564	4,016.32	$401,632,000	$321,305,600
2001	4,759	4,187.92	$418,792,000	$335,033,600
2002	4,825	4,246.00	$424,600,000	$339,680,000
2003	4,877	4,291.76	$429,176,000	$343,340,800
2004	5,025	4,422.00	$442,200,000	$353,760,000
2005	5,046	4,440.48	$444,048,000	$355,238,400
2006	5,105	4,492.40	$449,240,000	$359,392,000
2007	5,249	4,619.12	$461,912,000	$369,529,600
2008	5,446	4,792.48	$479,248,000	$383,398,400
2009	5,366	4,722.08	$472,208,000	$377,766,400
2010	5,196	4,572.48	$457,248,000	$365,798,400
2011	5,315	4,677.20	$467,720,000	$374,176,000

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THROAT CANCER (larynx, oropharynx and hypopharynx)					
Year diagnosed	**Number of diagnoses (larynx)**	**Number of diagnoses (throat)**	**-12% (immigration)**	**Total moral damages**	**80% factor**
1995	369	121	431.20	$43,120,000	$34,496,000
1996	338	136	417.12	$41,712,000	$33,369,600
1997	309	130	386.32	$38,632,000	$30,905,600
1998	324	141	408.20	$40,920,000	$32,736,000
1999	369	151	457.60	$45,760,000	$36,608,000
2000	312	147	403.92	$40,392,000	$32,313,600
2001	337	158	435.60	$43,560,000	$34,848,000
2002	325	161	427.68	$42,768,000	$34,214,400
2003	307	174	423.28	$42,328,000	$33,862,400
2004	294	158	397.76	39,776,000	$31,820,800
2005	289	176	409.20	$40,920,000	$32,736,000
2006	287	169	401.28	$40,128,000	$32,102,400
2007	276	199	418.00	$41,800,000	$33,440,000
2008	314	194	447.04	$44,704,000	$35,763,200
2009	311	217	464.64	$46,464,000	$37,171,200
2010	300	222	459.36	$45,936,000	$36,748,800
2011	300	208	447.04	$44,704,000	$35,763,200

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EMPHYSEMA				
Year diagnosed	**Number of diagnoses[1072]**	**-12% (immigration)**	**Total moral damages**	**80% factor**
1995	1,357	1,194.16	$35,824,800	$28,659,840
1996	1,357	1,194.16	$35,824,800	$28,659,840
1997	1,357	1,194.16	$35,824,800	$28,659,840
1998	1,357	1,194.16	$35,824,800	$28,659,840
1999	1,357	1,194.16	$35,824,800	$28,659,840
2000	1,357	1,194.16	$35,824,800	$28,659,840
2001	1,357	1,194.16	$35,824,800	$28,659,840
2002	1,357	1,194.16	$35,824,800	$28,659,840
2003	1,357	1,194.16	$35,824,800	$28,659,840
2004	1,357	1,194.16	$35,824,800	$28,659,840
2005	1,357	1,194.16	$35,824,800	$28,659,840
2006	1,357	1,194.16	$35,824,800	$28,659,840
2007	1,357	1,194.16	$35,824,800	$28,659,840
2008	1,357	1,194.16	$35,824,800	$28,659,840
2009	1,357	1,194.16	$35,824,800	$28,659,840
2010	1,357	1,194.16	$35,824,800	$28,659,840
2011	1,357	1,194.16	$35,824,800	$28,659,840

[1072] In the case of emphysema, the number of diagnoses is constant from year to year for the reason given by the witness Siemiatycki: “The survey on respiratory diseases was conducted in the late 1990s; we have no data specific to individual years in the period 1995-2006, but there is no reason to believe that annual incidence was increasing or decreasing during this period. Consequently, we have taken the survey-derived estimate and applied it to each year in the period.” (Exhibit 1426.1 at 41.)

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SCHEDULE III: Definitions of Blais and Létourneau Classes

February 21, 2005 – AUTHORIZATION JUDGMENT[1073]	
Blais File	**Létourneau File**
[TRANSLATION] All persons residing in Quebec who had lung, larynx or throat cancer or emphysema when the motion was served or who have developed lung, larynx or throat cancer or emphysema since the motion was served after directly inhaling cigarette smoke and smoking a minimum of 15 cigarettes per 24-hour period over a prolonged and uninterrupted period of at least five years, as well as the successors of any person who met the above-mentioned requirements and who has died since the motion was served.	[TRANSLATION] All persons residing in Quebec who, when the motion was served, were addicted to the nicotine found in the cigarettes made by the respondents and have remained addicted and the legal heirs of persons who were included in the class when the motion was served but who subsequently died without quitting smoking.
July 3, 2013 – JUDGMENT AMENDING THE CLASS DESCRIPTION[1074]	
Blais File	**Létourneau File**
[TRANSLATION] The class consists of all persons residing In Quebec who satisfy the following criteria: 1) To have smoked, before November 20, 1998, a minimum of 5 pack/years of cigarettes made by the defendants (that is, the equivalent of a minimum of 36,500 cigarettes, namely any combination of the number of cigarettes smoked per day multiplied by the number of days of consumption insofar as the total is equal to or greater than 36,500 cigarettes). For example, 5 pack/years equals: 20 cigarettes per day for 5 years (20 X 365 X 5 = 36,500)	[TRANSLATION] The class consists of all persons residing in Quebec who, as of September 30, 1998, were addicted to the nicotine contained in the cigarettes made by the defendants and who otherwise satisfy the following three criteria: 1) They started to smoke before September 30, 1994, by smoking the defendants' cigarettes; 2) They were smoking the cigarettes made by the defendants on a daily basis on September 30, 1998;

[1073] *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, J.E. 2005-589, 2005 CanLII 4070 (Sup. Ct.).

[1074] *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2013 QCCS 4904.

or 25 cigarettes per day for 4 years (25 X 365 X 4 = 36,500) or 10 cigarettes per day for 10 years (10 X 365 X 10 = 36,500) or 5 cigarettes per day for 20 years (5 X 365 x 20 = 36,500) or 50 cigarettes per day for 2 years (50 X 365 X 2 = 36,500)	3) They were still smoking the cigarettes made by the defendants on February 21, 2005, or until their death, if it occurred before that date.

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2) To have developed before March 12, 2012: a) Lung cancer or b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx or c) Emphysema. The class also includes the heirs of the persons deceased after November 20, 1998, who satisfy the criteria mentioned herein.	The class also includes the heirs of the members who satisfy the criteria described herein.
June 9, 2015 – JUDGMENT *A QUO*[1075]	
Blais File	**Létourneau File**
All persons residing in Quebec who satisfy the following criteria: 1) To have smoked, before November 20, 1998, a minimum of 12 pack/years of cigarettes manufactured by the defendants (that is, the equivalent of a minimum of 87,600 cigarettes, namely any combination of the number of cigarettes smoked in a day multiplied by the number of days of consumption insofar as the total is equal to or greater than 87,600 cigarettes) For example, 12 pack/years equals: 20 cigarettes a day for 12 years (20 x 365 x 12 = 87,600) or 30 cigarettes a day for 8 years (30 x 365 x 8 = 87,600) or 10 cigarettes a day for 24 years (10 x 365 x 24 = 87,600); 2) To have been diagnosed before March 12, 2012 with: a) Lung cancer; or b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx or c) Emphysema. The group also includes the heirs of the persons deceased after November 20, 1998 who satisfied the criteria mentioned herein.	All persons residing in Quebec who, as of September 30, 1998, were addicted to the nicotine contained in the cigarettes made by the defendants and who otherwise satisfy the following criteria: 1) They started to smoke before September 30, 1994 and since that date have smoked principally cigarettes manufactured by the defendants; 2) Between September 1 and September 30, 1998, they smoked on a daily basis an average of at least 15 cigarettes manufactured by the defendants; and 3) On February 21, 2005, or until their death if it occurred before that date, they were still smoking on a daily basis an average of at least 15 cigarettes manufactured by the defendants. The group also includes the heirs of the members who satisfy the criteria described herein.

[1075] Judgment *a quo* at para. 1208.

SCHEDULE IV: Extracts from the "*Special Report on Smoking and Health*", *The Leaflet,* Vol. 5, No. 5, June 1969 (Exhibit 2 at 1 *et seq*. − see *supra* note 580)

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• There is no proof that tobacco smoking causes human diseases.
• Other factors, such as environmental pollution, occupational exposures, have not been adequately assessed.
• Statistical associations, on which many of the claims against smoking are based, have many failings and do not show causation.

...

"Significant beneficial effects" of smoking have been acknowledged and consideration must be given to them.

…

The diseases under study, namely lung cancer, heart diseases and respiratory ailments, afflicted mankind long before smoking was ever heard of, according to a position paper prepared by the Canadian tobacco industry for the Commons Standing Committee on health.

Ignoring the fact that statistical associations are not proof of causation, 'do gooders' have been attempting to solve a scientific question in an emotional manner. They have made strong pronouncements (against cigarette smoking) based upon meagre evidence which they translate into absolute proof. And they choose to ignore or dismiss views and facts which are not consistent with their theories, the position paper states.

…

The data submitted to support the contentions that smoking is linked to heart disease, lung cancer and respiratory ailments, does not take into adequate account, and often completely ignores, other factors that might well be causal or contributory.

To the extent there may be an actual increase in the rates of these chronic diseases - all of them, it should be noted, occur in mainly aging populations - it correlates with a number of influences at work today. Among them:

1) The increased stresses and strains of living today's highly industrialized and urbanized modern world;

2) Environment pollution (industrial wastes in air and water);

3) Physiological disturbances associated with sudden changes in the way of life;

4) Emotional trauma and the crowding in congested cities;

5) Monotony, boredom and compulsory leisure from automated work.

...

Random autopsy studies have failed to correlate cigarette smoking with changes in blood vessels and the onset of heart failures. One scientist observed cigarette smoking "is a simple and easily visualized or discoverable trait which is very likely to be part of the behaviour pattern of an individual reacting to stress."

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Much scientific literature exists on the role of nervous tension as a factor in heart disease. Because heavy smoking appears to be more common among these individuals, some authorities believe the true association exists between heart diseases and tension, rather than smoking.

…

… The causes of chronic bronchitis and emphysema have not been established and the diseases pose great problems for doctors even in diagnoses and recognition as a cause of death.

The National Institute of Allergy and Infectious Diseases of the U.S. Department of Health, Education and Welfare issued a special report on emphysema which states "The cause or causes of emphysema are not now known." It mentions smoking only twice as one of the factors being studied, along with viruses, bacterial infections, asthma, hay fever, urban fumes, substandard economic and social conditions, genetics, lung clearance mechanisms, fungus, smog and racial influences.

…

The significant beneficial effects of smoking must also be considered in the current smoking and health dispute, according to a paper prepared by the Canadian tobacco industry.

Millions of people find in smoking some satisfaction, relaxation and help in meeting the stresses of modern living. For many, smoking provides one of the few available means for control of emotional stress.

The paper says nicotine is important for it produces two distinct effects. It reduces tension in the agitated and improves concentration in periods of stress, particularly prolonged stress.

…

Smoking is a weight control aid as well. The usual explanation is that smoking decreases the appetite.

The paper makes the distinction that the regular use of tobacco should be characterized by the term habituation rather than addiction. For unlike addiction, there is little tendency to increase the dosage and a psychic but not physical dependence is developed.

...

Is there sound scientific validity to the charges that smoking is a major cause of illness and death - validity that justifies the nature and extent of the anti-smoking proposals? No. Because there have been differences that have been shown to exist between people who do not smoke and those who choose to smoke, because data used against cigarettes are often 'selected', and because efforts have been made to blame cigarettes for every ailment with which there may be a statistical association.

TAB 7

See paras. 44, 45, 72

CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2013 ONSC 1078
COURT FILE NO.: CV-12-9667-00CL
CV-11-431153-00CP
DATE: 20130320

2013 ONSC 1078 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 SINO-FOREST CORPORATION, Applicant

AND RE: **THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT AND ROBERT WONG, Plaintiffs**

AND:

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (FORMERLY KNOWN AS BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PŐYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA) IN., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LUNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC AND MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (SUCCESSOR BY MERGER TO BANC OF AMERICA SECURITIES LLC), Defendants

BEFORE: **MORAWETZ J.**

COUNSEL: **Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, and Jonathan Ptak, for the Ad Hoc Committee of Purchasers including the Class Action Plaintiffs**

Peter Griffin, Peter Osborne, and Shara Roy, for Ernst & Young LLP

John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.

Robert W. Staley, for Sino-Forest Corporation

Won J. Kim, Michael C. Spencer, and Megan B. McPhee, for the Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.

John Fabello and Rebecca Wise for the Underwriters

Ken Dekker and Peter Greene, for BDO Limited

Emily Cole and Joseph Marin, for Allen Chan

James Doris, for the U.S. Class Action

Brandon Barnes, for Kai Kit Poon

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

Derrick Tay and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Simon Bieber, for David Horsley

James Grout, for the Ontario Securities Commission

Miles D. O'Reilly, Q.C., for the Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam

HEARD: FEBRUARY 4, 2013

ENDORSEMENT

INTRODUCTION

[1] The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the "Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

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[2] Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited ("Invesco"), Northwest and Ethical Investments L.P. ("Northwest"), Comité Syndical National de Retraite Bâtirente Inc. ("Bâtirente"), Matrix Asset Management Inc. ("Matrix"), Gestion Férique and Montrusco Bolton Investments Inc. ("Montrusco") (collectively, the "Objectors"). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

[3] For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

FACTS

Class Action Proceedings

[4] SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China. SFC's registered office is in Toronto, and its principal business office is in Hong Kong.

[5] SFC's shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

[6] All of SFC's debt or equity public offerings have been underwritten. A total of 11 firms (the "Underwriters") acted as SFC's underwriters, and are named as defendants in the Ontario class action.

[7] Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited ("BDO"), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

[8] Following a June 2, 2011 report issued by short-seller Muddy Waters LLC ("Muddy Waters"), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the "OSC"), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a "complex fraudulent scheme". SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the "Canadian Actions"), and in New York (collectively with the Canadian Actions, the "Class Action Proceedings"), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

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[9] The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former holders of SFC's notes (the "Noteholders"), in the amount of approximately $1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

[10] Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

[11] In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

CCAA Proceedings

[12] SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

[13] Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

[14] In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

[15] On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

[16] The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately $7.3 billion shareholder claim and $1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in

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the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. ("Kim Orr"), who represent the Objectors.

[17] Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited ("Pöyry") (the "Pöyry Settlement"), a forestry valuator that provided services to SFC. The class was defined as all persons and entities who acquired SFC's securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the "Pöyry Settlement Class").

[18] The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

[19] Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to opt-out was required to be exercised.

[20] Notice of the certification and settlement was given in accordance with the certification orders of Perell J. and Émond J. The notice of certification states, in part, that:

> IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

[21] The opt-out made no provision for an opt-out on a conditional basis.

[22] On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were "equity claims" as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC's notes.

[23] In reasons released July 27, 2012 [*Re Sino-Forest Corp*., 2012 ONSC 4377], I granted the relief sought by SFC (the "Equity Claims Decision"), finding that "the claims advanced in the shareholder claims are clearly equity claims". The Ad Hoc Securities Purchasers' Committee did not oppose the motion, and no issue was taken by any party with the court's determination that the shareholder claims against SFC were "equity claims". The Equity Claims Decision was

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subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Re Sino-Forest Corp.*, 2012 ONCA 816].

Ernst & Young Settlement

[24] The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting was adjourned to November 30, 2012.

[25] On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

[26] On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

[27] Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of $117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

(a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);

(b) the issuance of the Settlement Trust Order;

(c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;

(d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and

(e) all orders being final orders not subject to further appeal or challenge.

[28] On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the

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sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

[29] At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

[30] The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

[31] On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

[32] On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

[33] According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

LAW AND ANALYSIS

Court's Jurisdiction to Grant Requested Approval

[34] The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

[35] The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter.

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The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

[36] The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.

[37] It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647 [*Robertson*].

[38] As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

> When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

[39] In this case, the notice and process for dissemination have been approved.

[40] The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

[41] In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

[42] In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

Should the Court Exercise Its Discretion to Approve the Settlement

[43] Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

CCAA Interpretation

[44] The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial

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Order". The CCAA affords courts broad jurisdiction to make orders and "fill in the gaps in legislation so as to give effect to the objects of the CCAA." [*Re Nortel Networks Corp*., 2010 ONSC 1708, paras. 66-70 ("*Re Nortel"*)); *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99, para. 43 (Ont. C.J.)]

[45] Further, as the Supreme Court of Canada explained in *Re Ted Leroy Trucking Ltd. [Century Services]*, 2010 SCC 60, para. 58:

> CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly described as "the hothouse of real time litigation" has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted). ...When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

[46] It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalf and Mansfield Alternative Investments II Corp*., 2008 ONCA 587 ("*ATB Financial*"); *Re Nortel, supra*; *Robertson, supra*; *Re Muscle Tech Research and Development Inc.* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ontario S.C.J.) ("*Muscle Tech*"); *Re Grace Canada Inc*. (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J.); R*e Allen-Vanguard Corporation*, 2011 ONSC 5017].

[47] The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial, supra*:

> 69. In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> 70. The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan …

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71. In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72. Here, then – as was the case in T&N – there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed …

73. I am satisfied that the wording of the CCAA – construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation – supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

…

78. … I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

…

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> 113. At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here – with two additional findings – because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:
>
> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

[48] Furthermore, in *ATB Financial*, *supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that "there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given".

Relevant CCAA Factors

[49] In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson*, *supra*:

> (a) whether the settlement is fair and reasonable;
>
> (b) whether it provides substantial benefits to other stakeholders; and
>
> (c) whether it is consistent with the purpose and spirit of the CCAA.

[50] Where a settlement also provides for a release, such as here, courts assess whether there is "a reasonable connection between the third party claim being compromised in the plan and the

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restructuring achieved by the plan to warrant inclusion of the third party release in the plan". Applying this "nexus test" requires consideration of the following factors: [*ATB Financial*, *supra*, para. 70]

(a) Are the claims to be released rationally related to the purpose of the plan?

(b) Are the claims to be released necessary for the plan of arrangement?

(c) Are the parties who have claims released against them contributing in a tangible and realistic way? and

(d) Will the plan benefit the debtor and the creditors generally?

Counsel Submissions

[51] The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest's restructuring plan, and, therefore, the standards for granting third-party releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the $117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

[52] The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: "Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order." This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47, para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd.*, (1998) 16 C.P.C. (4th) 165 38 O.R. (3d) 703 (Ont. C.J.)].

[53] Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

[54] Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the

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circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

[55] Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

(a) class members are not releasing their claims to a greater extent than necessary;

(b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;

(c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and

(d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

[56] SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

[57] Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

Analysis and Conclusions

[58] The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial, supra*, para. 70, as quoted above.

[59] In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

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[60] Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the $117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

[61] Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.

[62] Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

[63] Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of $117 million.

[64] Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

[65] Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

[66] In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

[67] In *Re Nortel*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex

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litigation and associated depletion of assets to fund potentially significant litigation costs". In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of $117 million by Ernst & Young.

[68] In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC's subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young's submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.

[69] At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC's assets.

[70] Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Re Nortel, supra*, paras. 73 and 81; and *Muscle Tech, supra*, paras. 19-21.

[71] Implicit in my findings is rejection of the Objectors' arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the $117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders. The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

[72] I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors' claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings. The claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

[73] Even if one assumes that the opt-out argument of the Objectors can be sustained, and opt-out rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into

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account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial, supra*.

[74] Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

[75] Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the CCAA.

[76] The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to "opt-in" and share in the spoils.

[77] It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Re Sammi Atlas Inc.*, (1998) 3 C.B.R. (4th) 171 (Ont. Gen. Div. (Commercial List)).] If that were possible, no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.

[78] SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

[79] Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC's outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

[80] Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is "in the manner and within the time specified in the certification order". There is no provision for a conditional opt-out in the CPA, and Ontario's single opt-out regime causes "no prejudice…to putative class members". [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc*. (2009), 85 C.P.C. (6th) 148, paras. 43-46 (Ont. S.C.J.); and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299.]

Miscellaneous

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[81] For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

DISPOSITION

[82] In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

MORAWETZ J.

Date: March 20, 2013

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TAB 8

See paras. 15, 170, 756,759, 946-950, 1045-1050, 1193, 1208

SUPERIOR COURT
(Class Action Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N° : 500-06-000076-980
500-06-000070-983

DATE : June 9, 2015

PRESIDING: THE HONORABLE BRIAN RIORDAN, J.S.C.

N° 500-06-000070-983

CÉCILIA LÉTOURNEAU
Plaintiff

v.

JTI-MACDONALD CORP. ("**JTM**")
and
IMPERIAL TOBACCO CANADA LIMITED. ("**ITL**")
and
ROTHMANS, BENSON & HEDGES INC. ("**RBH**")
Defendants (collectively: the "**Companies**")

AND

N° 500-06-000076-980

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
and
JEAN-YVES BLAIS
Plaintiffs

v.

JTI-MACDONALD CORP.
and
IMPERIAL TOBACCO CANADA LIMITED.
and
ROTHMANS, BENSON & HEDGES INC.
Defendants

JUDGMENT CORRECTING CLERICAL ERRORS IN PARAGRAPHS 1114 and 1209 through 1213

JR1353

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RÉSUMÉ DU JUGEMENT

Les deux recours collectifs contre les compagnies canadiennes de cigarettes sont accueillis en partie.

Dans les deux dossiers, la réclamation pour dommages sur une base collective est limitée aux dommages moraux et punitifs. Les deux groupes de demandeurs renoncent à leur possible droit à des réclamations individuelles pour dommages compensatoires, tels la perte de revenus.

Dans le dossier Blais, intenté au nom d'un groupe de personnes ayant été diagnostiquées d'un cancer du poumon ou de la gorge ou d'emphysème, le Tribunal déclare les défenderesses responsables et octroie des dommages moraux et punitifs. Il statue qu'elles ont commis quatre fautes, soit en vertu du devoir général de ne pas causer un préjudice à d'autres, du devoir du manufacturier d'informer ses clients des risques et des dangers de ses produits, de la Charte des droits et libertés de la personne et de la Loi sur la protection du consommateur.

Dans le dossier Blais, le Tribunal octroie des dommages moraux au montant de 6 858 864 000 $ sur une base solidaire entre les défenderesses. Puisque l'action débute en 1998, cette somme s'accroit à approximativement 15 500 000 000 $ avec les intérêts et l'indemnité additionnelle. La responsabilité de chacune des défenderesses entre elles est comme suit:

ITL - 67%, RBH - 20% et JTM - 13%.

Puisqu'il est peu probable que les défenderesses puissent s'acquitter d'une telle somme d'un seul coup, le Tribunal exerce sa discrétion en ce qui concerne l'exécution du jugement. Ainsi, il ordonne un dépôt total initial de 1 000 000 000 $ à être partagé entre les défenderesses selon leur pourcentage de responsabilité et réserve le droit des demandeurs de demander d'autres dépôts, si nécessaire.

Dans le dossier Létourneau, intenté au nom d'un groupe de personnes devenues dépendantes de la nicotine, le Tribunal trouve les défenderesses responsables sous les deux chefs de dommages en ce qui concerne les quatre mêmes fautes. Malgré cette conclusion, le Tribunal refuse d'ordonner le paiement des dommages moraux puisque la preuve ne permet pas d'établir d'une façon suffisamment exacte le montant total des réclamations des membres.

Les fautes en vertu de la *Charte* québécoise et de la *Loi sur la protection du consommateur* permettent l'octroi de dommages punitifs. Comme base pour l'évaluation de ces dommages, le Tribunal choisit le profit annuel avant impôts de chaque défenderesse. Ce montant couvre les deux dossiers. Considérant le comportement particulièrement inacceptable de ITL durant la période ainsi que celui de JTM, mais à un degré moindre, le Tribunal augmente les montants pour lesquels elles sont responsables au dessus du montant de base. Pour l'ensemble, les dommages punitifs se chiffrent à 1 310 000 000 $, partagé entre les défenderesses comme suit:

ITL – 725 000 000 $, RBH – 460 000 000 $ et JTM – 125 000 000 $.

Il faut partager cette somme entre les deux dossiers. Pour ce faire, le Tribunal tient compte de l'impact beaucoup plus grand des fautes des défenderesses relativement au groupe Blais comparé au groupe Létourneau. Ainsi, il attribue 90% du total au groupe Blais et 10% au groupe Létourneau.

Cependant, compte tenu de l'importance des dommages moraux accordés dans Blais, le Tribunal limite les dommages punitifs dans ce dossier. Ainsi, il condamne chaque défenderesse à une somme symbolique de 30 000 $. Cela représente un dollar pour la mort de chaque Canadien causée par l'industrie du tabac chaque année, tel que constaté dans un jugement de la Cour suprême du Canada en 1995.

Il s'ensuit que pour le dossier Létourneau, la condamnation totale pour dommages punitifs se chiffre à 131 000 000 $, soit 10% de l'ensemble. Le partage entre les défenderesses se fait comme suit:

ITL – 72 500 000 $, RBH – 46 000 000 $ et JTM – 12 500 000 $

Puisque le nombre de personnes dans le groupe Létourneau totalise près d'un million, cette somme ne représente que quelque 130 $ par membre. De plus, compte tenu du fait que le Tribunal n'octroie pas de dommages moraux dans ce dossier, il refuse de procéder à la distribution d'un montant à chacun des membres pour le motif que cela serait impraticable ou trop onéreux.

Enfin, le Tribunal ordonne l'exécution provisoire nonobstant appel en ce qui concerne le dépôt initial de un milliard de dollars en guise de dommages moraux, plus tous les dommages punitifs accordés. Les défenderesses devront déposer ces sommes en fiducie avec leurs procureurs respectifs dans les soixante jours de la date du présent jugement. Le Tribunal statuera sur la manière de les débourser lors d'une audition subséquente.

SUMMARY OF THE JUDGMENT

The two class actions against the Canadian cigarette companies are maintained in part.

In both actions, the claim for common or collective damages was limited to moral damages and punitive damages, with both classes of plaintiffs renouncing their potential right to make individual claims for compensatory damages, such as loss of income.

In the Blais File, taken in the name of a class of persons with lung cancer, throat cancer or emphysema, the Court finds the defendants liable for both moral and punitive damages. It holds that they committed four separate faults, including under the general duty not to cause injury to another person, under the duty of a manufacturer to inform its customers of the risks and dangers of its products, under the Quebec Charter of Human Rights and Freedoms and under the Quebec Consumer Protection Act.

In Blais, the Court awards moral damages in the amount of $6,858,864,000 solidarily among the defendants. Since this action was instituted in 1998, this sum translates to approximately $15,500,000,000 once interest and the additional indemnity are added. The respective liability of the defendants among themselves is as follows:

ITL - 67%, RBH - 20% and JTM - 13%.

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Recognizing that it is unlikely that the defendants could pay that amount all at once, the Court exercises its discretion with respect to the execution of the judgment. It thus orders an initial aggregate deposit of $1,000,000,000, divided among the defendants in accordance with their share of liability and reserves the plaintiffs' right to request further deposits, if necessary.

In the Létourneau File, taken in the name of persons who were dependent on nicotine, the Court finds the defendants liable for both heads of damage with respect to the same four faults. In spite of such liability, the Court refuses to order the payment of moral damages because the evidence does not establish with sufficient accuracy the total amount of the claims of the members.

The faults under the Quebec *Charter* and the *Consumer Protection Act* allow for the awarding of punitive damages. The Court sets the base for their calculation at one year's before-tax profits of each defendant, this covering both files. Taking into account the particularly unacceptable behaviour of ITL over the Class Period and, to a lesser extent, JTM, the Court increases the sums attributed to them above the base amount to arrive at an aggregate of $1,310,000,000, divided as follows:

ITL - $725,000,000, RBH - $460,000,000 and JTM - $125,000,000.

It is necessary to divide this amount between the two files. For that, the Court takes account of the significantly higher impact of the defendants' faults on the Blais Class compared to Létourneau. It thus attributes 90% of the total to Blais and 10% to the Létourneau Class.

Nevertheless, in light of the size of the award for moral damages in Blais, the Court feels obliged to limit punitive damages there to the symbolic amount of $30,000 for each defendant. This represents one dollar for each Canadian death the tobacco industry causes in Canada every year, as stated in a 1995 Supreme Court judgment.

In Létourneau, therefore, the aggregate award for punitive damages, at 10% of the total, is $131,000,000. That will be divided among the defendants as follows:

ITL - $72,500,000, RBH - $46,000,000 and JTM - $12,500,000

Since there are nearly one million people in the Létourneau Class, this represents only about $130 for each member. In light of that, and of the fact that there is no condemnation for moral damages in this file, the Court refuses distribution of an amount to each of the members on the ground that it is not possible or would be too expensive to do so.

Finally, the Court orders the provisional execution of the judgment notwithstanding appeal with respect to the initial deposit of one billion dollars of moral damages, plus all punitive damages awarded. The Defendants must deposit these sums in trust with their respective attorneys within sixty days of the date of the judgment. The Court will decide how those amounts are to be disbursed at a later hearing.

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I. THE ACTIONS

I.A. THE PARTIES AND THE COMMON QUESTIONS

[1] In the fall of 1998[1], two motions for authorization to institute a class action were served on the Companies as co-defendants, one naming Cécilia Létourneau as the class representative (file 06-000070-983: the "**Létourneau File**" or "**Létourneau**"[2]), and the other naming Jean-Yves Blais and the Conseil québécois sur le tabac et la santé as the representatives (file 06-000076-980: the "**Blais File**" or "**Blais**")[3]. They were joined for proof and hearing both at the authorization stage and on the merits.

[2] The judgment of February 21, 2005 authorizing these actions (the "**Authorization Judgment**") defined the class members in each file (the "**Class Members**" or "**Members**"). After closing their evidence at trial, the Plaintiffs moved to modify those class descriptions in order that they correspond to the evidence actually adduced. The Court authorized certain amendments and the class definitions as at the end of the trial were as follows:

For the Blais File

All persons residing in Quebec who satisfy the following criteria:	*Toutes les personnes résidant au Québec qui satisfont aux critères suivants:*
1) To have smoked, before November 20, 1998, a minimum of 5 pack/years[4] of cigarettes made by the defendants (that is the equivalent of a minimum of 36,500 cigarettes, namely any combination of the number of cigarettes smoked per day multiplied by the number of days of consumption insofar as the total is equal or greater than 36,500 cigarettes).	*1) Avoir fumé, avant le 20 novembre 1998, au minimum 5 paquets/année de cigarettes fabriquées par les défenderesses (soit l'équivalent d'un minimum de 36 500 cigarettes, c'est-à-dire toute combinaison du nombre de cigarettes fumées par jour multiplié par le nombre de jours de consommation dans la mesure où le total est égal ou supérieur à 36 500 cigarettes).*
For example, 5 pack/years equals:	*Par exemple, 5 paquets/année égale:*
20 cigarettes per day for 5 years (20 X 365 X 5 = 36,500) or	*20 cigarettes par jour pendant 5 ans (20 X 365 X 5 = 36 500) ou*
25 cigarettes per day for 4 years (25 X 365 X 4 = 36,500) or	*25 cigarettes par jour pendant 4 ans (25 X 365 X 4 = 36 500) ou*
10 cigarettes per day for 10 years (10 X 365 X 10 = 36,500) or	*10 cigarettes par jour pendant 10 ans (10 X 365 X 10 = 36 500) ou*

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1 September 30, 1998 in the Létourneau File and November 20, 1998 in the Blais File.

2 Schedule "A" to the present judgment provides a glossary of most of the defined terms used in the present judgment.

3 In general, reference to the singular, as in "the action" or "this file", encompasses both files.

4 A "pack year" is the equivalent of smoking 7,300 cigarettes, as follows: 1 pack of 20 cigarettes a day over one year: 365 x 20 = 7,300. It is also attained by 10 cigarettes a day for two years, two cigarettes a day for 10 years etc. Given Dr. Siemiatycki's Critical Amount of five pack years, this equates to having smoked 36,500 cigarettes over a person's lifetime.

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5 cigarettes per day for 20 years (5 X 365 x 20 = 36,500) or

50 cigarettes per day for 2 years (50 X 365 X 2 = 36,500);

2) To have been diagnosed before March 12, 2012 with:

a) Lung cancer or

b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx or

c) Emphysema.

The group also includes the heirs of the persons deceased after November 20, 1998 who satisfied the criteria mentioned herein.

5 cigarettes par jour pendant 20 ans (5 X 365 x 20 = 36 500) ou

50 cigarettes par jour pendant 2 ans (50 X 365 X 2 = 36 500);

2) Avoir été diagnostiquées avant le 12 mars 2012 avec:

a) Un cancer du poumon ou

b) Un cancer (carcinome épidermoïde) de la gorge, à savoir du larynx, de l'oropharynx ou de l'hypopharynx ou

c) de l'emphysème.

Le groupe comprend également les héritiers des personnes décédées après le 20 novembre 1998 qui satisfont aux critères décrits ci-haut.

For the Létourneau File[5]

All persons residing in Quebec who, as of September 30, 1998, were addicted to the nicotine contained in the cigarettes made by the defendants and who otherwise satisfy the following criteria:

1) They started to smoke before September 30, 1994 by smoking the defendants' cigarettes;

2) They smoked the cigarettes made by the defendants on a daily basis on September 30, 1998, that is, at least one cigarette a day during the 30 days preceding that date; and

3) They were still smoking the defendants' cigarettes on February 21, 2005, or until their death, if it occurred before that date.

The group also includes the heirs of the members who satisfy the criteria described herein.

Toutes les personnes résidant au Québec qui, en date du 30 septembre 1998, étaient dépendantes à la nicotine contenue dans les cigarettes fabriquées par les défenderesses et qui satisfont par ailleurs aux trois critères suivants:

1) Elles ont commencé à fumer avant le 30 septembre 1994 en fumant les cigarettes fabriquées par les défenderesses;

2) Elles fumaient les cigarettes fabriquées par les défenderesses de façon quotidienne au 30 septembre 1998, soit au moins une cigarette par jour pendant les 30 jours précédant cette date; et

3) Elles fumaient toujours les cigarettes fabriquées par les défenderesses en date du 21 février 2005, ou jusqu'à leur décès si celui-ci est survenu avant cette date.

Le groupe comprend également les héritiers des membres qui satisfont aux critères décrits ci-haut.

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[5] We note that the representative member of this class, Cécilia Létourneau, lost an action against ITL for $299.97 before the Small Claims Division of the Court of Québec in 1998. In accordance with article 985 of the *Code of Civil Procedure*, this judgment is not relevant to the present cases.

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[3] The Authorization Judgment also set out the "eight principal questions of fact and law to be dealt with collectively" (the "**Common Questions**"). We set them out below, along with our unofficial English translation:[6]

A. Did the Defendants manufacture, market and sell a product that was dangerous and harmful to the health of consumers?	*A. Les défenderesses ont-elles fabriqué, mis en marché, commercialisé un produit dangereux, nocif pour la santé des consommateurs?*
B. Did the Defendants know, or were they presumed to know of the risks and dangers associated with the use of their products?	*B. Les défenderesses avaient-elles connaissance et étaient-elles présumées avoir connaissance des risques et des dangers associés à la consommation de leurs produits?*
C. Did the Defendants knowingly put on the market a product that creates dependence and did they choose not to use the parts of the tobacco containing a level of nicotine sufficiently low that it would have had the effect of terminating the dependence of a large part of the smoking population?	*C. Les défenderesses ont-elles sciemment mis sur le marché un produit qui crée une dépendance et ont-elles fait en sorte de ne pas utiliser les parties du tabac comportant un taux de nicotine tellement bas qu'il aurait pour effet de mettre fin à la dépendance d'une bonne partie des fumeurs?*
D. Did the Defendants employ a systematic policy of non-divulgation of such risks and dangers?	*D. Les défenderesses ont-elles mis en œuvre une politique systématique de non-divulgation de ces risques et de ces dangers?*
E. Did the Defendants trivialize or deny such risks and dangers?	*E. Les défenderesses ont-elles banalisé ou nié ces risques et ces dangers?*
F. Did the Defendants employ marketing strategies conveying false information about the characteristics of the items sold?	*F. Les défenderesses ont-elles mis sur pied des stratégies de marketing véhiculant de fausses informations sur les caractéristiques du bien vendu?*
G. Did the Defendants conspire among themselves to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use?	*G. Les défenderesses ont-elles conspiré entre elles pour maintenir un front commun visant à empêcher que les utilisateurs de leurs produits ne soient informés des dangers inhérents à leur consommation?*
H. Did the Defendants intentionally interfere with the right to life, personal security	*H. Les défenderesses ont-elles intentionnellement porté atteinte au droit à la vie,*

[6] We have modified the order in which the questions were stated in the Authorization Judgment to be more in accordance with the sequence in which we prefer to examine them.

and inviolability of the class members?	*à la sécurité, à l'intégrité des membres du groupe?*

[4] Our review of the Common Questions leads us to conclude that questions "D" and "E" are very similar and should probably be combined. While "F" is not much different from them, the specific accent on marketing there justifies its being treated separately. Therefore, marketing aspects will not be analyzed in the new combined question that will replace "D" and "E" and be stated as follows:

D. Did the Defendants trivialize or deny or employ a systematic policy of non-divulgation of such risks and dangers?	*D. Les défenderesses ont-elles banalisé ou nié ou mis en œuvre une politique systématique de non-divulgation de ces risques et de ces dangers?*

[5] Accordingly, the Court will analyze seven principal questions of fact and law in these files: original questions A, B, C, new question D, and original questions F, G, H, which now become E, F and G (the "**Common Questions**")[7]. Moreover, as required in the Authorization Judgment, this analysis will cover the period from 1950 until the motions for authorization were served in 1998 (the "Class Period").

[6] We should make it clear at the outset that a positive response to a Common Question does not automatically translate into a fault by a Company. Other factors can come into play.

[7] A case in point is the first Common Question. It is not really contested that, during the Class Period, the Companies manufactured, marketed and sold products that were dangerous and harmful to the health of consumers. Before holding that to be a fault, however, we have to consider other issues, such as, when the Companies discovered that their products were dangerous, what steps they took to inform their customers of that and how informed were smokers from other sources. Assessment of fault can only be done in light of all relevant aspects.

[8] In interpreting the Common Questions, it is important to note that the word "product" is limited to machine-produced ("tailor-made") cigarettes and does not include any of the Companies' other products, such as cigars, pipe tobacco, loose or "roll-your-own" ("fine-cut") tobacco, chewing tobacco, cigarette substitutes, etc. Nor does it include any issues relating to second-hand or environmental smoke. Accordingly, unless otherwise noted, when this judgment speaks of the Companies' "products" or of "cigarettes", it is referring only to commercially-sold, tailor-made cigarettes produced by the Companies during the Class Period.

[9] The conclusions of each action are similar, although the amounts claimed vary.

[10] In the Blais File, the claim for non-pecuniary (moral) damages cites loss of enjoyment of life, physical and moral pain and suffering, loss of life expectancy, troubles,

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[7] Given the different make-up of the classes and the different nature of the claims between the files, not all the Common Questions will necessary apply in both files. For example, question "C", dealing with dependence/addiction appears relevant only to the Létourneau file. To the extent that this becomes an issue, the Court will attempt to point out any difference in treatment between the files.

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worries and inconveniences arising after having been diagnosed with one of the diseases named in the class description (the "**Diseases**"). After amendment, it seeks an amount of $100,000 for each Member with lung cancer or throat cancer and $30,000 for those with emphysema.

[11] In the Létourneau file, the moral damages are described as an increased risk of contracting a fatal disease, reduced life expectancy, social reprobation, loss of self esteem and humiliation[8]. It seeks an amount of $5,000 for each Member under that head.

[12] The amounts claimed for punitive damages were originally the same in both files: $5,000 a Member. That claim was amended during final argument to seek a global award of between $2,000 and $3,000 a Member, which the Plaintiffs calculate would total approximately $3,000,000,000.

[13] With respect to the manner of proceeding in the present judgment, the Court must examine the Common Questions separately for each of the Companies and each of the files. Although there will inevitably be overlap of the factual and, in particular, the expert proof, during the Class Period the Companies were acting independently of and, indeed, in fierce competition with each other in most aspects of their business. As a result, there must be separate conclusions for each of the Companies on each of the Common Questions in each file.

[14] Organisationally, we provide a glossary of the defined terms in Schedule A to this judgment. As well, we list in the schedules the witnesses according to the party to whom their testimony related. For example, Schedule D identifies the witnesses called by any of the parties who testified concerning matters relating to ITL. Witnesses from the Canadian Tobacco Manufacturers Council (the "**CTMC**") were initially called by the Plaintiffs and they are identified in Schedule C as "Non-Party, Non-Government Witnesses". The schedules also list the experts called by each party and, finally, reproduce extracts of relevant external documents[9].

I.B. THE ALLEGED BASES OF LIABILITY

[15] We are in the collective or common phase of these class actions, as opposed to analyzing individual cases. At this class-wide level, the Plaintiffs are claiming only moral (compensatory) and punitive (exemplary) damages.

[16] Moral damages are claimed under either of the *Civil Codes* in force during the Class Period, as well as under the *Consumer Protection Act*[10] (the "**CPA**") and under the *Québec Charter of Human Rights and Freedoms*[11] (the "**Quebec Charter**). Faults committed prior to January 1, 1994 would be evaluated under the *Civil Code of Lower Canada*, including article 1053, while those committed as of that date would fall under the current *Civil Code of Quebec*, more specifically, under articles 1457 and 1468 and

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8 See paragraphs 182-185 of the Amended Introductory Motion of February 24, 2014 in the Létourneau File.

9 For ease of reference, we attempt to set out all relevant legislation in Schedule H, although we sometimes reproduce legislation in the text.

10 RLRQ, c. P-40.1.

11 RLRQ, c. C-12.

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following[12]. In any event, the Plaintiffs see those differences as academic, since the test is essentially the same under both codes.

[17] As for punitive damages, those are claimed under article 272 of the CPA and article 49 of the Quebec Charter.

[18] The Plaintiffs argue that the rules of extracontractual (formerly delictual) liability apply here, and not contractual. Besides the fact that the Class Members have no direct contractual relationship with the Companies, they are alleging a conspiracy to mislead consumers "at large", both of which would lead to extracontractual liability[13].

[19] And even where a contract might exist, they point out that, as a general rule, the duty to inform arises before the contract is formed, thus excluding it from the contractual obligations coming later[14]. Here too, in their view, it makes no difference whether the regime be contractual or extracontractual, since the duty to inform is basically identical under both.

[20] For their part, the Companies agreed that we are in the domain of extracontractual liability as opposed to contractual.

[21] As for the liability of the Companies, the Plaintiffs not surprisingly take the position that all of the Common Questions should be answered in the affirmative and that an affirmative answer to a Common Question results in a civil fault by the Companies. They liken cigarettes to a trap, given their addictive nature, a trap that results in the direst of consequences for the "unwarned" user.

[22] In fact, the Plaintiffs charge the Companies with a fault far graver than failing to inform the public of the risks and dangers of cigarettes. They allege that the Companies conspired to "disinform" the public and government officials of those dangers, i.e., as stated in their Notes[15], "to prevent knowledge of the nature and extent of the dangers inherent in (cigarettes) from being known and understood". The allegation appears to target both efforts to misinform and those to keep people confused and uninformed.

[23] The Plaintiffs see such behaviour as being so egregious and against public order that it should create a *fin de non recevoir*[16] against any attempt by the Companies to defend against these actions, including on the ground of prescription[17].

[24] For similar reasons, the Plaintiffs seek a reversal of the burden of proof. They argue that the onus should shift to the Companies to prove that Class Members, in spite

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12 *An Act Respecting the Implementation of the Reform of the Civil Code*, L.Q. 1992, c. 57, article 65.

13 *Option Consommateurs c. Infineon Technologies*, a.g., 2011 QCCA 2116, para 28.

14 See Pierre-Gabriel JOBIN, *« Les ramifications de l'interdiction d'opter. Y-a-t-il un contrat ? Où finit-il ? »*, (2009) 88 R. du B. Can 355 at page 363.

15 See paragraph 54 of Plaintiffs' Notes. Mention of the "Notes" of any of the parties refers to their respective "Notes and Authorities" filed in support of their closing arguments.

16 In general terms, a *fin de non recevoir* can be found when a person's conduct is so reprehensible that the courts should refuse to recognize his otherwise valid rights. It is a type of estoppel.

17 See paragraphs 100, 105, 107 and 120 of the Plaintiffs' Notes dealing with the Companies' right to make a defence, and paragraphs 2159 and following on prescription.

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of being properly warned, would have voluntarily chosen to begin smoking or would have voluntarily continued smoking once addicted[18].

[25] On the question of the *Consumer Protection Act*, the Plaintiffs argue that the Companies committed the prohibited practices set out in sections 219, 220(a) and 228, the last of which attracting special attention as a type of "legislative enactment of the duty to inform"[19]:

> **228.** No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

[26] They argue that the Companies' disinformation campaign is a clear case of failing to mention an important fact, i.e., that any use of the product harms the consumer's health. They add that the Companies failed to mention these important facts over the entire Class Period, including after the entry into force of the Quebec Charter and the relevant sections of the CPA.

[27] The Plaintiffs note that a court may award punitive damages irrespective of whether compensatory damages are granted[20]. They argue that the CPA introduces considerations for awarding punitive damages in addition to those set out in article 1621 of the Civil Code, since "the public order nature of its Title II provisions means that a court can award punitive damages to prevent not only intentional, malicious, or vexatious behaviour, but also ignorant, careless, or seriously negligent conduct".[21]

[28] The Plaintiffs see this as establishing a lower threshold of wrongful behaviour for the granting of punitive damages than under section 49 of the Quebec Charter, where proof of intentionality is required.

[29] As for the Quebec Charter, the Plaintiffs argue that the Companies intentionally violated the Class Members' right to life, personal inviolability[22], personal freedom and dignity under articles 1 and 4. This would allow them to claim compensatory damages under the first paragraph of article 49 and punitive damages under the second paragraph.

[30] If the claims relating to the right to life and personal inviolability are easily understood, it is helpful to explain the others. For the claim with respect to personal freedom, the Plaintiffs find its source in the addictive nature of tobacco smoke that frustrates a person's right to be able to control important decisions affecting his life.

[31] As for the violation of the Class Members' dignity, the Plaintiffs summarize that argument as follows in their Notes:

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18 See paragraph 96 of Plaintiffs' Notes.

19 Claude MASSE, *Loi sur la protection du consommateur : analyse et commentaires*, Cowansville : Les Éditions Yvon Blais Inc., 1999, page 861.

20 *Richard v. Time Inc.,* [2012] 1 S.C.R. 265 ("***Time***"), at paragraphs 145, 147. See also *de Montigny c. Brossard (succession)*, 2010 SCC 51.

21 *Ibidem, Time*, at paragraphs 175-177.

22 "The common meaning of the word "inviolability" suggests that the interference with that right must leave some marks, some *sequelae*, which, while not necessarily physical or permanent, exceed a certain threshold. The interference must affect the victim's physical, psychological or emotional equilibrium in something more than a fleeting manner": *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand* [1996] 3 SCR 211, at paras. 96-97.

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> **191.** A manufacturer mindful of a fellow human being's dignity does not sell them a product that will trap them in an addiction and lead to development of serious health problems or death. Such a manufacturer does not design, sell, and market a useless, toxic product and then hide the true nature of that product. The Defendants committed these acts and omissions over decades. The Defendants thus deliberately committed an egregious and troubling violation of the Plaintiffs' right to dignity.

[32] Of the criteria for assessing the amount of punitive damages set out in article 1621 of the *Civil Code*, the Plaintiffs put particular emphasis on the gravity of the debtor's fault. This position is supported by the Supreme Court in the *Time* decision, who categorized it as "undoubtedly the most important factor"[23].

[33] Along those lines, the Plaintiffs made extensive proof and argument that the Companies marketed their cigarettes to under-age smokers and to non-smokers. We consider those arguments in section II.E of this judgment.

I.C. THE COMPANIES' VIEW OF THE KEY ISSUES

[34] The Companies, for their part, were consistent in emphasizing the evidentiary burden on the Plaintiffs. In its Notes, JTM identifies the key issues as being:

> **16.** The first issue in these cases is whether JTIM can be said to have engaged in wrongful conduct at all, given that class members are entitled to take risks and that they knew or could have known about the health risks associated with smoking.
>
> **17.** Secondly, the issue is whether this Court can conclude that JTIM committed any fault, given that throughout the class period it behaved in conformity with the strict regulatory regime put in place by responsible and knowledgeable public health authorities.
>
> **18.** Thirdly, to the extent that JTIM has committed any fault, the issue is whether that fault can engage its liability. Unless Plaintiffs show that it led each class member to make the decision to smoke or continue smoking when he/she would not otherwise have made that choice, *and* that it was the resulting "wrongful smoking", attributable to the fault of JTIM, that was the physical cause of each member's disease (sic). Without such proof, collective recovery is simply not possible or justified in these cases.
>
> **16.** (sic) Finally, with respect to punitive damages, the key issue (apart from the fact that they are prescribed) is whether a party that has conformed with public policy, including by warning consumers since 1972 of the risks of smoking in accordance with the wording prescribed by the government, can be said to have intentionally sought to harm class members that have made the choice to smoke, especially in the absence of any evidence from any class member that anything that JTIM is alleged to have done had any impact whatsoever on him or her.

[35] The Companies also underline – seemingly on dozens of occasions - that the absence of testimony of class members in these files represents an insurmountable obstacle to proving the essential elements of fault, damages and causation for each Member. The class action regime, they remind the Court, does not relieve the Plaintiffs of

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[23] *Op. cit.*, *Time*, Note 20, at paragraph 200.

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the obligation of proving these three elements in the normal fashion, as the case law consistently states. As well, the Companies point out that the case law clearly requires that those elements be proven for each member of the class and the Plaintiffs' choice not to call any Members as witnesses should lead the Court to make an adverse inference against them in that regard.

[36] As mentioned, since each Company's conduct was, at least in part, unique to it and different from that of the others, we must deal with the Common Questions on a Company-by-Company basis.

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II. IMPERIAL TOBACCO CANADA LTD.[24]

[37] Given that ITL was the largest of the Companies during the Class Period, the Court will analyze the case against it first.

[38] The corporate history of ITL is quite complicated, with the broad lines of it being set out in Exhibit 20000. Through predecessor companies, ITL has done business in Canada since 1912. In 2000, two years after the end of the Class Period, it was amalgamated with Imasco Limited (and other companies) under the ITL name, with British American Tobacco Inc. ("**BAT**"), a British corporation, becoming its sole shareholder.

[39] Both directly and through companies over which it had at least *de facto* control, BAT was very much present in ITL's corporate picture during the Class Period, with its level of control of ITL's voting shares ranging between 40% and 58% (Exhibit 20000.1). As a result, the Court allowed evidence relating to BAT's possible influence over ITL during the Class Period.

[40] We now turn to the first Common Questions as it relates to ITL.

II.A. DID ITL MANUFACTURE, MARKET AND SELL A PRODUCT THAT WAS DANGEROUS AND HARMFUL TO THE HEALTH OF CONSUMERS?

[41] What is a "dangerous" product? One is tempted to say that it would be a product that is harmful to the health of consumers, but that would make the second part of this question redundant. In light of the other Common Questions, we shall take it that "harmful to the health of consumers" means that it would cause either the Diseases in the Blais Class or tobacco dependence in the Létourneau Class. The latter holding requires us to determine if tobacco dependence is dangerous and harmful to the health of consumers, a question we answer affirmatively further on in the present judgment[25].

[42] In its Notes, ITL sums up its position on this question as follows:

> **292.** The evidence overwhelmingly supports the testimony of ITL and BAT scientists who told the Court that, throughout the Class Period, they and their colleagues engaged in a massive research effort, in the face of an enormous series

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[24] The witnesses called by any of the parties who testified concerning matters relating to ITL are listed in Schedule D to the present judgment and those called by the Plaintiffs who testified concerning non-company matters are listed in Schedule C. Schedules E and F apply to JTM and RBH respectively.

[25] See section II.C.1.

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of challenges and made good faith efforts to reduce the risks of smoking (and continue to do so).

293. The work carried on in the R&D department of ITL was professional and driven by ethical considerations. In particular, Dr. Porter could name no avenues of work that were worth pursuing in the search for a less hazardous cigarette but which were not pursued by ITL or the larger BAT group.

294. Acting in good faith and in accordance with the state of the art at all relevant times, ITL took steps to reduce the hazards associated with its cigarettes. Contrary to what Plaintiffs might suggest, the mere fact that smoking continues to pose a (known) risk to consumers due to the inherent make-up of cigarettes simply does not give rise to a de facto "dangerous product" or "defective product" claim.

[43] Also, in response to a request from the Court as to when each Company first admitted that smoking caused a Disease, ITL pointed out that, early on in the Class Period, its scientists adopted the working hypothesis that there is a relationship between smoking and disease.

[44] Whatever the merits of these arguments, they contain clear admissions that ITL manufactured, marketed and sold products that were dangerous and harmful to the health of consumers.

[45] This is confirmed by the testimony of ITL's current president, Marie Polet. At trial, she made the following statements:

ON JUNE 4, 2012:

Q121: A - Well, BAT has acknowledged for many, many years that smoking is a cause of serious disease. So, absolutely, I believe that that's something that I agree with.

Q158: A- The company I have worked for, for those years, and that's BAT, yes. So I can't speak to Imperial Tobacco specifically but I can tell you that I've always recalled BAT saying that there was a risk associated to smoking and accepting that risk.

Q251: A- I think we have a duty to work on trying to reduce the harm of the products we sell; I believe we are responsible for that.

Q302: A- What I believe is that smoking can cause a number of serious and, in some cases, fatal diseases. And those diseases that I see here are commonly referred to as these diseases (referring to a list of diseases) that smoking can cause.

Q339: A- … It was very clear at that point in time, and I believe it was very clear many years before, decades before actually, and I can only speak to my own environment, and that was Europe, that smoking was a ... you know, represented a health risk. It was very clear and it had been very clear in my view for many years before I joined (in 1978).

> Q811: A- I think, as I... I think I said that earlier, as a company selling a product which can cause serious disease, it is our responsibility to work and to do as much as we can to try and develop ways and means to reduce the harm of those products. So I believe that that's the company's position at this point in time.
>
> ON JUNE 5, 2012:
>
> Q334: A- I would say that none of them (ITL's brands) is safe. I don't think any tobacco product in any form could qualify under the definition of "safe."

[46] Although she added a number of qualifiers at other points, for example, that smoking is a general cause of lung cancer but it cannot be identified as the specific cause in any individual case, Mme. Polet's candid statements provide further admissions to the effect that ITL did manufacture, market and sell a product that was dangerous and harmful to the health of consumers during the Class Period.

[47] In fact, none of the Companies today denies that smoking is a cause of disease in some people, although each steadfastly denies any general statement that it is the major cause of any disease, including lung cancer.

[48] The real questions, therefore, become not whether the Companies sold a dangerous and harmful product but, rather, when did each of them learn, or should have learned, that its products were dangerous and harmful and what obligations did each have to its customers as a result. These points are covered in the other Common Questions.

[49] Also examined in the other Common Questions is the Companies' argument that it is not a fault to sell a dangerous product, provided it does not contain a safety defect. A safety defect is described in article 1469 of the Civil Code as being a situation where the product "does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in the design or manufacture of the thing, poor preservation or presentation of the thing, or the lack of sufficient indications as to the risks and dangers it involves or as to safety precautions".

[50] The Plaintiffs, on the other hand, argue that the special rules set out in articles 1469 and 1473 shift the burden of proof on this point to the Companies. While confirming this position, article 1473 creates two possible defences, whereby the manufacturer must prove:

a. that the victim knew or could have known of the defect or

b. that the manufacturer could not have known of it at the time the product was manufactured or sold[26].

[51] We must examine both possible defences. The formulation of the second Common Question makes it appropriate to undertake that analysis immediately, though we are fully cognizant that we have not as yet been made any finding of fault by the Companies.

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[26] The full text of these articles is set out in other parts of this judgment, as well as in Schedule "H".

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II.B. DID ITL KNOW, OR WAS IT PRESUMED TO KNOW OF THE RISKS AND DANGERS ASSOCIATED WITH THE USE OF ITS PRODUCTS?

[52] The pertinence of this question flows from the two articles of the Civil Code mentioned above. Article 1469 indicates that a safety defect in a product occurs where it does not afford the safety which a person is normally entitled to expect, including by reason of a lack of sufficient indications as to the risks and dangers it involves. Nevertheless, even where a safety defect exists, the second paragraph of article 1473 would exculpate the manufacturer if he proves either that the plaintiff knew of it or that he, the manufacturer, could not have known of it at the time and that he acted diligently once he learned of it.

[53] Exactly what are the risks and dangers associated with the use of cigarettes for the purposes of this Common Question? The class descriptions answer that. The increased likelihood of contracting one of the Diseases is a risk or danger associated with smoking, as admitted by Mme. Polet. The same can be said for the likelihood of becoming dependent on cigarettes in light of the fact that they increase the probability of contracting one of the Diseases.[27]

[54] As for knowledge of the risks and dangers relating to the Diseases and dependence, the evidence indicates that both scientific and public recognition of the risks and dangers of dependence came later than for the Diseases. For example, it was not until his 1988 report that the US Surgeon General clearly identified the dependence-creating dangers of nicotine use, whereas he pointed out the health risks of tobacco smoke as early as 1964. As well, warnings on the cigarette packs began in 1972, but did not mention dependence or addiction until 1994.

II.B.1 THE BLAIS FILE

II.B.1.a AS OF WHAT DATE DID ITL KNOW OF THE RISKS AND DANGERS?

[55] In April and May 1958, three BAT scientists made an omnibus tour of the United States, with a stop in Montreal, for the purpose, *inter alia*, of seeking information on "the extent to which it is accepted that cigarette smoke 'causes' lung cancer". Their ten-page report on the visit (Exhibit 1398) portrays an essentially unanimous consensus among the specialists interviewed to the effect that smoking causes lung cancer:

> CAUSATION OF LUNG CANCER
>
> With one exception (H.S.N. Greene) the individuals with whom we met believed that smoking causes lung cancer if by "causation" we mean any chain of events that leads eventually to lung cancer and which involves smoking as an indispensable link. In the USA only Berkson, apparently, is now prepared to doubt the statistical evidence and his reasoning is nowhere thought to be sound[28].

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[27] The Plaintiffs characterize "compensation", as discussed later in this judgment, as one of the risks and dangers of smoking. Although the Court disagrees with that characterization, it does agree that compensation is a factor that needs to be considered in the present judgment, which we do further on.

[28] At page 3 pdf.

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> CONCLUSIONS
>
> 1. Although there remains some doubt as to the proportion of the total lung cancer mortality which can fairly be attributed to smoking, scientific opinion in USA does not now seriously doubt that the statistical correlation is real and reflects a cause and effect relationship[29].

[56] Given the close intercorporate and political collaboration between the tobacco industries in the US and Canada by the beginning of the Class Period[30], the state of knowledge in this regard was essentially the same in both countries, as well as in England, where BAT was headquartered. Nevertheless, except for one short-lived blip on the radar screen by Rothmans in 1958, which the Court examines in a later chapter, no one in the Canadian tobacco industry was saying anything publicly about the health risks of smoking outside of corporate walls. In fact, at ITL's instigation, it and the other Companies started moving towards a "Policy of Silence" about smoking and health issues as of 1962.[31]

[57] Within the industry's walls, however, certain individuals in ITL and BAT were finding it increasingly difficult to hold their tongue. Not surprisingly, the ones most recalcitrant in the face of this wall of silence were the scientists.[32]

[58] Prominent among them was BAT's chief scientist, Dr. S.J. Green, now deceased. In a July 1972 internal memo entitled "THE ASSOCIATION OF SMOKING AND DISEASE" (Exhibit 1395), Dr. Green goes very far indeed in advocating full disclosure. The force of his text is such that it is appropriate to cite, exceptionally, a large portion of it:

> I believe it will not be possible indefinitely to maintain the rather hollow "we are not doctors" stance and that, in due course, we shall have to come up in public with a more positive approach towards cigarette safety. In my view, it would be best to be in a position to say in public what was believed in private, i.e., to have consistent responsible policies across the board.
>
> …
>
> The basic assumptions on which our policy should be built must be recognized and challenged or accepted. A preliminary list of assumptions is suggested:
>
> 1) The association of cigarette smoking and some diseases is factual.
>
> …
>
> 6) The tobacco smoking habit is reinforced or dependent upon the psycho-pharmacological effects mainly of nicotine.

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29 At page 9 pdf.

30 As of 1933, BAT had major shareholdings in ITL: see Exhibit 20,000.1. Later in this judgment, we discuss this collaboration, including the embracing of the scientific controversy strategy and the cross-border role of the public relations firm Hill & Knowlton.

31 This refers to the "Policy Statement" discussed in Section II.F.1 of the present judgment.

32 At trial, one of ITL's most prominent scientists, Dr. Minoo Bilimoria, stated what might seem the obvious, especially for a micro-biologist: "I've known of the hazard in smoking even before (the US Surgeon General's Report of 1979). I didn't have to have a Surgeon General report to tell me that smoking was not good for you". (Transcript of March 5, 2013 at page 208)

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> …
>
> Is it still right to say that we will not make or imply health claims? In such a system of statutory control, can we completely abdicate from making judgments on our products in this context and confine ourselves to presenting choices to the consumer? In a league table position should we take advantage of a system of measurement or reporting in a way which could lead to misinforming our consumers?
>
> …
>
> … we must ensure that our consumers have a choice between genuine alternatives and are sufficiently informed to exercise their choice effectively.
>
> In my view, the establishment of league tables does not mean that the cigarette companies can contract out of responsibility for their products: league tables should be regarded only as a partial specification. We should not allow them to lead us to abdicate from making our own judgments. "We are not doctors", in my view may, through flattery, lead to short term peace with the medical establishment but will not fool the public for long.
>
> …
>
> To inform the consumer, i.e., to offer him an effective choice, health implications will have to be stated by government or industry or both and within the broader areas. Companies may well have to bring home the health implication at the least for different classes of their products.
>
> …
>
> Meanwhile, we should also study how we could inform the public directly.

[59] Dr. Green's already-heretical position actually hardened over time, as we shall see below.

[60] On this side of the Atlantic, a questioning of the conscience was also taking place. This is seen in a March 1977 memo (Exhibit 125) from Robert Gibb, head of ITL's Research and Development Department, commenting on an ITL position paper on smoking and health (Exhibit 125A) and a related document entitled "An Explanation" (Exhibit 125B). Both documents had been prepared by ITL's Marketing Department. He wrote:

> The days when the tobacco industry can argue with the doctors that the indictment is only based on statistics are long gone. I think we would be foolish to try to use "research" to combat what you term "false health claims" (item 7). Contrary to what you say, the industry has challenged the position of governments (e.g. Judy La Marsh hearings) with expert witnesses, and lost.
>
> The scientific "debate" nowadays is not <u>whether</u> smoking is a causative factor for certain diseases, but <u>how</u> it acts and <u>what</u> may be the harmful constituents in smoke. (emphasis in the original)

[61] Around the same time, Mr. Gibb distributed to ITL's upper management two papers by Dr. Green, the second of which echoed a similar concern and noted how the "domination by legal consideration … puts the industry in a peculiar position with respect to product safety discussions, safety evaluations, collaborative research " (Exhibit 29, at PDF 8):

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CIGARETTE SMOKING AND CAUSAL RELATIONSHIPS

> The public position of tobacco companies with respect to causal explanations of the association of cigarette smoking and diseases is dominated by legal considerations. In the ultimate companies wish to be able to dispute that a particular product was the cause of injury to a particular person. By repudiation of a causal role for cigarette smoking in general they hope to avoid liability in particular cases. This domination by legal consideration thus leads the industry into a public rejection in total of any causal relationship between smoking and disease and puts the industry in a peculiar position with respect to product safety discussions, safety evaluations, collaborative research etc. Companies are actively seeking to make products acceptable as safer while denying strenuously the need to do so. To many the industry appears intransigent and irresponsible. The problem of causality has been inflated to enormous proportions. The industry has retreated behind impossible demands for "scientific proof" whereas' such proof has never been required as a basis for action in the legal and political fields. Indeed if the doctrine were widely adopted the results would be disastrous. I believe that with a better understanding of the nature of causality it is plain that while epidemiological evidence does indicate a cause for concern and action it cannot form a basis on which to claim damage for injury to a specific individual.

[62] Dr. Green's frank assessment of the industry's contradictory and conflicted position, and its domination by legal considerations, did not, however, totally blind him to the need to be sensitive to such issues, as reflected in his March 10, 1977 letter to Mr. Gibb commenting on the ITL position paper (Exhibit 125D):

> … and I think your paper would be a useful basis (for discussion) to start from. Of course, it may be suggested that it is better in some countries to have no such paper - "it's better not to know" and certainly not to put it in writing.

[63] Or perhaps Dr. Green was just being discreetly sarcastic, for his days at BAT were numbered.

[64] By April 1980, he "was no longer associated with BAT" (See Exhibit 31B). In fact, he was so "not" associated that he agreed to give a very forthright interview to a British television programme dealing with smoking and health issues. Here is the content of an April 1980 telex from Richard Marcotullio of RJRUS to Guy-Paul Massicotte, in-house legal counsel to RJRM in Montreal, on that topic (Exhibit 31B), another document meriting exceptionally long citation:

> Panorama TV program included following comments from Dr. S.J. Green, former BAT director of research and development:
>
> 1. He regards industry's position on causation as naïve, i.e. "to say evidence is statistical and cannot prove anything is a nonsense". He stated that nearly all evidence these days is statistical but believes that experiments can be and have been carried out that show that smoking is a very serious causal factor as far as the smoking population is concerned.
> 2. In response to a question as to whether he believes that cigarette smoking to be (sic) harmful he said he is quite sure it can and does cause harm. Specifically he said "I am quite sure it is a major factor in lung cancer in our

> society. In my opinion, if we could get a decrease in the prevalence of smoking we would get a decrease in the incidence of lung cancer".
>
> In addition, an anonymous quotation supposedly prepared by industry scientific advisors in 1972 was stated as follows:
>
> "I believe it will not be possible to maintain indefinitely the rather hollow 'we are not doctors' and I think in due course we will have to come up in public with a rather more positive approach towards cigarette safety. In my view it would be best to be in the position to say in public what we believe in private."
>
> Dr. Green referred briefly to ICOSI on the program and described it as representing the industry in the EEC. FYI, BAT's response has been that Dr. Green is no longer associated with BAT and his views therefore are those of a private individual. Further BAT reiterated the position that causation is a continuing controversy in scientific circles and that scientists are by no means unanimous in their views regarding smoking and health issues.
>
> As with previous telexes, please share the above information with whom you feel should be kept up to date.

[65] Robert Gibb, too, appears to have remained consistent in his scepticism of the wisdom and propriety of criticizing epidemiological/statistical research. Four years after his 1977 memo on ITL's position paper, he made the following comments in a 1981 letter concerning BAT's proposed Handbook on Smoking and Health (Exhibit 20, at PDF 2):

> The early part of the booklet casts doubt on epidemiological evidence and says there is no scientific proof. Later on epidemiology is used as evidence that filtered low tar cigarettes are beneficial. You can't have it both ways. I would think most health authorities consider well conducted epidemiology to be "scientific", in fact the only kind of "science" that can be brought to bear on diseases that are multi-factored origin, whose mechanisms are not understood, and take many years to develop. The credibility of scientists who still challenge the epidemiology is not high, and their views are ignored.

[66] Gibb was the head of ITL's science team and, to his credit, he refused to toe the party line on the "scientific controversy". On the other hand, his company, to its great discredit, not only failed to embrace the same honesty, but, worse still, pushed in the opposite direction[33].

[67] Getting back to the question at hand, to determine the starting date of ITL's knowledge of the dangers of its products one need only note that, over the Class Period, ITL adopted as its working hypothesis that smoking caused disease[34]. The research efforts of its fleet of scientists, which at times numbered over 70 people in Montreal

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[33] This analysis unavoidably goes beyond the specific issue of the starting point of ITL's knowledge of the risks and dangers of its products. The light it casts on ITL's attitude towards divulging what it knew to the public and to government is also relevant to the question of punitive damages.

[34] See "ITL's Position on Causation Admission" filed as a supplement to its Notes.

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alone[35], were at all relevant times premised on that hypothesis. It follows that, since the company was going to great lengths to eradicate the dangers, it had to know of them.

[68] Speaking of research, it should not be overlooked that one of the main research projects of the Companies, dating back even to before the Class Period, was the development of filters. Their function is to filter out the tar from the smoke, and it is from the tar, as it was famously reported by an eminent British researcher, that people die.[36]

[69] Then there is the expert evidence offered by the three Companies as to the date at which the public should be held to have known about the risks and dangers[37]. Messrs. Duch, Flaherty and Lacoursière put that date as falling between 1954 (for Duch) and the mid-1960s (for Flaherty).

[70] Although to a large degree the Court rejects the evidence of Messrs. Flaherty and Lacoursière, as explained later, there is no reason not to take account of such an admission as it reflects on the Companies' knowledge[38]. It is merely common sense to say that, advised by scientists and affiliated companies on the subject[39], the Companies level of knowledge of their products far outpaced that of the general public both in substance and in time[40]. These experts' evidence leads us to conclude that the Companies had full knowledge of the risks and dangers of smoking by the beginning of the Class Period.

[71] The Court acknowledges that little in the preceding refers directly to the Diseases of the Blais Class. For the most part, Dr. Greene and Mr. Gibb speak of "disease" in a generic way and the historians are no more specific. Nevertheless, we do not see this as an obstacle to arriving at a conclusion with regard to ITL's knowledge with respect to the Diseases. No one can reasonably doubt that the average tobacco company executive at the time would have included lung cancer, throat cancer and emphysema among the diseases likely caused by smoking.

[72] Thus, the Court concludes that at all times during the Class Period ITL knew of the risks and dangers of its products causing one of the Diseases.

[73] This conclusion not only answers the second Common Question in the affirmative with respect to ITL, but it also eliminates the second of the possible defences offered by article 1473. Hence, to the extent that ITL is found to have committed the fault of selling a product with a safety defect, its only defence would be to prove that the

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35 ITL also had essentially unlimited access to the research conducted by BAT in England under a cost-sharing agreement.

36 M.A.H. Russell wrote in a June 1976 issue of the British Medical Journal: *"People smoke for nicotine but they die from the tar"* (Exhibit 121).

37 Later on in this judgment we show a table indicating the dates at which the various history experts opined as to that knowledge.

38 We do not accept this opinion as being accurate with respect to the knowledge of consumers, as we discuss in detail further on.

39 This applies less to JTM prior to its acquisition by RJRUS.

40 In *Hollis v. Dow Corning Corp* ([1995] 4 S.C.R. 634: "***Hollis***") the Supreme Court comes to a similar conclusion with respect to relative level of knowledge, going so far as to qualify the difference in favour of the manufacturer as an "enormous informational advantage" at paragraphs 21 and 26.

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Members knew or could have known of it or could have foreseen the injury[41]. We shall deal with that aspect next.

II.B.1.b AS OF WHAT DATE DID THE PUBLIC KNOW?

[74] Although the knowledge of the public is not directly the subject of Common Question Two, it makes sense to consider it now, during the discussion of the defences offered by article 1473[42]. In that light, the proof offers two main avenues for assessing this factor: the expert reports of historians and the effect of the warnings placed on cigarette packages as of 1972 (the "**Warnings**")[43].

II.B.1.b.1 THE EXPERTS' OPINIONS: THE DISEASES AND DEPENDENCE

[75] The Companies filed three expert reports attempting to establish the date that the risks and dangers of smoking became "common knowledge" among the public. ITL filed the report of David Flaherty (Exhibit 20063), while JTM offered the opinion of Raymond Duch (Exhibit 40062.1) and shared with RBH the report of Jacques Lacoursière (Exhibit 30028.1)[44]. The Plaintiffs offered the historian, Robert Proctor, as an expert and he also testified on this issue.

[76] Mr. Christian Bourque, an expert in surveys and marketing research, testified for the Plaintiffs with respect to the information contained in, and the motivation behind, the marketing surveys conducted for the Companies. Although some of what he said touched on this issue, his evidence is not conducive to determining a cut-off date for the question at hand. In light of that, the Court will not consider the evidence of Professor Claire Durand in this context, since her mandate was essentially to criticize Mr. Bourque's work.

[77] The following table summarizes the historical experts' opinions as to the dates at which the public attained common knowledge of the danger to health and the risk of developing tobacco dependence:

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41 We note that, even if that hurdle is overcome, there will still remains the general fault under article 1457 of failing to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. There are also the alleged faults under the CPA and the Quebec Charter.

42 The Companies made proof as to the date at which Canada and other public health authorities knew of the risks of smoking. In light of the Court of Appeal's judgment dismissing the action in warranty against Canada, the Court finds no relevance to that question in the current context. Whether or not Canada acted diligently, for example, with respect to imposing the Warnings, does not affect the actual level of knowledge of the public.

43 For the sake of completeness, we should note that, starting in 1968, Health Canada published a series of press releases providing "League Tables" showing the tar and nicotine levels in Canadian cigarettes, the first press release being filed as Exhibit 20007.1. No one alleges that this initiative represented a significant factor in the public's gaining adequate knowledge of the risks and dangers of smoking.

44 JTM also filed the reports of Robert Perrins (Exhibits 40346, 40347) with respect to the knowledge of the government and the public health community. For reasons already noted, the Court does not find this aspect relevant given the current state of the files.

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EXPERT	KNOWLEDGE OF DANGER TO HEALTH	KNOWLEDGE OF THE RISK OF ADDICTION OR "STRONG HABIT" OR "DIFFICULT TO QUIT"
David Flaherty[45]	mid-1960s	mid-1950s
Jacques Lacoursière[46]	late 1950s	late 1950s
Raymond Duch[47]	between 1954 and 1963	1979 to 1986
Robert Proctor[48]	the 1970s	after 1988

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[78] Professor Flaherty was commissioned by ITL to answer two questions:

- At what point in time, if ever, did awareness of the health risks of smoking, and the link between smoking and cancer in particular, become part of the "common knowledge" of Quebecers?
- At what point in time, if ever, did awareness of the fact that smoking was "hard to quit", "habit forming" or "addictive", become part of the "common knowledge" of Quebecers?

[79] On the first question, he concludes that "Awareness of the causal relationship between smoking and cancer and other health risks was almost inescapable, and as such became common knowledge among the population of Quebec by the mid-1960s" (Exhibit 20063, at page 3).

[80] He defines "common knowledge" as "a state of generally acknowledged awareness of some fact among members of a group" (at page 5), adding that a vast majority of the group must be aware of the fact in question in order for it to be common knowledge. He also cautions that common knowledge can be either ahead of or behind the state of scientific knowledge, i.e., that scientific proof of the fact can come either before or after it has become part of common knowledge.

[81] At the request of JTM and RBH, Jacques Lacoursière produced an exhaustive report chronicling the evolution of public knowledge (*la connaissance populaire*) of Quebec residents of the risks associated with smoking, including the risk of dependence (Exhibit 30028.1). He analyzed the print and broadcast media and government publications in Quebec over the Class Period. This was essentially a duplication of the work of Professor Flaherty, although, having dismissed Professor Lacoursière as "an amateur historian", Professor Flaherty would presumably not agree that it was of the same level of scholarship.

[82] Professor Lacoursière sees awareness of the dangers of smoking among the general public arriving even earlier than Professor Flaherty. Interestingly, he is of the opinion that knowledge with respect to the risk of tobacco dependence was acquired

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45 See pages 3 and 4 of his report: Exhibit 20063.
46 See page 3 of his report: Exhibit 30028.1.
47 Exhibit 40062.1, at page 5.
48 Transcript of November 29, 2012, at pages 34-38.

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essentially at the same time as that for danger to health, while Professor Flaherty felt it came even earlier, and before knowledge related to disease. Professors Duch and Proctor, on the other hand, agreed that knowledge of dependence came much later than for danger to health. This reflects what the public health authorities were saying, as seen in the twenty-four-year gap between the two in the US Surgeon General Reports: 1964 versus 1988.

[83] Professor Lacoursière opined that during the 1950s it was very unlikely (*très peu probable*) that a person would not have been made aware (*n'ait pas eu connaissance*) of the health dangers of smoking regularly and the risk of dependence attached to it.[49] By the end of the next decade, 1960-69, his view firmed up to a point where ignorance of the danger in both cases was a near impossibility:

> **278.** I can affirm, in my role as historian, that it was nearly impossible for a person not to know of the dangers to health of regular smoking and the dependence that it can cause. (the Court's translation)[50]

[84] Not surprisingly, his opinion on the degree of awareness of the dangers of smoking and of possible dependence extant at the end of the following decades solidify to the point of it being "impossible" ("*il est devenu impossible*") not to know by the end of the 1970s (at page 69), and incontrovertible ("*incontestable*") up to the end of the Class Period (at pages 90 and 104).

[85] Both Professors Flaherty and Lacoursière based their opinions exclusively on publicly-circulated documents, such as newspapers, magazines, television and radio shows, school books and the like. Neither included the Companies' internal documents in their analysis, arguing persuasively that the public could not have been influenced by such items, since they were never circulated publicly.

[86] We can accept that logic, but they were much less persuasive in their justification for omitting to consider any of the voluminous marketing material circulated by the Companies over the Class Period. Both of them completely ignored the Companies' numerous advertisements appearing in the same newspapers and magazines from which they extracted articles and airing on the same television and radio stations that especially Professor Lacoursière referred to. As well, they took no note of billboards, signs, posters, sponsorships and the like on the level of public awareness of the dangers of smoking and of dependence.

[87] Professor Lacoursière attempted to justify this omission on his lack of expertise in evaluating the effect of advertising on the public. In cross-examination, however, he admitted that advertising can have an effect on public knowledge, noting that the ads were quite attractive, "to say the least".[51] This indicates that advertising material is

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[49] *154. En tant qu'historien, à la suite de l'étude des documents analysés, je peux affirmer qu'il est très peu probable que quelqu'un n'ait pas eu connaissance de dangers pour la santé du fait de fumer régulièrement et de la dépendance que cela peut créer.* - Exhibit 30028.1.

[50] *Je peux affirmer, en tant qu'historien, qu'il devient presque impossible que quelqu'un n'ait pas connaissance des dangers pour la santé du fait de fumer régulièrement et la dépendance que cela peut créer.* - at page 53 of the report: Exhibit 30028.1.

[51] *C'est le moins que je puisse dire*: Transcript of May 16, 2013, at page 144.

something that should be considered in assessing common knowledge/*connaissance populaire*. It also indicates that Professor Lacoursière's report is incomplete, since it omits elements that have a real impact on his conclusions.

[88] As for Professor Flaherty, he brushed off this omission by saying that he initially intended to include an analysis of marketing material but, after long discussions with lawyers for ITL, who, he insisted, imposed no restrictions on him, he concluded that this type of communication really didn't have much of an impact on common knowledge.

[89] Professor Flaherty was remarkably stubborn on the point but seemed eventually to concede that there might be some influence, not, however, enough to bother with. This is a surprising position indeed, one that not only flies in the face of common sense, but also contradicts a view he supported several years earlier.

[90] In 1988, he sent to ITL what he described as a periodic report relating to research that was not specific to the present files (Exhibit 1561). There, in a section entitled "Remaining Research Activities", he wrote:

> 8. We have not done any explicit research on cigarette advertising, although we are aware from U. S. materials of significant episodes in advertising. My intuitive sense is that advertising is a component of any person's information environment and that it would be unwise not to think about the health claims that have been made about smoking since the 1910s, especially in terms of preparation for litigation.

[91] His "intuitive sense" that advertising is a component of any person's information environment is, as we note above, only common sense. The sole explanation he offered for the metamorphosis of his reasoning by the time he wrote his report for our files came in cross examination on May 23, 2013. There, he stated that: "I decided, early on, that the probative effect of the information content of advertising for Canadian cigarettes that I saw was not contributing anything beyond name rank and serial number to the smoking and health debate".

[92] It is difficult to reconcile that view with his statement at page 5 of his report that "The only category of material that I have intentionally not reviewed is tobacco advertising, since it is outside the scope of my area of expertise to opine on the impact of the messages inherent in such advertising". He should make up his mind. Did he ignore tobacco advertising because it is not important, or was it because it is outside of his expertise? If the latter, why did he not see it the same way in 1988?

[93] As well, it seems inconsistent, to say the least, that these experts should be so chary to opine on the effect of newspaper and magazine ads on people's perception when they have absolutely no hesitation with respect to the effect of articles and editorial cartoons in the very same newspapers and magazines in which those ads appeared. They seem to have been tracing their opinions with a scalpel in order to justify sidestepping such an obviously important factor. In doing so, they not only deprive the Court of potentially valuable assistance in its quest to ascertain one of the key facts in the case, but they also seriously damage their credibility.

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[94] As if this were not enough, there is another obstacle to accepting these opinions. These are historians who purport to opine on how the publication of certain information in the general media translates into knowledge of and/or belief in that information. Neither one professed to have any expertise in psychology or human behaviour, yet their opinions invade both these areas.

[95] Professor Flaherty talks of "common knowledge", but all either he or Professor Lacoursière is showing is the level of media attention given to the issue. That is not knowledge. That is exposure. On that basis, how can they opine on anything more than surveying what was published and publicly available? It is more in the field of the survey expertise of Professor Duch where one can see indices of common knowledge.

[96] For all these reasons, the Court cannot give any credence to the reports of Professors Flaherty and Lacoursière, other than for the purpose of showing part, and only part, of the information about smoking available to the public - and to the Companies - over the Class Period.

[97] Turning to Dr. Proctor, he does not opine as to the date of knowledge by the public in his report (Exhibit 1238), his mandate being to comment on the reports of Professors Flaherty, Lacoursière and Perrins. At trial, however, he was questioned by the Court as to the likely date at which the average American knew or reasonably should have known that the smoking of cigarettes causes lung cancer, larynx cancer, throat cancer or emphysema.

[98] Having first replied that it was during the 1970s and 1980s, he later seemed to favour the 1970s, saying that "The surveys show that, by the seventies (70s), more than half of people answered yes when asked that question. And I view that … as most Americans."[52] The question was as to the date of knowledge, not belief, to the extent that that makes a difference. He also answered on the basis of surveys, which, in our view, is the appropriate measure in this context.

[99] With respect to dependence, he testified that the American public's knowledge was not "extremely common" until after the 1988 Surgeon General's Report[53].

[100] It is true that he was opining as to Americans and not Canadians, but there appears to be a high degree of similarity in the levels of awareness about tobacco in the two countries. This is echoed by one of JTM's expert, Dr. Perrins, who states that: "An examination of the understanding that the Federal Government and the public health and medical communities had of the smoking and health issue and its practice, in Canada, should take into account the histories of similar developments in both the United States and the United Kingdom".[54]

[101] Accordingly, the Court has no hesitation in deducing certain tendencies relevant to the Canadian and Quebec cases from proof adduced with respect to the US and UK situations, including those about the level of public awareness. That said, we might well

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52 Transcript of November 29, 2012, at pages 34-38.
53 *Ibidem*, at page 47.
54 Report of Dr. Perrins, Exhibit 40346, at page 11.

find some minor differences owing to specific events occurring in one or the other of those countries.

[102] As for Professor Duch, his mandate was "to review the published public opinion data and provide my opinion on the awareness of the Quebec (and Canada) population from 1950 to 1998 of the health risks associated with smoking and of the public's view that smoking can be difficult to quit"[55]. His conclusions, as stated at page 5 of his report, are:

> 1: The Quebec population's awareness of the reports linking smoking with lung cancer or other health risks:
>
> - By at least 1963 there was an exceptionally high level of awareness, 88 percent, among the Quebec population of reports or information that smoking may cause lung cancer or have other harmful effects.
> - Even before then, in 1954, 82 percent of the Quebec population was aware of reports that smoking may cause lung cancer.
>
> 2. The population's awareness of the risk of smoking being "habit forming" or being an "addiction":
>
> - Since the first relevant survey identified in 1979, over 80 percent of the population indicated that smoking is a habit and 84 percent reported it is very hard to stop smoking (in 1979). By 1986 the majority of the population considered smoking to be an "addiction".

[103] On the Diseases, the conclusion that smoking "may cause cancer or other harmful effects" does not satisfy the Court. The minimum acceptable level of awareness should be much higher than that, for example, "is likely" or "is highly likely". The Companies have the burden of proof on this ground of defence, as stated in article 1473. In addition, we are in the context of a dangerous product and it is logical to seek a higher assurance of awareness[56]. This is reflected in the cautionary note that Professor Duch adds in paragraphs 53 through 57 of his report concerning the complexities of measuring such questions.

[104] Consequently, his date of 1963 seems unrealistic as the date by which the public acquired sufficient knowledge about smoking and the Diseases, i.e., knowledge sufficient to trigger the defence offered by article 1473. Whatever the effect of Minister LaMarsh's conference held in that year, the evidence points to a much later date.

[105] In 1963, the Canadian government had not even started its efforts at educating the public and was, in fact, still educating itself on many of the key aspects of the question. It wasn't until 1968 that Health Canada first published the tar and nicotine levels for Canadian cigarette brands through the League Tables and it was a year later that the House of Commons mandated Dr. Isabelle to study tobacco advertising, a study that by necessity spilled over into general issues of smoking and health.

[106] Upon further review, and after reasonable adjustments, the Court sees a fair amount of compatibility between the opinions of Professors Proctor and Duch.

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55 Exhibit 40062.1, at page 5.

56 This reasoning is echoed in the higher degree of intensity of the obligation to inform in such circumstances, as discussed below.

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[107] On dependence, there is, in fact, very little difference. Professor Proctor talks of "after 1988" and Professor Duch focuses on a range between 1979 and 1986, the latter year being the one by which "the majority of the population considered smoking to be an "addiction". The Companies, on the other hand, see the arrival of the 1994 Warning on addiction as the watershed event for this awareness, as discussed below.

[108] As for the Diseases, if one adds ten or fifteen years to Dr. Duch's 1963 figure in order to move from "may cause" to "is highly likely", one arrives at a date that is consistent with Dr. Proctor's "the seventies".

[109] We shall see how this reasoning is affected by our analysis of the Warnings.

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II.B.1.b.2 THE EFFECT OF THE WARNINGS: THE DISEASES AND DEPENDENCE

[110] The first Warnings appeared on Canadian cigarette packages in 1972[57]. Starting out in what we would today consider to be almost laughably timid fashion, they evolved over the Class Period. The following table shows that evolution.

YEAR	INITIATOR	TEXT
1972	The Companies – under threat of legislation (Exh. 40005D)	WARNING: THE DEPARTMENT OF NATIONAL HEALTH AND WELFARE ADVISES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED
1975	The Companies - under threat of legislation (Exh. 40005G)	WARNING: HEALTH AND WELFARE CANADA ADVISES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED – AVOID INHALING
1988	The Parliament of Canada - Bill C-51, the "**TPCA**",[58] at subsection 9(1)(a)[59] and in section 11 of the regulations	• SMOKING REDUCES LIFE EXPECTANCY[60] • SMOKING IS THE MAJOR CAUSE OF LUNG CANCER • SMOKING IS A MAJOR CAUSE OF HEART DISEASE • SMOKING DURING PREGNANCY CAN HARM THE BABY

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57 It is a mischaracterization to call these first Warnings "voluntary". Several Ministers of Health had threatened legislation to impose warnings (and more) and Minister Munro had even tabled Bill C-248 in 1971 (Exhibit 40347.12, section 3(3)(c)(i)) requiring "words of warning" on the package stating the amount of nicotine, tar and other constituents, although it never went beyond first reading. Consequently, the first warnings in the 1970s appear to have been implemented more under threat of legislation than on a voluntary basis.

58 *Tobacco Products Control Act* ("**TPCA**"), S.C. 1988, ch. 20.

59 **9(1)** No distributor shall sell or offer for sale a tobacco product unless
(a) the package containing the product displays, in accordance with the regulations, messages pertaining to the health effect of the product and a list of toxic constituents of the product and, where applicable, of the smoke produced from its combustion indicating the quantities of those constituents present therein;

60 The Court does not consider the "attribution" question of any significance to these files. The fact that the Companies insisted that the Warnings be attributed to Health Canada, as opposed to appearing to come directly from them, does not, in fact, diminish their impact. Not only did the attribution to Health

1994	Modifications to the TPCA regulations (Exh. 40003E)	• CIGARETTES ARE ADDICTIVE • TOBACCO SMOKE CAN HARM YOUR CHILDREN • CIGARETTES CAUSE FATAL LUNG DISEASE • CIGARETTES CAUSE CANCER • CIGARETTES CAUSE STROKE AND HEART DISEASE • SMOKING DURING PREGNANCY CAN HARM YOUR BABY • SMOKING CAN KILL YOU • TOBACCO SMOKE CAUSES FATAL LUNG DISEASE IN NON SMOKERS
1995 to end of Class Period[61]	The Companies - under threat of legislation, since the TPCA had been struck down by the Supreme Court in 1995 (Exh. 4005O)	• HEALTH CANADA ADVISES THAT CIGARETTES ARE ADDICTIVE • HEALTH CANADA ADVISES THAT TOBACCO SMOKE CAN HARM YOUR CHILDREN • HEALTH CANADA ADVISES THAT CIGARETTES CAUSE FATAL LUNG DISEASE • HEALTH CANADA ADVISES THAT CIGARETTES CAUSE CANCER • HEALTH CANADA ADVISES THAT CIGARETTES CAUSE STROKE AND HEART DISEASE • HEALTH CANADA ADVISES THAT SMOKING DURING PREGNANCY CAN HARM YOUR BABY • HEALTH CANADA ADVISES THAT SMOKING CAN KILL YOU • HEALTH CANADA ADVISES THAT TOBACCO SMOKE CAUSES FATAL LUNG DISEASE IN NON SMOKERS

[111] The effect of the various iterations of the Warnings must be analyzed in light of the atmosphere and attitudes prevailing at the time each of them appeared. Professor Viscusi, an expert for the Companies, advised the Court that the novelty of the first Warnings in 1972 would likely have caused the public to take greater notice of them than would normally be the case. He added, however, that their effect would soon have become essentially negligible, especially because they were simply repeating things that the public already knew.

[112] In the same vein, Professor Young, another of the Companies' experts, disparaged pack warnings as a means of informing consumers about a product's safety defects.

Canada not lessen the Warnings' credibility, it might well have increased it by associating the Warnings directly with a highly-credible source.

[61] The *Tobacco Act* , which was assented to on April 25, 1997, replaced the TPCA and provided for Warnings on cigarette packages. These new Warnings were not implemented until after the end of the Class Period, therefore, neither they nor the other provisions of the *Tobacco Act* are relevant for these files.

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[113] That said, the Warnings are the most frequent, direct, and graphic communications that smokers receive about cigarettes. We cannot accept that they have absolutely no effect and, in this regard, we are simply following the Companies' lead.

[114] They attribute such importance to the Warnings that they submit that, as of the appearance of the Warning about addiction in 1994, no Canadian smoker can have been unaware of the dependence-creating properties of cigarettes. They go so far as to identify September 12, 1994, the date that the regulation creating that Warning came into effect, as the very day on which prescription started to run for the Létourneau Class. This shows great respect, indeed, for the impact of the Warnings, even if the Court would not go so far in that respect.

[115] As for the contents of the Warnings, we have noted how they became more and more specific over the Class Period. The question remains as to when they became specific enough, i.e., at what point can it be said that, other things being equal, the Warnings caused the Members to know of the safety defect for the purposes of article 1473.

[116] It is important to note that the test for that level of knowledge is affected by the type of product in question. Where it is a toxic one, i.e., dangerous for the physical well-being of the consumer, that test is more stringent[62]. This higher standard thus applies to both files here.

[117] With respect to the Diseases, despite its novelty in 1972, the statement that "Danger to health increases with amount smoked", as well intentioned as it might have been, is unlikely to have struck fear into the heart of the average smoker. In the same vein, the remarkably naïve admonition to avoid inhaling that was added in 1975 must have inspired either a hearty chuckle or a cynical shake of the head in most smokers, for, as President Obama is said to have responded in a different context: "Inhaling is the whole point".

[118] It appears that during the 1980s, in the absence of a legislative basis for imposing them[63], the Warnings' message dragged behind the public's knowledge. Once the powers under the TPCA were exercised in 1988, however, the Warnings started having some bite.

[119] Cancer is mentioned for the first time in the 1988 Warnings, although only lung cancer. We note that the other Diseases are not specified but, as with the Companies' executives, no one can reasonably doubt that the average smoker at the time would have included lung cancer, throat cancer and emphysema among the diseases likely caused by smoking.

[120] Getting back to the date of sufficient knowledge of the risk of contracting one of the Diseases, our analysis of the experts' reports leads us to conclude that adequate

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62 Jean-Louis BAUDOUIN and Patrice DESLAURIERS, *La responsabilité civile*, 8ème éd., vol. 2, p. 2-354, page 370; Pierre LEGRAND, *Pour une théorie de l'obligation de renseignement du fabricant en droit civil canadien*, (1980-1981) 26 McGill Law Journal 207, pages 260 – 262 and 274; Barreau du Québec, *La réforme du Code civil*, page 97; Paul-André CRÉPEAU, *L'intensité de l'obligation juridique*, Cowansville, Éditions Yvon Blais, 1989, p. 1, page 1.

63 The TPCA came into force in 1988.

public knowledge would have been acquired well before the 1988 change to the Warnings. We favour the end of the 1970s.

[121] Consequently, the Court holds that the public knew or should have known of the risks and dangers of contracting a Disease from smoking as of January 1, 1980, which we shall sometimes term the "**knowledge date**". It follows that the Companies' fault with respect to a possible safety defect by way of a lack of sufficient indications as to the risks and dangers of smoking ceased as of that date in the Blais File.

[122] As for the Létourneau File, the public's knowledge came later. The Warnings were completely silent about dependence until 1994, while the US Surgeon General took until 1988 to adopt a firm stand on it. For their part, Professors Proctor and Duch point to the 1980s. Then there is the Companies' position favouring the adoption of the new Warning on addiction of September 1994.

[123] The Court notes that, as with the Diseases, there is a reasonable level of compatibility within the evidence of Professors Duch and Proctor, which also reflects the contents of the Warnings.

[124] To start, of Professor Duch's range of dates, i.e., 1979 and 1986, his view is that, by the latter, only "the majority of the population considered smoking to be an 'addiction'". A majority is not sufficient on this point. The "vast majority" is more along the lines that the experts, and the Court, favour.

[125] To reach that level would require a number of additional years. That being so, however, the intense publicity on the issue of dependence around the beginning of the 1990s was such that knowledge on the topic was being acquired rapidly. One need only consider the 1988 Surgeon General Report and the 1994 addiction Warning. These are key factors, but not dispositive.

[126] Although Canadians paid much attention to the Surgeon General Reports, the Court sees the new Warning on addiction as confirmation that the Quebec public did not have sufficient knowledge before its appearance. This is indirectly supported by statements made by the CTMC in its lobbying to avoid such a warning in 1988. It argued that "Calling cigarettes "addictive" trivializes the serious drug problems faced by our society, but more importantly (t)he term "addiction" lacks precise medical or scientific meaning[64].

[127] That the Companies recognize the new Warning's importance is telling, but the Court puts more importance on the fact that Health Canada did not choose to issue a Warning on dependence before it did. If the government, with all its resources, was not sufficiently concerned about the risk of tobacco dependence to require a warning about it, then we must assume that the average person was even less concerned.

[128] That said, even something as visible as a pack warning does not have its full effect overnight.

[129] The addiction Warning was one of eight new Warnings and they only started to appear on September 12, 1994. It would have taken some time for that one message to

[64] Exhibit 694, at pdf 10.

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circulate widely enough to have sufficient force. The impact of decades of silence and mixed messages is not halted on a dime. The Titanic could not stop at a red light.

[130] The Court estimates that it would have taken one to two years for the new addiction Warning to have sufficient effect among the public, which we shall arbitrate to about 18 months, i.e., March 1, 1996. We sometimes refer to this as the "**knowledge date**" for the Létourneau Class.

[131] There is support for this date in one of the Plaintiffs' exhibits, a survey entitled "Canadians' Attitudes toward Issues Related to Tobacco Use and Control"[65]. It was conducted in February and March 1996 by Environics Research Group Limited for "a coalition" of the Heart and Stroke Foundation of Canada, The Canadian Cancer Society and the Lung Foundation. Although this is a "2M" exhibit, meaning that the veracity of its contents is not established, Professor Duch cites it at two places in his report for the Companies[66]. This should have led to the "2M" being removed and the veracity, along with the document's genuineness, being accepted.

[132] The Environics survey sampled 1260 Canadians, of which some 512 were from Quebec. When they were asked to name, without prompting, the health hazards of smoking, "only two percent mention the fundamental hazard of tobacco use which is addiction"[67].

[133] Since the Létourneau Class's knowledge date about the risks and dangers of becoming tobacco dependent from smoking is March 1, 1996, it follows that the Companies' fault with respect to a possible safety defect by way of a lack of sufficient indications as to the risks and dangers of smoking ceased as of that date in the Létourneau File.

II.B.2 THE LÉTOURNEAU FILE

[134] Despite scooping ourselves with respect to this file in the previous paragraph, there remain aspects still to be examined in Létourneau, particularly since concern over tobacco dependence developed differently from concern over the Diseases. Nevertheless, much of what we say concerning the Blais File is also relevant to Létourneau and we shall not repeat that.

II.B.2.a AS OF WHAT DATE DID ITL KNOW?

[135] Early in the Class Period, ITL executives were openly discussing "the addictiveness of smoking".[68] In October 1976, Michel Descôteaux, then Manager of Public Relations and later Director of Public Affairs[69], prepared a report for ITL's Vice President of Marketing, Anthony Kalhok, proposing new policies and strategies for dealing with the increasing

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65 Exhibit 1337-2M.
66 Exhibit 40062.1, at pdf 56 and 160.
67 Exhibit 1337-2M, at pdf 9.
68 Exhibit 11 at pdf 5.
69 Descôteaux was an employee of ITL, and for a few years its parent company, IMASCO, for some 37 years. He was the Director of Public Affairs from 1979 until he retired in 2002, overseeing community, media and government relations, as well as lobbying.

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criticism the company was encountering over its products[70]. In it, he says the following on the subject of dependence:

> A word about addiction. For some reason, tobacco adversaries have not, as yet, paid too much attention to the addictiveness of smoking. This could become a very serious issue if someone attacked us on this front. We all know how difficult it is to quit smoking and I think we could be very vulnerable to such criticism.
>
> I think we should study this subject in depth, with a view towards developing products that would provide the same satisfaction as today's cigarette without "enslaving" consumers.[71] (emphasis in the original)

[136] Today, Mr. Descôteaux tries to brush off the contents of this report as the product of youthful excess, pointing out that he was only 29 years old at the time. That might well be the case, but that is not the point. This document shows that the risk of creating tobacco dependence was known, accepted and openly discussed within ITL by 1976. They all knew how difficult it was to quit smoking, to the point of "enslaving" their customers.

[137] Indeed, some four years earlier, Dr. Green of BAT had characterized as a basic assumption that "The tobacco smoking habit is reinforced or dependent upon the psycho-pharmacological effects mainly of nicotine", as we noted above[72]. The basis for that assumption must have been present for many years, given that ITL's expert, Professor Flaherty, feels that it was common knowledge among the public since the mid-1950s that smoking was difficult to quit, and that by that time "the only significant discussion in the news media on this point concerned whether smoking constituted an addiction, or whether it was a mere habit"[73].

[138] If the public knew of the risk of dependence by the 1950s, the Court feels safe in concluding that ITL knew of it at least by the beginning of the Class Period. We so conclude.

II.B.2.b AS OF WHAT DATE DID THE PUBLIC KNOW?

[139] As explained above, the Court holds that the public knew or should have known of the risks and dangers of becoming tobacco dependent from smoking as of March 1, 1996 and that the Companies' fault with respect to a possible safety defect ceased as of that date in the Létourneau File.

[140] Let us be clear on the effect of the above findings. The cessation of possible fault with respect to the safety defects of cigarettes has no impact on the Companies' possible faults under other provisions, i.e., the general rule of article 1457 of the Civil Code, the Quebec Charter or the Consumer Protection Act. There, a party's knowledge is less relevant, an element we consider in section II.G.1 and .2 of the present judgment.

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70 Exhibit 11.
71 At pdf 5.
72 Exhibit 1395.
73 Exhibit 20063, at page 4.

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[141] In any event, the Companies' objectionable conduct continued after those dates. Moreover, the reasons for this cessation of fault had nothing to do with anything they did. In fact, the opposite is actually the case. Both by their inaction and by their support of the scientific controversy, whereby the dangers of smoking were characterized as being inconclusive and requiring further research, the Companies actually impeded and delayed the public's acquisition of knowledge.

[142] Thus, the Members' knowledge does not arrest the Companies' faults under these other provisions. Since the Companies took no steps to correct their faulty conduct, their faults continued throughout the Class Period. This, however, does not mean that the other conditions of civil liability would have been met, as they must be in order for liability to exist. As well, a Member's decision to start to smoke, or perhaps to continue to smoke, after he "knew or could have known" of the risks and dangers could be considered to be a contributory fault, a subject we analyze in a later section of the present judgment.

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II.C. DID ITL KNOWINGLY PUT ON THE MARKET A PRODUCT THAT CREATES DEPENDENCE AND DID IT CHOOSE NOT TO USE THE PARTS OF THE TOBACCO CONTAINING A LEVEL OF NICOTINE SUFFICIENTLY LOW THAT IT WOULD HAVE HAD THE EFFECT OF TERMINATING THE DEPENDENCE OF A LARGE PART OF THE SMOKING POPULATION?

[143] Common Question C is actually two distinct questions:

- Did ITL knowingly market a dependence-creating product?

  and

- Did ITL choose tobacco that contained higher levels of nicotine in order to keep its customers dependent?

[144] Looming above the debate, however, is a preliminary question: Is tobacco a product that creates dependence of the sort to generate legal liability for the manufacturer? Before starting the analysis with that question, certain introductory comments are appropriate.

[145] The evidence on the issue of dependence is essentially industry wide, in the sense that most of the relevant facts cannot be sifted out on a Company-by-Company basis. The expert opinions here do not differentiate among the Companies, and the issue of the choice of tobacco leaves ends up depending almost entirely on what Canada and its two ministries were doing rather than on the actions of any one of the Companies. As a result, our analysis and conclusions will not be Company specific, but will apply in identical fashion to all three of them.

[146] Vocabulary took on excessive proportions in the discussion on dependence. The meaning of the term "addiction" in the context of tobacco and smoking evolved over the Class Period, eventually getting toned down to become, for all intents and purposes, synonymous with "dependence". The Oxford Dictionary of English reflects this, as seen by the use of the word "dependent" in its definition of "addiction": "physically and mentally dependent on a particular substance".

[147] It is of note that, since 1988, the Surgeon General of the United States has abandoned earlier appellations and now applies the term "addiction" exclusively. That position is far from unanimous, however.

[148] In its flagship diagnostic manual, the DSM[74], the American Psychiatric Association has never recommended a diagnosis termed as "addiction", this according to Dr. Dominique Bourget, one of the Companies' experts. She filed the latest DSM into the Court record (DSM-5: Exhibit 40499) and testified that the DSM is extensively used in Canada. With the publication of DSM-5 in 2013, "dependence", the term of choice in previous DSM iterations, was abandoned in favour of "disorder". Thus, the cigarette addiction of the Surgeon General is now the "tobacco use disorder" of the APA.

[149] In spite of this terminological turbulence, the Court sees little significance to the specific word used. What is important is the reality that, for the great majority of people, smoking will be difficult to stop because of the pharmacological effect of nicotine on the brain. That which we call a rose by any other name would still have thorns.

[150] In that light, the Court will simply follow the lead of Common Question C and, unless the context requires otherwise, opt for the term "dependence" or "tobacco dependence".

II.C.1 IS TOBACCO A PRODUCT THAT CREATES DEPENDENCE OF THE SORT THAT CAN GENERATE LEGAL LIABILITY FOR THE MANUFACTURER?

[151] The Plaintiffs take this as a given, but the Companies went to great lengths to contest the point. They called two experts in support of a view that seems to say that nicotine is no more dependence creating than many other socially acceptable activities, such as eating chocolate, drinking coffee or shopping.

[152] Plaintiff's expert, Dr. Juan Carlos Negrete, is a medical doctor and psychiatrist specializing in the treatment of and research on addiction. He has some 45 years of clinical experience in psychiatry, along with a teaching position in the Department of Psychiatry of McGill University since 1967. Currently, he is serving as a senior consultant in the Addictions Unit of the Montreal General Hospital, a service that he founded in 1980, and as "Honorary Staff" at the Centre for Addictions and Mental Health in Toronto.

[153] Although concentrating on alcohol dependence during much of his career, he indicates at the end of his 71-page CV that he has been acting as the "Seminar Leader for the McGill Post-Graduate Course in Psychiatry: Tobacco dependence" since March 2013. He explains that he has offered this seminar for several years but that since 2013 it has been focused solely on tobacco dependence.

[154] He testified that there is often "co-morbidity" present in an addicted person, so that, for example, alcohol addiction is generally accompanied by tobacco dependence. As a result, he often deals with both addictions in the same patient. That said, in cross examination he stated that he has treated several hundred patients for tobacco

[74] *Diagnostic and Statistical Manual of Mental Disorders*. In the Preface to DSM-5, it is described as "a classification of mental disorders with associated criteria designed to facilitate more reliable diagnoses of these disorders": Exhibit 40499, page xii (41 PDF).

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dependence only[75]. He readily admits that it is possible to quit smoking and recognizes that a majority of Canadian smokers have succeeded in doing that, but generally with great difficulty[76].

[155] The Companies produced two experts who disputed Dr. Negrete's opinions: Professor John B. Davies (Exhibit 21060), professor emeritus of psychology at Strathclyde University in Glasgow, Scotland and Director of the Centre for Applied Social Psychology, and Dr. Dominique Bourget (Exhibit 40497), a clinical psychiatrist at the Royal Ottawa Mental Health Centre and associate professor at the University of Ottawa.

[156] The Court accepted Professor Davies as an expert in "applied psychology, psychometrics, drug use and addiction". During his career, although he has worked almost exclusively in the area of drug addiction, he sees "commonalities" between drug use and cigarette use.

[157] No friend of the tobacco industry, this was his first experience in a tobacco trial. He explained that he agreed to testify here "because there is an overemphasis on a deterministic pharmacological model of drug misuse which is frequently challenged in academic debates, and I have a number of friends who are violently opposed to the pharmacological determinist model. […] and I thought it was high time that somebody... - I don't want to sound self-congratulatory -... I thought it was time somebody stood up and put the opposite point of view. And having had this point of view since nineteen ninety-two (1992), it started to occur to me that it was probably my job to do it."[77]

[158] He admitted that he is not a qualified pharmacologist, but declared "having some knowledge of how the basic addictive process, whatever that means, comes about, in the way that different drugs bind to different receptor sites so as to affect the dopamine cycle, and those kinds of things." He thus feels that he could have "an intelligent conversation" with a qualified pharmacologist.[78]

[159] That is likely so, but the Court notes that his principal objective, one might go so far as to say his "mission", is to challenge the pharmacological model of drug misuse in favour of a socio-environmental approach. We would feel more assured were the critic a specialist in the area he was criticizing. That, however, is not all that makes us uncomfortable with his evidence.

[160] Although testifying as an expert in addiction, he was adamant to the point of obstinacy that the use of terms such as "addiction" and "dependence" must be avoided at all costs in order to assist substance abusers to change their behaviour. His theory is that such terms disparage people with a substance abuse problem and discourage them from trying to correct it. Given his fervour over that, cross examination was all but impossible. There was constant quibbling over vocabulary and searching for terms that he could agree to consider.

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75 Transcript of March 20, 2013 at pages 68 and 78.

76 Dr. Negrete admits that a minority of smokers do not become dependent, generally because of genetic or "cerebral structural" characteristics, although he affirms that about 95% of daily smokers are dependent. See pages 8 and 20 of his report: Exhibit 1470.1.

77 Transcript of January 27, 2014, at page 81.

78 *Ibidem*, at page 75.

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[161] Moreover, his almost total dismissal of the pharmacological effects of nicotine on the brain is not supported by the experts in the field. He implicitly recognized this when, after much painful cross examination, he admitted that nicotine does, in fact, have a pharmacological effect on the brain. He stated that nicotine binds to receptors in the brain, thus causing "brain changes".

[162] Such changes do not mean that the brain is damaged, in his view, because they are not permanent[79]. He cited a study (Exhibit 21060.22) showing that the brains of people who quit smoking "return to normal" after twelve weeks[80]. That this indicates that the smoker's brain was, therefore, not "normal" while he was smoking seems not to have been considered by him.

[163] Professor Davies is very much a man on a crusade, too much so for the purposes of the Court. He has a theory about drug misuse and he defends it with vehemence. That might be laudable in certain quarters, but is inappropriate and counter productive for an expert witness. It smothers the objectivity so necessary in such a role and blinds him to the possible merits of other points of view. As a result, it robs the opinion of much of its usefulness. That is the fate of Professor Davies' evidence in this trial.

[164] As for Dr. Bourget, she was recognized by the Court as "an expert in the diagnosis and treatment of mental disorders, including tobacco-use disorder, and in the evaluation of mental capacity". In hindsight, despite her extensive experience testifying in criminal matters, we have serious doubts as to her qualifications in the areas of interest in this trial. Her frank responses to questions about her tobacco-related credentials reinforce that doubt:

> 45Q- Doctor, among your patients, are there any for whom you are only treating for tobacco use disorder?
>
> A- No. (Transcript of January 22, 2014, at page 18)
>
> 244Q-Aside from that, did you do any research on addiction prior to receiving your mandate, ever, to any extent?
>
> A- Well, I did read on this topic. I was certainly familiar with the diagnosing of it. I was also familiar with, you know, dealing with people who had all sorts of substance abuse and monitoring them for their substance abuse, as was mentioned earlier. So, yes, before that time, I did have experience in that field. (Transcript of January 22, 2014, at pages 65-66)
>
> 253Q-Did you have any research projects […] that were interested ... involved in the field of addiction?
>
> A- No, as I said earlier, my experience is clinical. I did not conduct any research, nor participated, to my knowledge, in specific research studies concerning substance use. I have been involved in research certainly throughout my career, as you could see from my CV, in the area... mostly in the psychopharmacological

79 *Ibidem*, at pages 205-206.
80 *Ibidem*, at pages 205 and 211.

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> area, and that is reflected in my CV, but not specific to addiction or substance abuse. (Transcript of January 22, 2014, at page 67)

[165] The Court's lack of enthusiasm for her evidence can only be heightened by her reply to the final question of the examination in chief:

> 656Q- … if I wanted to quit smoking, would I come to you or...?
> A- Not if you just have a smoking problem. (Transcript of January 22, 2014, at page 200)

[166] As with Professor Davies' opinion, the Court finds Dr. Bourget's evidence to be of little use. We shall nevertheless refer to both opinions where appropriate.

[167] Getting back to Dr. Negrete, in his two reports (Exhibits 1470.1 and 1470.2), he opines on the dependence-creating process of cigarette smoking and the effect of tobacco dependence on individuals and their personal lives. He provides his view on what criteria indicate that a smoker is dependent on tobacco, being essentially behavioural factors. Professor Davies and Dr. Bourget did none of that. As usual with the Companies' experts, they were content to criticize the opinions of the Plaintiffs' experts while voicing little or no opinion on the main question.

[168] One justification for this omission was Dr. Bourget's argument that the diagnosis of dependence cannot be assessed on a population-wide basis, but must necessarily include a direct examination of each individual. This leads to the conclusion, in her view, that dependence is not something that can be considered in a class action because it cannot be treated at a "collective" level. With due respect, in saying this she was overstepping the bounds of an expert by purporting to opine on a legal matter.

[169] This said, Dr. Negrete did agree that, before diagnosing tobacco dependence in any one person, he would always examine that person. Nevertheless, he did not see this as being relevant to the question in point. He had no hesitation in opining as to a set of diagnostic criteria that would indicate a state of tobacco dependence within a population for epidemiological/statistical purposes. We note below that the American Psychiatric Association shares his view in the DSM-5 (Exhibit 40499).

[170] Although it was Dr. Bourget who filed the DSM-5 into the record, she failed to approach the question from the angle espoused there, insisting on a clinical view as opposed to a population-wide one. Her argument requiring a personal examination of each Class Member fits in with the Companies' master strategy of attempting to exclude from collective recovery any sort of compensatory damages, because they are always felt on a personal level. The Court rejects this argument in a later section of the present judgment.

[171] The question here is whether tobacco creates a dependence of the sort to generate legal liability for the Companies and, for the reasons explained above, the Court prefers the evidence of Dr. Negrete in this regard.

[172] In his second report (Exh 1470.2, at page 2), he describes the effects of tobacco dependence. The most serious impact he identifies is the increased risk of "*morbidité*"

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and premature death[81]. He also cites a lower quality of life, both with respect to physical and social aspects, as one of the major problems[82]. Finally, he states that the mere fact of being dependent on tobacco is, itself, the principal burden caused by smoking, since dependence implies a loss of freedom of action and an existence chained to the need to smoke – even when one would prefer not to[83].

[173] True, he used the word "slave" and the expressions "loss of freedom of action" and "*maladie du cerveau*", which the Companies translated as "disease of the brain" and "brain disease". Professor Davies and Dr. Bourget devoted much of their reports and testimony to proclaiming their fundamental disagreement with such strong language. The gist of their argument was that nicotine in no way destroys one's decision-making faculties and that, since more Canadians have quit smoking than are actually smoking now, one's freedom of action is clearly not lost.

[174] They used semantics as a way of side-stepping the real issue of identifying the harm that smoking causes to people who are dependent on tobacco. Dr. Negrete did address this issue, albeit with occasionally dramatic language. For example, his term "loss of freedom of action" really comes down to meaning that implementing the decision to quit smoking (as opposed simply to making the decision) is harder than it would otherwise be were tobacco and nicotine not dependence creating. This equates to a diminution of one's abilities, though not a total loss, the interpretation given to his words by the Companies' experts.

[175] As for the terms "disease of the brain" and "brain disease", those are the Companies' translations and, as is often the case with translations, they might not be a totally accurate reflection of what is meant by Dr. Negrete's French term: "maladie du cerveau". It could also be translated as a sickness of the brain. We have seen that even Professor Davies admits that nicotine causes brain changes. Might those changes be seen as a sickness?[84]

[176] Whatever the case, Dr. Negrete did not deny that there are other forces that also contribute to the difficulty of quitting, such as the social, sensory and genetic factors so fundamental to the theories of Professor Davies. This said, he chose to put much more emphasis on the pharmacological impact than did the other two experts. Unlike

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81 *Face à cette évidence, on doit conclure que le risque accru de morbidité et mort prématurée constitue le plus grave dommage subi par les personnes avec dépendance au tabac*, at page 2.

82 *Une moindre qualité de vie - tant du point de vue des limitations physiques que des perturbations dans les fonctions psychique et sociale - doit donc être considérée comme un des inconvénients majeurs associes avec la dépendance tabagique*, at page 2.

83 *La personne qui développe une dépendance a la nicotine, même sans être atteinte d'aucune complication physique, subit l'énorme fardeau d'être devenue l'esclave d'une habitude psychotoxique qui régit son comportement quotidien et donne forme à son style de vie. L'état de dépendance est, en soi même, le trouble principal causé par le tabagisme.*
Cette dépendance implique une perte de liberté d'action, un vivre enchaine au besoin de consommer du tabac, même quand on préférerait ne pas fumer, at pages 2-3.

84 Even if Dr. Negrete meant brain disease, he is not alone on that. To support his statement that "*toute dépendance chimique est fondamentalement une maladie du cerveau*" (Exhibit 1470.1, page 11), he cited an article in the journal *Science* entitled "*Addiction Is a Brain Disease, and It Matters*" (Exhibit 1470.1, footnote 15, see Exhibit 2160.68).

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Professor Davies, he is a medical doctor and, unlike Dr. Bourget, he has significant experience in the area of tobacco dependence, including as seminar leader of the post-graduate course in psychiatry at the McGill University Medical School. This impresses the Court.

[177] For their part, the Companies do not deny that "Smoking can be a difficult behaviour to quit", but insist that it is "not an impossible one".[85] They seem to see it as a state of benevolent dependence, one that can be conquered by ordinary will power, as witnessed by the impressive quitting rates among Canadian smokers, including those in Quebec, but to a slightly lesser degree. And the figures do impress. In 2005, there were more than twice as many ex-smokers in Canada than current smokers[86].

[178] They and their experts see the real obstacle to quitting not so much in their product as in a lack of sufficient motivation, commitment and will power by smokers to implement their decision to quit. Since many smokers eventually succeed, in the Companies' eyes those who fail have only themselves to blame.

[179] Will power certainly plays a role, but that is not the point here. Nicotine affects the brain in a way that makes continued exposure to it strongly preferable to ceasing that exposure. In other words, although it can vary from individual to individual, nicotine creates dependence. That is the point.

[180] Admitting that quitting smoking was one of the most practised pastimes of the latter half of the Class Period, and that many people succeeded, one still has to wonder why, if tobacco dependence is as benevolent as the Companies would have us believe, the American Psychiatric Association devotes so much space to the issue in its manual for diagnosing psychiatric disorders. The DSM-5 (Exhibit 40499) devotes some six pages to Tobacco Use Disorder and Tobacco Withdrawal. They shine a light directly on the issue at hand, meriting an exceptionally long citation:

> CONCERNING TOBACCO USE DISORDER
>
> **Diagnostic Criteria**
>
> A problematic pattern of tobacco use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period: (followed by a description of 11 symptoms). (Page 571 – 159 pdf)
>
> Tobacco use disorder is common among individuals who use cigarettes and smokeless tobacco daily and is uncommon among individuals who do not use tobacco daily or who use nicotine medications. […] Cessation of tobacco use can produce a well-defined withdrawal syndrome. Many individuals with tobacco use disorder use tobacco to relieve or to avoid withdrawal symptoms (e.g., after being in a situation where use is restricted). Many individuals who use tobacco have tobacco-related physical symptoms or diseases and continue to smoke. The large majority report craving when they do not smoke for several hours. (page 572 – 160 pdf) (The Court's emphasis throughout)

[85] Professor Davies' report, Exhibit 21060, at page 3.

[86] *Ibidem*, at page 22: "… official statistics from 2005 show that at that date 17% of Canadians were regular (daily) smokers, compared to 38% who were ex-smokers."

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Smoking within 30 minutes of waking, smoking daily, smoking more cigarettes per day, and waking at night to smoke are associated with tobacco use disorder. (page 573 – 161 pdf)

CONCERNING TOBACCO WITHDRAWAL

Diagnostic Criteria

A. Daily use of tobacco for at least several weeks.

B. Abrupt cessation of tobacco use, or reduction in the amount of tobacco used, followed within 24 hours by four (or more) of the following signs or symptoms:

1. Irritability, frustration, or anger.
2. Anxiety.
3. Difficulty concentrating.
4. Increased appetite.
5. Restlessness.
6. Depressed mood.
7. Insomnia.

C. The signs or symptoms in Criterion B cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. (Page 575 – 163 pdf)

Diagnostic Features

Withdrawal symptoms impair the ability to stop tobacco use. The symptoms after abstinence from tobacco are in large part due to nicotine deprivation. Symptoms are much more intense among individuals who smoke cigarettes or use smokeless tobacco than among those who use nicotine medications. This difference in symptom intensity is likely due to the more rapid onset and higher levels of nicotine with cigarette smoking. Tobacco withdrawal is common among daily tobacco users who stop or reduce but can also occur among nondaily users. Typically, heart rate decreases by 5-12 beats per minute in the first few days after stopping smoking, and weight increases an average of 4-7 lb (2-3 kg) over the first year after stopping smoking. Tobacco withdrawal can produce clinically significant mood changes and functional impairment. (Page 575 – 163 pdf)

Associated Features Supporting Diagnosis

Craving for sweet or sugary foods and impaired performance on tasks requiring vigilance are associated with tobacco withdrawal. Abstinence can increase constipation, coughing, dizziness, dreaming/nightmares, nausea, and sore throat. Smoking increases the metabolism of many medications used to treat mental disorders; thus, cessation of smoking can increase the blood levels of these medications, and this can produce clinically significant outcomes. This effect appears to be due not to nicotine but rather to other compounds in tobacco. (Page 575 – 163 pdf)

Prevalence

Approximately 50% of tobacco users who quit for 2 or more days will have symptoms that meet criteria for tobacco withdrawal. The most commonly

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> endorsed signs and symptoms are anxiety, irritability, and difficulty concentrating. The least commonly endorsed symptoms are depression and insomnia. (Page 576 - 164 pdf)
>
> **Development and Course**
>
> Tobacco withdrawal usually begins within 24 hours of stopping or cutting down on tobacco use, peaks at 2-3 days after abstinence, and lasts 2-3 weeks. Tobacco withdrawal symptoms can occur among adolescent tobacco users, even prior to daily tobacco use. Prolonged symptoms beyond 1 month are uncommon. (Page 576 – 164 pdf)
>
> **Functional Consequences of Tobacco Withdrawal**
>
> Abstinence from cigarettes can cause clinically significant distress. Withdrawal impairs the ability to stop or control tobacco use. Whether tobacco withdrawal can prompt a new mental disorder or recurrence of a mental disorder is debatable, but if this occurs, it would be in a small minority of tobacco users. (page 576 – 164 pdf)

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[181] It is not insignificant that the APA believes that about half of the people who attempt to quit smoking for two or more days will experience at least four of the symptoms of tobacco withdrawal, and that withdrawal symptoms will last two to three weeks. It stands to reason that many other "quitters" will experience one, two or three of those symptoms and no expert came to deny that.

[182] Thus, the DMS-5 supports Professor Davies' admission that smoking can be a difficult behavior to quit, as well as his assertion that quitting is not impossible. More to the point, by detailing the obstacles likely to confront a smoker who wishes to stop, it underlines the high degree of nicotine dependence that is generally, but not always, created by smoking and the challenge posed by trying to quit.

[183] Dependence on any substance, to any degree, would be degrading for any reasonable person. It attacks one's personal freedom and dignity[87]. When that substance is a toxic one, moreover, that dependence threatens a person's right to life and personal inviolability. The Court has no hesitation in concluding that such a dependence is one that can generate legal liability for the Companies.

[184] To the extent that the Companies knew during any phase of the Class Period of the dependence-creating properties of their products, they had an obligation to inform their customers accordingly. The failure to do so in those circumstances would constitute a civil fault, one that has the potential of justifying punitive damages under both the Québec Charter and the Consumer Protection Act.

II.C.2 DID ITL KNOWINGLY MARKET A DEPENDENCE-CREATING PRODUCT?

[185] We have previously held that ITL knew throughout the Class Period that smoking caused tobacco dependence. As well, there is no doubt that the Companies never warned their consumers of the risks and dangers of dependence. They admit never providing any health-related information of any sort, with only the 1958 gaffe by

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87 See Dr. Negrete's second report, Exhibit 1470.2.

Rothmans as the exception[88]. They plead that the public was receiving sufficient information from other sources: by the schools, parents, doctors and the Warnings.

[186] We cite above extracts from Mr. Descôteaux's 1976 memo to Mr. Kalhok (Exhibit 11), which underscores the fact that "the addictiveness of smoking" was still below the radar even of tobacco adversaries. Hence, ITL knew not only that its products were dependence creating but also knew that through a good portion of the Class Period the anti-smoking movement, much less the general public, was not focusing on that danger.

[187] In light of the above, no more need be said on this question. ITL did knowingly market a dependence-creating product, and still does, for that matter. As with the previous Common Questions, whether or not this constitutes a fault depends on additional elements, ones that are examined below.

II.C.3 DID ITL CHOOSE TOBACCO THAT CONTAINED HIGHER LEVELS OF NICOTINE IN ORDER TO KEEP ITS CUSTOMERS DEPENDENT?

[188] To answer this, it is necessary to examine the role and effect of the research done at Canada's Delhi Research Station ("**Delhi**") in Delhi, Ontario starting in the late 1960s[89]. As described in a 1976 newspaper interview by Dr. Frank Marks, Delhi's Director General at the time, Delhi's role was to "(help) growers to produce the best crop possible for the most economic input expenditures to maintain a good net profit - and in addition - the type of tobacco most acceptable from a health viewpoint and for consumer acceptance"[90].

[189] One of the principal projects undertaken at Delhi was the creation of new strains of tobacco containing higher nicotine than previous strains ("**Delhi Tobacco**")[91]. This project was successful to the point that by 1983 essentially all the tobacco used in commercial cigarettes in Canada was Delhi Tobacco (Exhibit 20235). This was due in part, no doubt, to pressure by Canada on the Companies to buy their tobacco from Canadian farmers. [92]

[190] The Plaintiffs allege that the Companies controlled the research priorities at Delhi to the point of being able to dictate what type of projects would be carried out. Thus, they see the work done to develop higher-nicotine tobacco as a plot to assist the Companies in their quest to ensure and increase tobacco dependence among the populace.

[191] With respect, neither the documentary evidence nor the testimony at trial bear that out.

[192] Dr. Marks testified directly on this point:

> 196Q-Did the cigarette manufacturing companies ask Delhi to design and develop the higher nicotine strains?

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88 See Exhibits 536 and 536A.

89 Delhi was jointly funded by Health Canada and Agriculture Canada.

90 Exhibit 20784.

91 Canada holds the patents to the various strains of Delhi Tobacco and earns royalties from their use by the Companies. The Court does not consider this fact to be of any relevance to these cases.

92 It is relevant to note that Delhi Tobacco gave a significantly higher yield per acre than previous strains, an important consideration for tobacco growers, AgCanada's main "clients".

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> A- No, they did not.
>
> 197Q-Where did the idea come from?
>
> A- Part of the LHC Program and knowing... us knowing that the filtration process was going to be taking out a certain amount of the tar and, also, nicotine at the same time. So that was the impetus for going to a higher... higher nicotine type tobacco, so that when they did filter out tar, there would still be enough nicotine left for the smoker to get some satisfaction from it.[93]

[193] This explanation is consistent with the flow of evidence about Canada's approach to reducing the impact of smoking on Canadians' health in the 1970s and 1980s: "If you can't quit smoking, then smoke lower tar cigarettes".

[194] Rather than pointing to the Companies, the proof indicates that Canada was the main supporter of higher nicotine tobacco in its campaign to develop a less hazardous cigarette, i.e., one with a higher nicotine/tar ratio.[94] Health Canada assumed that by increasing the amount of nicotine inhaled "per puff", smokers could satisfy their nicotine needs with less smoking. It saw this as a way of developing a "less hazardous" cigarette, and even hoped to use the Companies' advertising as a means of promoting such products.[95]

[195] The problem was that the levels of tar and nicotine in tobacco follow each other. A reduction of, say, 20% in the tar will generally result in about a 20% reduction in the nicotine, which can leave the smoker "unsatisfied". Canada saw higher nicotine tobaccos as a way to preserve a sufficient level of nicotine after reducing the tar. In fact, this appears to have been something of a worldwide movement[96].

[196] It is true that the Companies favoured this approach, but there is no indication that they were the ones driving the Delhi bus in this direction[97]. In fact, it could be argued that higher nicotine cigarettes would permit a smoker to satisfy his nicotine needs with fewer cigarettes a day, thus reducing cigarette sales.

[197] On another point, the Plaintiffs argue at paragraph 585 of their Notes that "ITL had the ability to create a non addictive cigarette but instead chose to work to maintain or increase the addictive nature of its cigarettes". The submission is that the Companies did this in order to hook their customers on nicotine to the greatest extent possible so as to protect their market. Here again, the evidence fails to substantiate the allegation.

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93 Transcript of December 3, 2013, at page 64.

94 Anecdotally, it is interesting to note that certain years' crops of Delhi Tobacco were so high in nicotine that it made the taste unacceptable. As a result, ITL imported low-nicotine tobacco from China to be blended with the Delhi Tobacco in order to produce cigarettes acceptable to smokers.

95 See Exhibits 20076.13, at page 2 and 20119, at page 3.

96 A useful analysis of the "high-nicotine tobacco movement" is found in a 1978 memo of Mr. Crawford of Macdonald Tobacco Inc. to Mr. Shropshire: Exhibit 647.

97 The Companies, on the other hand, certainly did cooperate. For example, Health Canada requested assistance from them in conducting smoker acceptance testing of the new tobaccos, and their cooperation in this regard was essential to the success of Delhi Tobacco.

[198] Although it is technically possible to produce a non-addictive cigarette[98], the evidence was unanimous in confirming that consumers would never choose it over a regular cigarette.

[199] Nicotine-free cigarettes were tested by several companies and consumer reaction confirmed their lack of commercial acceptance. They tasted bad and gave no "satisfaction". Even neutral government employees working at Delhi confirmed that. Furthermore, no evidence was adduced that such a cigarette would have any less tar than a regular cigarette.

[200] In light of the above, the present question loses its relevance. Accepting that they did choose tobacco with higher levels of nicotine, the Companies were in a very practical way forced to do so by Health Canada. Moreover, in the context of the time, far from being a nefarious gesture, this could actually be seen as a positive one with respect to smokers' health.

[201] Thus, by using tobacco containing higher levels of nicotine, ITL was neither attempting to keep its customers dependent nor committing a fault. This finding does not, however, negate possible faults with respect to the obligation to inform smokers of the dependence-creating properties of tobacco of which it was aware.

II.D. DID ITL TRIVIALIZE OR DENY OR EMPLOY A SYSTEMATIC POLICY OF NON-DIVULGATION OF SUCH RISKS AND DANGERS?

[202] Since Common Question "E" deals with marketing activities, the Court will limit its analysis in the present chapter to ITL's actions outside of the marketing field. This covers two rather broad areas: what ITL said publicly about the risks and dangers of smoking and what it did not say.

[203] In order to weigh these factors, it is necessary to understand what the Companies should have been saying. This requires a review of the nature and degree of the obligations on them to divulge what they knew, taking into account that the standards in force might have varied over the term of the Class Period. We shall thus consider the "obligation to inform"[99].

[204] Thereafter, we shall consider what the public knew, or could have known, about the dangers of smoking. It is also relevant to examine what ITL knew, or at least thought it knew, about what the public knew, for a party's obligation to inform can vary in accordance with the degree to which information is lacking. This analysis will apply to both files unless otherwise indicated.

[205] Before going there, however, we must, unfortunately, make several comments concerning the credibility of certain witnesses.

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98 Such a product would have little or no nicotine, presumably being made from the mild leaves from the very bottom of the tobacco plant, versus those from higher up the stalk.

99 We treat this term as being synonymous with "duty to warn".

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II.D.1 CREDIBILITY ISSUES

[206] The Court could not help but have an uneasy feeling about parts of the testimony of many of the witnesses who had been associated with ITL during the Class Period, particularly those who occupied high-level positions in management. Listening to them, one would conclude that there was very little concern within the company over the smoking and health debate raging in society at the time.

[207] Witness after witness indicated that issues such as whether smoking caused lung cancer or whether possible legal liability loomed over the company because of the toxicity of its products or whether the company should do more to warn about the dangers of smoking were almost never discussed at any level, not even over the water cooler. It went to the point of having ITL's in-house counsel, a member of the high-level Management Committee, confirm that he did not "specifically recall" if in that committee there had ever even been a discussion about the risks of smoking or whether smoking was dangerous to the health of consumers[100].

[208] How can that be? It is not as if these people were not aware of the maelstrom over health issues raging at the company's door. They should have been obsessed with it and its potentially disastrous consequences for the company's future prosperity - and even its continued existence. But one takes from their testimony that it was basically a non-issue within the marketing department and the Management Committee.

[209] If that is so, how can one explain ITL's embracing corporate policies and goals designed to respond to such health concerns, as it says it did? The company adopted as its working hypothesis that smoking caused disease, and it devoted a significant portion of its research budget to developing ways and means to reduce health risks, such as filters, special papers, ventilation, low tar and nicotine cigarettes and, through "Project Day", a "safer cigarette"?

[210] Make no mistake. There can be no question here of managerial incompetence. These are impressive men, each having decades of relevant experience in high positions in major corporations, including ITL. There must be another explanation.

[211] Might it be that the corporate policy at the time not to comment publicly on smoking and health issues carried over even to discussing them internally? This would be consistent with the BAT group's sensitivity towards "legal considerations".[101]

[212] One example of that sensitivity was provided by Jean-Louis Mercier, a former president of ITL. He testified that BAT's lawyers frowned on ITL performing scientific research to verify the health risks of smoking because that might be portrayed in lawsuits as an admission that it knew or suspected that such risks were present. Another example comes from BAT's head of research, Dr. Green, who confided to ITL's head of research in

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100 See the transcript of April 2, 2012, at pages 86 and 157. This 73-year-old witness professed to have a faulty memory, but he repeatedly demonstrated exact recall in responses that appeared to favour ITL's position.

101 See Exhibit 29 at pdf 8 cited at paragraph 61 of the present judgment.

a 1977 memo that " ... it may be suggested that it is better in some countries to have no such (position) paper - "it's better not to know" and certainly not to put it in writing"[102].

[213] It simply does not stand to reason that, at the time they were getting legal advice going to the extent of limiting the type of research that ITL's large and well-staffed R&D department should perform, company executives were not discussing the hot topic of smoking and health.

[214] Either way, it goes against the Company. If false, it undermines the credibility and good faith of these witnesses. If true, it demonstrates both a calculated effort to rig the game and inexcusable insouciance. In any case, it is an element to consider in the context of punitive damages.

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II.D.2 THE OBLIGATION TO INFORM

[215] Prior to 1994, the Civil Code dealt with this obligation under article 1053, the omnibus civil fault rule. The "new" Civil Code of 1994 approaches it in two similar but distinct ways, maintaining the general civil fault rule in article 1457 and specifying the manufacturer's duty in article 1468 and following. While the latter are new provisions of law, they are essentially codifications of the previous rules applicable in the area.

[216] Article 1457 is the cornerstone of civil liability in our law. It reads:

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.	**1457.** Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.	Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.
[...]	[...]

[217] The Plaintiffs allege that the Companies failed to abide by the rules of conduct that every reasonable person should follow according to the circumstances, usage or law by the mere act of urging the public to use a thing that the Companies knew to be dangerous. Subsidiarily, they argue that it would still be a fault under this article by doing that without warning of the danger.

[218] The Court sees a fault under article 1457 as being separate and apart from that of failing to respect the specific duty of the manufacturer with respect to safety defects, as set out in article 1468 and following. The latter obligation focuses on ensuring that a potential user has sufficient information or warning to be adequately advised of the risks he incurs by using a product, thereby permitting him to make an educated decision as to whether and how he will use it. The relevant articles read as follows:

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102 See Exhibit 125D.

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1468. The manufacturer of a movable property is liable to reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable. […]

1468. Le fabricant d'un bien meuble, même si ce bien est incorporé à un immeuble ou y est placé pour le service ou l'exploitation de celui-ci, est tenu de réparer le préjudice causé à un tiers par le défaut de sécurité du bien. […]

1469. A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in the design or manufacture of the thing, poor preservation or presentation of the thing, or the lack of sufficient indications as to the risks and dangers it involves or as to safety precautions.

1469. Il y a défaut de sécurité du bien lorsque, compte tenu de toutes les circonstances, le bien n'offre pas la sécurité à laquelle on est normalement en droit de s'attendre, notamment en raison d'un vice de conception ou de fabrication du bien, d'une mauvaise conservation ou présentation du bien ou, encore, de l'absence d'indications suffisantes quant aux risques et dangers qu'il comporte ou quant aux moyens de s'en prémunir.

1473. The manufacturer, distributor or supplier of a movable property is not liable to reparation for injury caused by a safety defect in the property if he proves that the victim knew or could have known of the defect, or could have foreseen the injury.

Nor is he liable to reparation if he proves that, according to the state of knowledge at the time that he manufactured, distributed or supplied the property, the existence of the defect could not have been known, and that he was not neglectful of his duty to provide information when he became aware of the defect.

1473. Le fabricant, distributeur ou fournisseur d'un bien meuble n'est pas tenu de réparer le préjudice causé par le défaut de sécurité de ce bien s'il prouve que la victime connaissait ou était en mesure de connaître le défaut du bien, ou qu'elle pouvait prévoir le préjudice.

Il n'est pas tenu, non plus, de réparer le préjudice s'il prouve que le défaut ne pouvait être connu, compte tenu de l'état des connaissances, au moment où il a fabriqué, distribué ou fourni le bien et qu'il n'a pas été négligent dans son devoir d'information lorsqu'il a eu connaissance de l'existence de ce défaut.

[219] When discussing the ambit of this obligation in our law, Quebec authors have taken inspiration from at least two common law judgments: *Dow Corning Corporation v. Hollis*[103], a British Columbia case ("***Hollis***"), and *Lambert v. Lastoplex Chemicals Co. Limited*[104], an Ontario case ("***Lambert***"). Baudouin cites these two Supreme Court of Canada decisions on a number of points[105]. Hence, the issue of a manufacturer's duty to warn is one where the two legal systems coexisting in Canada see the world in a similar way, and for which we see no obstacle to looking to common law decisions for inspiration.

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103 *Op. cit.*, Note 40.

104 [1972] R.C.S. 569.

105 See, for example, Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at para. 2-354, footnotes 62, 68 and para. 2-355.

[220] The Quebec jurisprudence on this question appears to have started with the exploding-gun case of *Ross v. Dunstall* ("***Ross***") in 1921[106]. Its ground-breaking holding was that a manufacturer of a defective product could have extracontractual (then known as "delictual") liability towards a person that did not contract directly with it.

[221] The Plaintiffs advance that it also stands for the proposition that the mere marketing of a dangerous product constitutes an extracontractual fault against which there can be no defence. They cite Baudouin in support:

> 2-346 - *Observations* – Cette reconnaissance (de l'existence d'un lien de droit direct entre l'acheteur et le fabricant) établissait, en filigrane, une distinction importante entre le produit dangereux, impliqué en l'espèce, et le produit simplement défectueux, la mise en marché d'un produit dangereux étant considérée comme une faute extracontractuelle.[107] (The Court's emphasis)

[222] The Court does not read either the *Ross* judgment or the citation from Baudouin in the same way as do the Plaintiffs. In *Ross*, it appears never to have crossed Mignault J.'s mind that the marketing of a dangerous product could constitute an automatic fault in and of itself. The closest that he comes to that is when he writes:

> […] but where as here there is hidden danger not existing in similar articles and no warning is given as to the manner to safely use a machine, it would appear contrary to the established principles of civil responsibility to refuse any recourse to the purchaser. Subject to what I have said, I do not intend to go beyond the circumstances of the present case in laying down a rule of liability, for each case must be disposed of according to the circumstances disclosed by the evidence.[108]

[223] In light of that, far from asserting that the sale of a dangerous product will always be a fault, the statement in Baudouin appears to be limited to underlining the possible extracontractual nature of marketing a dangerous product without a proper warning[109], as opposed to its being strictly contractual. That is the only rule of liability that Mignault J. appears to have been laying down in *Ross*.[110]

[224] Building on the sand-based foundation of the above argument, the Plaintiffs venture into the area of "risk-utility" theory. They argue that, "absent a clear and valid legislative exclusion of the rules of civil liability, every manufacturer must respect its duties under civil law to not produce and market a useless, dangerous product, and repair any injury caused by its failure to do so".[111] Implicit in this statement is the assumption not only that cigarettes

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106 S.C.R. (1921) 62 S.C.R. 393.

107 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at para 2-346, p. 362.

108 *Ross, op. cit.*, Note 106, at p. 421.

109 It is important to note that, even in 1921, our courts recognized the duty to warn, a fact that disarms any argument here to the effect that imposing such a duty as of the beginning of the Class Period, some thirty years later, is an error of "hindsight".

110 Plaintiffs also cite the reflection of Professor Jobin as to whether, in the most serious of cases, an extremely dangerous item should ever be put on the market, regardless of the warnings attached: Pierre-Gabriel JOBIN, *La vente*, 3ème éd., Cowansville, Éditions Yvon Blais, 2007, pages 266-267. The question is an interesting one, flowing, as it seems to, from "risk-utility" theory, which we discuss below. That said, in our view it overstates the situation at hand.

111 At paragraph 42 of their Notes.

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are dangerous, but that they are also useless and, moreover, that there exists a principle of civil law forbidding the production and marketing of useless products that are dangerous.

[225] Although the Companies now admit that cigarettes are dangerous, the proof does not unconditionally support their uselessness. Even the Plaintiffs' expert on dependence, Dr. Negrete, admits that nicotine has certain beneficial aspects, for example, in aiding concentration and relaxation[112].

[226] In any event, the Court finds no support in the case law and doctrine for a principle of civil law similar to the one that the Plaintiffs wish to invoke. In Quebec, the first paragraph of article 1473 makes it possible to avoid liability for a dangerous product, even one of questionable use or social value, by providing sufficient warning to its users. The rule is similar in the common law[113].

[227] Our review of the case law and doctrine applicable in Quebec leads us to the following conclusions as to the scope of a manufacturer's duty to warn in the context of article 1468 and following:

a. The duty to warn "serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product"[114];

b. A manufacturer knows or is presumed to know the risks and dangers created by its product, as well as any manufacturing defects from which it may suffer;[115]

c. The manufacturer is presumed to know more about the risks of using its products than is the consumer;[116]

d. The consumer relies on the manufacturer for information about safety defects;[117]

e. It is not enough for a manufacturer to respect regulations governing information in the case of a dangerous product;[118]

f. The intensity of the duty to inform varies according to the circumstances, the nature of the product and the level of knowledge of the purchaser and the degree of danger in a product's use; the graver the danger the higher the duty to inform;[119]

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112 See Exhibit 1470.1, at page 3.

113 *Hollis, op. cit.,* Note 40, at page 658, citing *Buchan v. Ortho Pharmaceutical Canada Ltd.*, (1986) 32 B.L.R. 285 (Ont. C.A.) ("***Buchan***") at page 381, speaking of drug manufacturers.

114 *Hollis*, *op. cit.,* Note 40, at page 653.

115 *Banque de Montréal v. Bail Ltée*, [1992] 2 SCR 554 ("***Bail***"), at p. 587.

116 *Lambert*, *op. cit.,* Note 104, at pages 574-575).

117 *Bail*, *op. cit.,* Note 115, at page 587.

118 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 2-354.

119 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 2-354; Buchan, at page 30; Hollis, *op. cit.*, Note 40, at page 654.

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g. Manufacturers of products to be ingested or consumed in the human body have a higher duty to inform;[120]

h. Where the ordinary use of a product brings a risk of danger, a general warning is not sufficient; the warning must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product;[121]

i. The manufacturer's knowledge that its product has caused bodily damage in other cases triggers the principle of precaution whereby it should warn of that possibility;[122]

j. The obligation to inform includes the duty not to give false information; in this area, both acts and omissions may amount to fault; and[123]

k. The obligation to inform includes the duty to provide instructions as to how to use the product so as to avoid or minimize risk.[124]

[228] Professor Jobin sums it up nicely:

> *Il faut enfin souligner l'étendue, variable, de l'obligation d'avertir d'un danger inhérent. À juste titre, la jurisprudence exige que, plus le risque est grave et inusité, plus l'avertissement doit être explicite, détaillé et vigoureux. D'ailleurs, dans un grand nombre de cas, il ne suffit pas au fabricant d'indiquer le danger dans la conservation ou l'utilisation du produit: en effet, il est implicite dans la jurisprudence qu'il doit aussi, très souvent, indiquer à l'utilisateur comment se prémunir du danger, voire comment réduire les conséquences d'une blessure quand elle survient.*[125]

II.D.3 NO DUTY TO CONVINCE

[229] Since the present analysis applies to all three Companies, the Court will consider now two connected arguments raised by JTM. The first is that "the source of the awareness and, in particular, whether it came from the manufacturer, is legally irrelevant. What matters is that consumers are apprised of the risks, not how they became so."[126]

[230] In the second[127], it contests the Plaintiffs' assertion that "If a manufacturer becomes aware that, despite the information available to consumers, they do not fully understand their products' risks, *this should be a signal to this manufacturer that it has not appropriately*

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120 *Hollis*, *op. cit.,* Note 40, at page 655.

121 *Hollis*, *op. cit.,* Note 40, at page 654; *Lambert*, *op. cit.,* Note 104, at pages 574-575.

122 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at para 2-354; Lambert, at pages 574-575.

123 *Bail*, *op. cit.*, Note 115, at page 587.

124 Pierre LEGRAND, *Pour une théorie de l'obligation de renseignement du fabricant en droit civil canadien*, (1980-1981) 26 McGill Law Journal, 207 at page 229.

125 Pierre-Gabriel JOBIN, *La vente*, *op. cit.*, Note 110, pages 294-295, paragraph 211. He cites some six cases in support at footnote 116.

126 At paragraph 89 of JTM's Notes.

127 At paragraph 110 of JTM's Notes.

discharged its duty to inform."[128] In this regard, JTM argues that the duty to warn is not equivalent to a duty to convince.

[231] On the question of the source of the awareness, the test under article 1473 is whether the consumer knew or could have known of the safety defect, as opposed to whether the manufacturer had taken any positive steps to inform. That confirms JTM's position, but does not paint the full picture.

[232] Where the manufacturer knows that the information provided is neither complete nor sufficient with respect to the nature and degree of probable danger[129], the duty has not been met. That is the case here. We earlier held that the Companies were aware throughout the Class Period of the risks and dangers of their products, both as to the Diseases and to dependence. They thus knew that those risks and dangers far surpassed what either Canada, through educational initiatives, or they themselves, through the pack warnings, were communicating to the public. That represents a grievous fault in light of the toxicity of the product.

[233] Much of this also applies to JTM's second argument opposing the imposition of a duty to convince. Again, the test is, in general: "knew or could have known", but the bar is higher for a dangerous product. Turning that test around, in these circumstances it seems appropriate to ask whether the Companies knew or could have known if the public was being sufficiently warned. The answer is that the Companies very well knew that they were not.

[234] Putting aside specialized, scientific studies to which the public would not normally have access, the information available during much of the Class Period was quite general and unsophisticated. We include in that the pre-1988 Warnings.

[235] It is telling, for example, that Health Canada did not see the need to impose starker Warnings until 1988. This indicates that the government could not have been fully aware of the exact nature and extent of the dangers of smoking, otherwise we must presume that they would have acted sooner. This was apparent to the Companies, a fact that they essentially admit in a June 1977 RJRM memo drafted by Derrick Crawford.

[236] Reporting on a meeting between Health Canada and, *inter alia*, the Companies to discuss the project for a less hazardous cigarette, Mr. Crawford mocked the technical abilities of Health Canada in several areas and noted that "they were actually looking to us for help and guidance as to where they should go next"[130]. In his concluding paragraph, he underlines the government's shortcomings and lack of understanding:

> 7. One had to leave this meeting with a sense of frustration — so much time spent and so little achieved. On the other hand it leaves one with a degree of optimism for the future as far as the industry is concerned. They are in a state of chaos and are uncertain where to turn next from a scientific point of view. They want to be

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128 At paragraph 365 of Plaintiffs' Notes. Emphasis in the original.

129 Theoretically, at least, incomplete information could still provide sufficient warning.

130 Exhibit 1564, at pdf 1. At pdf 6, he does state that the Companies would be willing to give guidance if the government were prepared to embark on a realistic programme, which he felt they were not ready to do.

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> seen to be doing the right thing, and to keep their Dept. in the forefront of the Smoking & Health issue. However it appears they simply do not have the funds to tackle the problem in a proper scientific manner. Our continuing dialogue can continue for a long time, as they feel meetings such as these are beneficial. Pressure must be off shorter butt lengths for a considerable time[131]

[237] If the Companies knew that Health Canada was in a state of confusion, they had to assume that the public was even less up to speed. Farther on, we look at what ITL knew about what the public knew and conclude that its regular market surveys would have led it to believe that much of the public was in the dark about smoking and health realities. This should have guided ITL's assessment of whether it had met its duty to inform. It did not.

[238] Rather than taking the initiative in helping the government through the learning process, the Companies' strategy was to hold Canada back as long as possible in order to continue the *status quo*. Smoking prevalence was still growing in Canada through much of this period[132] and the Companies were reaping huge profits. It was in their financial interest to see that continue as long as possible.

[239] By choosing not to inform either the public health authorities or the public directly of what they knew, the Companies chose profits over the health of their customers. Whatever else can be said about that choice, it is clear that it represent a fault of the most egregious nature and one that must be considered in the context of punitive damages.

[240] So far in this section, the Court has focused on the manufacturer's obligation to inform under article 1468 and following but, under article 1457, a reasonable person in the Companies' position also has a duty to warn.

[241] In a very technical but nonetheless relevant sense, the limits and bounds of that duty are not identical to those governing the duty of a manufacturer of a dangerous product. This flows from the "knew or could have known" defence created by article 1473.

[242] Under that, a manufacturer's faulty act ceases to be faulty once the consumer knows, even where the manufacturer continues the same behaviour. In our view, that is not the case under article 1457. The consumer's knowledge would not cause the fault, *per se*, to cease. True, that knowledge could lead to a fault on his part, but that is a different issue, one that we explore further on.

II.D.4 WHAT ITL SAID PUBLICLY ABOUT THE RISKS AND DANGERS

[243] In its Notes, ITL dismisses Plaintiffs' arguments, and the evidence, or lack thereof, on which they are based:

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131 Exhibit 1564, at pdf 8. The issue of shorter butt lengths was one that the Companies opposed, so this comment indicates that Health Canada's problems would keep pressure off the Companies to change their practices on that point.

132 Prevalence, i.e., the percentage of Canadians smoking, peaked in 1982, although sales did not peak until a year later because of population growth.

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> **574.** Accordingly, Plaintiffs are left with a handful of statements by individuals from a 50-year period which they characterize as being "public statements" made on ITL's behalf. On their face, however, these statements were clearly not widely disseminated, and were not intended to "trivialize" smoking risks. What is more, these statements have to be contextualized by the fact that the company had long since acknowledged the risks, and had included warnings on their packs and advertisements since the early 1970s. No isolated statement made in a discrete forum could possibly even rise to the level of a footnote in the context of these background communications.
>
> **575.** Finally, and perhaps most fundamentally, this Court has not heard a single Class Member come forward to say that he/she heard any of the allegedly "trivializing" statements, let alone relied upon any of them.

[244] Before considering the impact of ITL's declarations, let us look at what was being said.

[245] In the early part of the Class Period, ITL did not hesitate to voice doubt about the link between tobacco and disease. A 1970 interview accorded by Paul Paré, then president of ITL, to Jack Wasserman, a Vancouver radio host[133], is typical of the message ITL was still delivering at that time. There, Mr. Paré makes light of the scientific evidence linking tobacco to serious disease and advances the argument so often made by Canadian tobacco executives that more research must be done by "real" scientists before being able to make any statement on the risks of smoking.

[246] Although this event did not have any direct effect in Quebec, it typifies the "scientific controversy" message that the Company and the CTMC were extolling throughout much of the Class Period and it is useful to reproduce a large part of it.

> (J. Wasserman) … All through your speech in Vancouver you have suggested that it's just a propaganda campaign against the tobacco industry, and it really ain't true that I'm liable to get lung cancer, that I'm liable to get emphysema, if I keep on smoking.
>
> (P. Paré) Well, I don't think that we have said that you're liable to get nothing if you smoke a great deal. And I don't think that we have tried to point the finger at being entirely a propaganda activity. I think, what we have said, that the finger of suspicion is pointed at the industry.
>
> (J.W.) Yes
>
> (P.P.) And the industry has, on that account, a responsibility to respond to it. The interesting feature is, there isn't a single person in the medical profession or any federal or provincial bureau that's been able to identify anything that suggests that there's a connection between smoking and any disease.
>
> (J.W.) Do you mean that the world famous scientists and medical men that make these connections, using statistical evidence, are just a bunch of needless worry warts?
>
> (P.P.) No, but I think that one would have to question the world famous scientists. I think I could demonstrate to you that there are more world famous scientists who

[133] Exhibit 25A.

have actually conducted a good deal of activity on the … on those areas of research which, we think, are probably more fruitful, for they would talk about the kind of things that speak of generic differences, or behavioural differences, or stress differences, the kind of thing that may have some meaning. What is the virtue of having a statistical association reiterated, year after year after year, without adding a single new bit of information and….

(J.W.) You said the responsibility of the industry was to answer the charges.

(P.P.) M'hm

(J.W.) Is it not the responsibility of the industry to go find out if the charges are correct and to deal with them because, if the charges are correct – and God knows there are enough charges – you are selling poison?

(P.P.) Well, I think the industry has done everything so far, within its competence to do. We have invested, as an industry (inaudible), scores of millions of dollars trying to demonstrate what it is that causes this phenomenon of a statistical association.

…

(P.P.) … I think that I can turn around and tell you about men, any number of them, we could have brought fifty (50) famous people who ...

(J.W.) You quote … you quote a number of them.

(P.P.) Just … yes, and that particular top guy is given there as a reference to what Professor *Cellier (?)*, Dr. Cellier has said. But any number of these scientists are much larger in the context of their reputation than what people generally think about the tobacco industry, and basically not, in any way, subservient to us. Indeed they've made it very clear, this is something they believe strongly in because … And I suspect, if you had a chance to see most doctors privately, you would find that they would say that this particular thing has been blown up out of proportion.

…

(P.P.) … But it would be difficult to rely – certainly I wouldn't try and rely – on any tar and nicotine relationship as between filters and non-filters, because tar and nicotine themselves have not been able to be shown to be dangerous to anything.

(J.W.) They injected it into rats and there was a higher incidence of a certain kind of cancer.

(P.P.) No, there wasn't. This is one of the curious things about it. They have tried, when I say "they", I mean the medical fraternity as a whole, have tried to induce cancer for thirty (30) years by the use of extraordinary dosages of the by-products of smoke, which are identified as tar and nicotine. It's never been able to be achieved. Now they have applied, or did apply, in a couple of experiments on mouse, on mice rather, doses of tar on their backs, and were able to develop certain skin cancers on the early experiments. Now even the doctors will confess that this is meaningless, for you can do the same thing with tomato ketchup or orange juice, or anything if you want to apply it…

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> (J.W.) Have they done tests showing that, in fact … suggesting that tomato ketchup has caused skin cancer in mice?
>
> (P.P.) Oh yes, indeed, lots of different products that have been used in this way have been able to develop a skin cancer.
>
> …
>
> (P.P.) … I think that the human system is exposed to these things in cycles, and it tends to develop a resistance to them. Now, just to put it in a perspective. At the turn of the century, when lung cancer was first identified, the average age of the incidence of lung cancer was in the forties (40's). Now lung cancer today is a disease (inaudible) of the old. The average incidence of lung cancer is over sixty (60). And projecting the pattern, in ten (10) years, it will be over seventy (70).
>
> …
>
> (P.P.) … What I think a scientist would say, a real scientist would say, is that this kind of a statistical association creates a pretty important hypothesis, and one that deserves some pure research. You then will have to decide, well, what is the area of the research, for you can't look at a particular contributing factor in isolation. Obviously, even in this case, they're talking about the possibility of two (2) factors; it may very well be there are ten (10) factors, and it's possible – I suppose – that smoking be one of them, but there is no evidence to support that view…
>
> …
>
> (P.P.) … I think, what you find, and this is I think an interesting thing, in a general context, here you say, or we have had it said constantly that the morbidity rate is associated …, the morbidity rate of cigarette smokers is going to be something like eight (8) or nine (9) years less than somebody else. And I think the fact of the matter is, all these evils of smoking that are charged with visiting upon consumers (sic), tends to be, in my view at least, questioning the fact that, here we are as Canadians, living healthier and longer lives than we've ever lived, smokers or non-smokers alike. And, you know, you can go back over the years and find people three hundred (300) years ago saying that tobacco is going to kill everybody going to kill everybody.
>
> …
>
> (P.P.) Is having smaller babies a bad thing, do you know? I think there was a study done in Winnipeg by a doctor which demonstrated that smaller babies was probably a good thing; the baby has a better chance to live and lives a health … has a better chance to grow normally.

[247] Even to its own employees, ITL was denying the existence of a scientifically-endorsed link between cigarette smoking and disease and trivializing the evidence to that effect. As would be expected, the company's internal corporate newsletter, *The Leaflet*, painted a most favourable portrait of smoking[134].

[248] In the June 1969 edition of the *Leaflet*[135], ITL published a "Special Report on Smoking and Health". It highlighted Mr. Paré's comments before the Isabelle Committee

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134 See the Exhibit 105 series.

135 Exhibit 2.

of the House of Commons studying the effects of smoking on health[136]. The following are extracts from its front page:

> Mr. Paré pointed out that in the last 15 years no clinical or experimental evidence has been found to support the statistical association of smoking with various diseases. In fact, considerable evidence to the contrary has been found and many scientist and medical people were now prepared to say so publicly.
>
> There is an emerging feeling among many people that smoking isn't really the awful sin it has been made out to be, Mr. Paré said. He attributed this to the fact that the tobacco industry has recently been able to counter the arguments of the anti-smoking advocates with the testimony of reputable scientists. More has been leaned about tobacco in the last five years, he said, and as a result the industry feels more confident of its position.
>
> Highlights of (the industry's) brief
>
> - There is no proof that tobacco smoking causes human disease.
>
> …
>
> - Statistical associations, on which many of the claims against smoking are based, have many failings and do not show causation.
>
> …
>
> - Attacks on tobacco and its users – for health and other reasons – are not new. They have been recurring for centuries.
> - The tobacco industry has diligently sought answer to the unresolved health questions.
>
> …
>
> - Although there is no proof of any health significance in the levels of so-called "tar" and nicotine in the smoke of cigarettes, the industry has responded to the demands of some of its consumers by producing brands that deliver less "tar" and nicotine.
>
> …
>
> - The industry has acted with restraint in challenging the extreme, biased, and unproved charges that cigarettes are responsible for all kinds of ailments.

[249] It is important to note that Mr. Paré's comments before the Isabelle Committee and the extracts of the 120-page brief reproduced in *The Leaflet* were all submitted on behalf of the Ad Hoc Committee of the Canadian Tobacco Industry, later to become the CTMC. Paré was the Chairman of that organisation at the time. As such, he and the brief were speaking for all the members of the Canadian tobacco industry and the extracts cited above must therefore be taken as having been endorsed by each of the Companies.

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[136] ITL makes a claim of Parliamentary Privilege on this edition of its newsletter. Although the Court accepts that claim for Mr. Paré's actual testimony before the committee, it rejects it with respect to a voluntary restatement or "republication" of his comments outside of that body: *Jennings v. Buchanan*, [2004] UKPC 36, at pages 12 and 18 (UK Privy Council).

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[250] By the time of Mr. Paré's testimony before the Isabelle Committee in 1969, the Companies had long known of the risks and dangers of smoking and yet they wilfully and knowingly denied those risks and trivialized the evidence showing the dangers associated with their products.

[251] The campaign continued. In a written reply to the question: "How can you reconcile your leadership in an industry whose product is indicted as a health hazard?" posed by the Financial Post in November 1970, Mr. Paré, speaking for ITL, writes:

> However, no proof has been found that tobacco smoking causes human disease. The results of the scientific research and investigation indicate that tobacco, especially the cigarette, has been unfairly made a scapegoat in recent times for nearly every ill that can affect mankind.
>
> In the indictment against smoking other factors such as environmental pollution, genetic factors and occupational exposures have not been adequately assessed. Attempts have been made to build up statistics to claim that smokers suffer more illnesses and loss of working days, but there is no valid experimental evidence to support this claim.[137]

[252] This reflects the standard mantra of the industry at the time, the "scientific controversy" by which the harmful effects of smoking on health were not exactly denied but, rather, were characterized as being complicated, multi-dimensional and, especially, inconclusive, requiring much further research. It insinuated into the equation the idea that genetic predisposition and "environmental factors", such as air pollution and occupational exposures, could be the real causes of disease among smokers.

[253] Seven years after the correspondence with the Financial Post, the message had not changed. In a December 1976 document entitled "Smoking and Health: The Position of Imperial Tobacco", we see the following statement:

> 6. I.T.L. is in agreement with serious-thinking consumers, whether they choose to smoke or not, who view the smoking and health question as being inconclusive, as requiring continuing research and corrective measures as definitive findings are established.[138]

[254] In fairness, ITL did permit certain research papers produced by it or on its behalf to be published in scientific journals, some of which were peer reviewed. In particular, some of Dr. Bilimoria's work in collaboration with McGill University was published[139]. This, however, does not impress the Court with respect to the obligation to warn the consumer.

[255] Such papers were inaccessible to the average public, both because of their limited circulation and of the technical nature of their content. Moreover, the fact that the general scientific community might have been informed of certain research results does not satisfy ITL's obligation to inform. Except in limited circumstances, as under the

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137 Exhibit 907.

138 Exhibit 28A, at page 1.

139 It is unfortunate that this "openness" on ITL's part did not apply across the board. In 1985, its president, Stewart Massey, asked BAT if it had objections or comments about the publication of certain research papers, to which Mr. Heard of BAT replied: *"I think it is unwise to publish any findings of our studies on smoking behaviour on any smoking products"*: Exhibit 1603.2.

learned intermediary doctrine, the duty to warn cannot be delegated. As the Ontario Court of Appeal states in *Buchan*:

> I think it axiomatic that a drug manufacturer who seeks to rely on the intervention of prescribing physicians under the learned intermediary doctrine to except itself from the general common law duty to warn consumers directly must actually warn prescribing physicians. The duty, in my opinion, is one that cannot be delegated.[140]

[256] On the other hand, the role played by Health Canada with respect to smoking and health issues might fit into the learned intermediary definition. In that regard, however, the Companies would have had to show that they actually warned Health Canada of all the risks and dangers that they knew of. As shown elsewhere in the present judgment, they failed to do that.

[257] Getting back to what ITL and the other Companies were telling the public, the CTMC continued the same message after Mr. Paré's departure. In a 1979 letter to the Editorial Page Editor of the Montreal Star newspaper[141], Jacques Larivière, the CTMC's head of communications and public relations, responded to an editorial by sending two documents, accompanied by the following comments on the second one:

> The second document, "Smoking and Health 1964-1979 The Continuing Controversy"[142] was produced by the Tobacco Institute in Washington in an attempt to inject some rational thinking into the debate and to replace the emotionalism with fact.

[258] The Tobacco Institute is the US tobacco industry's trade association and the document defends "the continuing smoking and health controversy" where "there are statistical relationships and several working hypotheses, but no definitive and final answers" and "scientists have not proven that cigarette smoke or any of the thousands of its constituents as found in cigarette smoke cause human disease.[143]

[259] In the opinion of Professor Perrins, one of the Companies' experts, only "outliers" were denying the relationship between smoking and disease after 1969. He defined outliers as persons who defend a position that the vast majority of the community rejected.[144] The Tobacco Institute document that the CTMC turned to "to inject some rational thinking into the debate and to replace the emotionalism with fact" was published ten years after Dr. Perrins' outlier date. It contradicted what the Companies knew to be the truth and it was sent to a newspaper, as were other similar communications at the time.

[260] The Companies argue that these types of statements had little or no play with the public and could not have caused anyone to smoke. They also point out that not a single Member came forward to testify that any of the Companies' statements in favour of their products caused him to start or to continue to smoke.

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140 *Buchan*, at pages 31-32. The learned intermediary doctrine will often apply in the type of relationship between a doctor and his patient with respect to information provided by a pharmaceutical company to the medical community but not to the general public.

141 Exhibit 475.

142 Exhibit 475A.

143 At pdf 5-7.

144 See the transcript of August 21, 2013, at pages 70-76 and 235-236.

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[261] The latter statement is true and it is one that the Companies raise time and again against the Plaintiffs' case on a number of issues, starting well before the opening of the trial. It is also one that never inspired great sympathy from the Court, and our lack of enthusiasm remains unabated.

[262] We have repeatedly held that, in class actions of this nature, the usefulness of individual testimony is inversely proportional to the number of people in the class. As we shall see, the number of people in the Classes here varies from 100,000 to 1,000,000. These proportions render individual testimony useless, a viewed shared by the Court of Appeal[145]. They also render hollow the Companies' cry for an unfavourable inference resulting from the absence of Members' testimony.

[263] In any event, the Court is of the view that the Plaintiffs are entitled to a presumption[146] that the Companies' statements (outside of marketing efforts, which are analyzed further on) were generally seen by the public and did lead to cigarette smoking.

[264] As Professor Flaherty's time lines show, the Companies' statements were widely reported in newspapers and magazines read in Quebec[147]. The Companies rely on this evidence to show that the general public was aware of the negative publicity about smoking through newspaper and magazine articles, but the knife cuts both ways. Although fewer and fewer with time, articles reporting the Companies' stance appeared in the same publications. One must presume that they would also have been seen by the general public.

[265] As well, the effect of the gradual reduction of these statements after the Companies decided to abstain from making any public statements about health, as discussed in the following chapter, is mitigated by the reality that, during the Class Period, the Companies never rescinded these statements. In fact, as late as the end of 1994 ITL was still defending the existence of the same "scientific controversy" that Mr. Paré had been preaching decades earlier[148]. As noted by Professor Flaherty, ITL's own expert:

> November/December 1994 issue of *The Leaflet*, an Imperial Tobacco publication for employees and their families, had an article entitled — Clearing the Air: Smoking and Health, The Scientific Controversy" which contained this excerpt: "The facts are that researchers have been studying the effects of tobacco on health for more than 40 years now, but are still unable to provide undisputed scientific proof that smoking causes lung cancer, lung disease and heart disease ... The fact is nobody knows yet how diseases such as cancer and heart disease start, or what factors affect the way they develop. We do not know whether or not smoking could cause these diseases because we do not understand the disease process".[149]

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145 See Imperial *Tobacco v. Létourneau*, 2012 QCCA 2013, at parapgraph 51.

146 We present our understanding of the rules relating to presumptions in section VI.E of the present judgment.

147 See the titles of smoking and health stories in newspapers in the series of Exhibits filed under number 20063.2 and following, especially in the pre-1975 years.

148 We discuss the birth of the scientific-controversy strategy in section II.F.2 of the present judgment.

149 Exhibit 20063.10, at pdf 154.

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[266] True, this article was directed principally at its own employees, presumably hundreds or even thousands of them, but it highlights the degree to which ITL's posture and message had not changed even 25 years after the first date when only outliers were denying causality, or at least the existence of a relationship between smoking and disease[150].

[267] On the other hand, many of the Companies' statements were technically accurate. Science has not, even today, been able to identify the actual physiological path that smoking follows in causing the Diseases. That, however, is neither a defence nor any sort of moral justification for denying the link. As noted in our review of the manufacturer's obligation to inform, its knowledge that its product has caused bodily damage in other cases triggers the principle of precaution whereby it should warn of that possibility.[151]

[268] Thus, one can only wonder whether the people making such comments were remarkably naïve, wilfully blind, dishonest or so used to the industry's mantra that they actually came around to believe it. Their linguistic and intellectual pirouettes were elegant and malevolent at the same time. They were also brutally negligent.

[269] ITL and the other Companies, through the CTMC and directly[152], committed egregious faults as a result of their knowingly false and incomplete public statements about the risks and dangers of smoking.

[270] As a final note on the subject, ITL and the other Companies argue that their customers were getting all the information they needed through other sources, especially the Warnings. Although these do form part of what the Companies were saying publicly, for reasons alluded to above[153] and developed more fully in the next section, it is more logical to deal with the Warnings in the context of what the Companies were not saying publicly.

II.D.5 WHAT ITL DID NOT SAY PUBLICLY ABOUT THE RISKS AND DANGERS

[271] Throughout much of the Class Period, the Companies adhered to a strict policy of silence on questions of smoking and health[154]. They justify their decision in this regard on three accounts: the Warnings gave notice enough, no one would believe anything they said anyway and, in any event, it was up to the public health authorities to do that and they did not want to contradict the message Health Canada was sending.

[272] The history of the implementation of the Warnings, even after the enactment of the TPCA, shows constant haggling between Canada and the Companies, initially, as to whether pack warnings were even necessary, and then, as to whether they should be attributed to Health Canada, and finally, as to the messages they would communicate.

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150 See the transcript Dr. Perrins: August 21, 2013, at pages 70-76 and 235-236.

151 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 2-354; *Lambert*, at pages 574-575.

152 We analyze the situation of the other Companies in the chapters dealing with them.

153 See section II.B.1.b.2 of the present judgment.

154 See, for example, the testimony of ITL's former Vice-President of Marketing, Anthony Kalhok, in the transcript of April, 18, 2012, at page 113.

The Companies resisted the Warnings at all stage and attempted, and generally succeeded, in watering them down.

[273] A good example of this is seen as late as August 1988 in the CTMC's comments to Health Canada on the proposed Warnings under the TPCA. Lobbying against a Warning on addiction, its president wrote the following to a Health Canada representative:

> Particularly in the absence of clear government sponsorship of the proposed messages, we have serious difficulty with the specific language of the health messages contained in your July 29th proposals. We do not accept the accuracy of their content.
> With or without attribution, we are particularly opposed to an "addiction" warning. Calling cigarettes "addictive" trivializes the serious drug problems faced by our society, but more importantly. (sic) The term "addiction" lacks precise medical or scientific meaning. (Exhibit 694, at page 10 PDF)

[274] The Warning on addiction was not introduced for another six years, presumably at least in part as a result of the CTMC's interventions.

[275] Be that as it may, the Companies maintain that the Warnings, whether voluntary or imposed, satisfied in every aspect their obligations to inform the customer of the inherent risks in using their products. In fact, they read subsection 9(2) of the TPCA as a type of injunction blocking them from saying anything more, particularly when coupled with the ban on advertising in effect as of 1988. That provision reads:

> **9(2)** No distributor shall sell or offer for sale a tobacco product if the package in which it is contained displays any writing other than the name, brand name and any trade marks of the tobacco product, the messages[155] and list referred to in subsection (1), the label required by the *Consumer Packaging and Labelling Act* and the stamp and information required by sections 203 and 204 of the *Excise Act*.

[276] Plaintiffs disagree. They correctly point out that subsection 9(3) of the TPCA rules out that argument:

> **9(3)** This section does not affect any obligation of a distributor, at common law or under any Act of Parliament or of a provincial legislature, to warn purchasers of tobacco products of the health effects of those products".

[277] This should have been notice enough to the Companies that the public health authorities were clearly not trying to occupy the field with respect to warning the public. On the other hand, it is, of course, true that the Companies should not say or do anything that would contradict Health Canada's message, but that posed no obstacle to acting properly.

[278] The "restrictions" on the Companies' statements to the public are every bit as present today as they were during the Class Period, nevertheless, for at least the last ten years each Company has been warning the public of the dangers of smoking on its

[155] i.e., the Warnings.

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website[156]. If the kinds of statements they are making today are legal and proper, their contention that during the fifty previous years the tobacco laws - or their respect for the role of public health authorities - foreclosed them from doing more than printing the Warnings on their packages is feeble to the point of offending reason. It also leads to the conclusion that during the Class Period the Companies shirked their duty to warn in a most high-handed and intentional fashion.

[279] For these reasons, the argument that it was up to the public health authorities to inform the public of the dangers of smoking, to the exclusion of the Companies, is rejected.

[280] On the point about whether anyone would believe any smoking warning they might have tried to deliver, there is a flaw in their logic. Although it is probably true that no one would believe anything positive the Companies said about smoking, that is not necessarily the case when it comes to delivering a negative message. It is not unreasonable to think that, had the manufacturer of the product readily and clearly admitted the health risks associated with its use, as the Companies sort of do now, people might well have taken notice. But is that even relevant?

[281] The obligation imposed on the manufacturer is not a conditional one. It is not to warn the consumer "provided that it is reasonable to expect that the consumer will believe the warning". That would be nonsensical and impossible to enforce.

[282] If the manufacturer knows of the safety defect, then, in order to avoid liability under that head, it must show that the consumer also knows. On the other hand, under the general rule of article 1457, there is a positive duty to act, as discussed earlier.

[283] The argument that they would not have been believed had they tried to do more is rejected.

[284] Getting back to the obligation to inform, the Warnings appear to be not so much a demonstration of the Companies saying publicly what they knew but, rather, just the opposite.

[285] We have already held that the Companies knew of the risks and dangers of using their products at least from the beginning of the Class Period. We have also noted that the pre-TPCA Warnings conveyed essentially none of that knowledge. In fact, even in the 1998 document where ITL claims to have first admitted that smoking causes lung cancer, it fails to drive the message home:

> **What about smoking and disease?**
>
> Statistical research indicates that smoking is a risk factor which increases a person's chances of getting lung cancer, emphysema, and heart disease. Clear

[156] See, for example, Exhibit 561, JTM's website in 2008, which stated as the first of its six core principles: "**Openness about the risks of smoking**: public authorities have determined that smoking causes and/or is a risk factor for a number of diseases. We support efforts to advise smokers accordingly. No one should smoke without being fully informed about the risks of doing so".

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> messages about risks are printed on all packs of cigarettes, and public health authorities advise against choosing to smoke.[157]

[286] Once again, the points are accurate, but one gets the distinct impression that ITL is trying to disassociate itself from them, as if it is something of an unpleasant business to have to say this.

[287] Throughout essentially all of the Class Period, the Warnings were incomplete and insufficient to the knowledge of the Companies and, worse still, they actively lobbied to keep them that way. This is a most serious fault where the product in question is a toxic one, like cigarettes. It also has a direct effect on the assessment of punitive damages.

[288] It follows that, if there is fault for tolerating knowingly inadequate Warnings, there is an arguably more serious fault during the 22 years of the Class Period when there were no Warnings at all. The Companies adduced evidence that in this earlier time it was less customary to warn in consumer matters than it is today. So be it. Nonetheless, knowingly exposing people to the type of dangers that the Companies knew cigarettes represented without any precaution signals being sent is beyond irresponsible at any time of the Class Period. It is also intentionally negligent.

[289] There is more to say on the subject of pack warnings. The Companies called two experts: Dr. Stephen Young and Dr. William "Kip" Viscusi to assist the Court on aspects of this topic.

[290] Dr. Young, a consultant on safety communications at Applied Safety & Ergonomics, Inc. in Ann Arbor, Michigan, was qualified by the Court as an expert in the theory, design and implementation of consumer product warnings and safety communications. The Companies asked him to answer three questions "from the perspective of an expert in the theory, design and implementation of product warnings":

- Was it reasonable that Defendants did not provide consumers with product warnings regarding the health risks of smoking prior to the Department of National Health and Welfare warning that was adopted in 1972?
- Was it reasonable that Defendants did not include additional/different information in their warnings such as:
  - a detailed list of all diseases potentially caused by smoking,
  - statistical information about the probabilities of various health consequences associated with smoking, and/or
  - a detailed list of known or suspected carcinogens in cigarette smoke?
- Would the adoption of an earlier warning or the provision of additional/different warning information likely have had a significant effect on smoking initiation and/or quitting rates in Quebec?[158]

[291] He answered all three in the Companies' favour, summarizing his opinion in the following terms:

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[157] Exhibit 34, at pdf 5. See also Exhibit 561, JTM's website in 2008, cited in the preceding footnote.

[158] Dr. Young's report: Exhibit 21316.

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> Yes, my conclusions was that... are that it was reasonable that Defendants did not provide health warnings, product warnings, regarding the health risks of smoking prior to nineteen seventy-two (1972); that it was reasonable they did not provide additional or different information on health warnings, including a detailed list of all diseases potentially caused by smoking, statistical information about the probability of various health consequences, or detailed lists of known and suspected carcinogens.
>
> And then, finally, that the adoption of earlier warning, or one with additional or different information, would not likely have had a significant effect on smoking initiation or quitting rates in Quebec.[159]

[292] Smoking is a public health risk, in his view, and public health risks should be, and generally are, controlled by the public health authorities as far as warning, education and risk management are concerned. He views the proper role of printed warnings on product packaging as being "instructional" with regard to how to use the product properly, not "informational" with regard to the possible dangers of the product.

[293] If that is the case, then the Companies' position that the Warnings provided sufficient information is impaled on its own sword.

[294] In performing his mandate, his first related to tobacco products, Dr. Young saw no need to consider any internal company documentation or, for that matter, public company documentation, such as advertising material and public pronouncements. He approached his work "entirely from a warnings perspective, and from warnings theory"[160].

[295] We note that his use of the term "warnings" relates specifically and solely to on-package warnings. He was not engaged to address the overall obligation to warn. There is a danger that these two issues could be confused. The latter is much broader than the former, as seen in this exchange before the Court:

> 459Q-I'm not talking about warning, I'm talking about telling the public one way or the other.
>
> A- Well, my opinions really only relate to what a reasonable manufacturer would do with regard to warnings. So other communications and so forth would be the judgment of others, as far as whether or not they're appropriate.[161]

[296] Thus, Dr. Young was not mandated to, nor did he, make any effort to analyze the actual degree to which the Quebec public - or the Canadian public health authorities for that matter – were ignorant of the risks and dangers of smoking at various times over the Class Period. He was not provided any of the available evidence on the internal documents of the Companies dealing with things like their marketing, advertising and public relations campaigns and the long history of their negotiations with Health Canada about the Warnings, as well as their assessment of general consumer awareness of the risks related to smoking.

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159 Transcript of March 24, 2014, pages 83-84.

160 Transcript of March 24, 2014 at page 51. See pages 46-51 of that day's transcript. See also pages 3, 18, 26, 31 of his report.

161 Transcript of March 24, 2014 at pages 208-209.

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[297] By restricting himself to theoretical questions, as he was hired to do, he saw no need to examine the level of the Companies' own knowledge of the public health risks of smoking, or the extent to which they were sharing that knowledge with their customers and with the government. Of equal importance, Dr. Young was unable to evaluate the degree to which the Companies, based on their own knowledge, realized that the government of Canada might be underestimating and thus under-reporting the risks of smoking during the first four decades of the Class Period.

[298] Pressed on the latter point in cross-examination, he did not hesitate to admit that the Companies had a duty to ensure that the public health authorities were properly informed of what the Companies knew about the risks of smoking:

> 455Q-Okay. So let's take the nineteen sixties (1960s). If the tobacco manufacturer knew that cigarettes caused lung cancer, there was no need for them to warn the public about that; that's your opinion?
>
> A- The reasons that manufacturers still would not provide warnings about residual risk would still apply. So what I would expect them to do at that point, if the Government or public health officials did not know, would be, rather than provide that as the source of a message on an on-product label, I would expect them to go to public health officials and identify what needs to be done in response to that. And the Government could decide to deal with it in terms of a warning, or they could decide to deal with that through other means.
>
> 456Q-Okay. So you would expect that the manufacturer go to the Government and tell them everything that they knew about the risk of tobacco smoke, on a regular basis, a continuous basis; correct?
>
> A- I would expect them to convey material information that they had about the risk to public health authorities.[162] (The Court's emphasis)

[299] Dr. Young's opinions, although probably correct within the confines of his terms of engagement, are of limited use to the Court. As was the case with most of the other experts called by the Companies, he was given neither the necessary background information nor the leeway to step outside the strict bounds of his mandate.

[300] Except for pack warnings, his theoretical analysis seems to assume a communications vacuum between the Companies and their customers and the government. He admits that, not being an advertising expert, "I haven't even looked into the role that that (advertising) played overall".[163] Later, he adds the following clarification:

> I've really only focused on the issue related to warnings, and the necessity of having consistency in warning messages between public health officials and the manufacturer. And I have not addressed issues related to advertising or other types of communications that may have been in play at any given point in time. And since I don't know how those other types of communications would... the extent to which they'd be seen, the influence they might have on people, I can't

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162 Transcript of March 24, 2014, pages 207-208.
163 Transcript of March 24, 2014, page 126.

> really comment on that, apart to say from... that any warning information provided by the manufacturer should be consistent with government policy regarding smoking health risks.[164]

[301] By his omitting to consider the undeniable effects of the very professional advertisements and public relations campaigns that the Companies were putting forth during much of the Class Period, and admitting that he was not competent to do so, Dr. Young's evidence loses most of its usefulness for the Court. And even on the subject of pack warnings, there are gaps left unfilled.

[302] For example, he does not deal with the attitudes and actions of the Companies with respect to the conception and implementation of the Warnings, both at the initial stage of non-legislated implementation and throughout the evolution of the programme. Dr. Young was not informed by his clients of that part of the story, nor was he provided internal company documentation relating to it. He felt no need to query further because, as he was often forced to say, it was not material to his mandate.

[303] This subject is, however, very much material to the Court's mandate, as it could have a role not only with respect to the present Common Question, but also in the context of punitive damages. Hence, it is unfortunate that it was not seen fit to allow this expert "in the design and implementation of consumer product warnings and safety communications" to assist the Court on aspects of the design and implementation of the Warnings.

[304] In summary, Dr. Young's evidence was so restricted by the terms of his mandate that it was not responsive to the questions at hand. Its overall effect is more that of a red herring, distracting attention away from the real issues and directing it towards secondary ones that, although of some marginal relevance, tend to muddy the analysis of the primary ones. That said, certain of the points he made are enlightening and useful and it is possible that we could refer to some of them at the appropriate time.

[305] Dr. Viscusi, a law and economics professor at Vanderbilt University, was accepted by the Court as an expert on how people make decisions in risky and uncertain situations and as to the role and sufficiency of information, including warnings to consumers, when making the decision to smoke. In his report (Exhibit 40494), he described his mandate as addressing two subjects:

- the theory of warnings and health risk information provision in situations of risk and uncertainty and the characteristics relevant to the consumer choice process in these situations and
- the sufficiency of the publicly available information in Canada over time regarding the health risks of cigarette smoking, viewed from the standpoint of fostering rational decision making by the individual consumer.

[306] He reports the following three conclusions:

- The data demonstrate that there has been sufficient information in Canada for decades for consumers to make rational smoking decisions given the state of

[164] Transcript of March 24, 2014, page 210.

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scientific knowledge about smoking risks.

- Consumers have had adequate information – both concerning particular diseases or particular incidence rates or constituents of smoke – to assist them in making rational smoking decisions.
- The public and smokers generally overestimate the serious risks of smoking including the overall smoking mortality risk, life expectancy loss, and the risk of lung cancer. Younger age groups overestimate the risks more than older age groups. These overall results for the population generally and for younger age groups, which are borne out in survey evidence since the 1980s, also can safely be generalized to the 1970s and perhaps earlier as well.

[307] He opined that one must consider all the information available in order to assess the impact of a warning and that advertising, including lifestyle advertising, is part of the "information environment"[165]. In spite of that, he does not examine the effect of advertising in his analysis because he does not view it as providing credible information about risk[166].

[308] His first two conclusions relating to Canadian consumer awareness of the dangers of smoking are nothing more than a recital of Dr. Duch's opinion and of Professor Flaherty's report[167]. He did not even look at the studies Dr. Duch used, but was content to rely on the summary of the results. Moreover, his use of Dr. Duch's report relates to matters that appear not to fall within his areas of competence. This part of his opinion is, thus, useless to the Court.

[309] His third conclusion seems to boil down to saying that the Warnings were not necessary because people tend to overreact to health concerns of the nature of those publicized for cigarettes. That was not contradicted and the Court accepts it. Its relevance, on the other hand, is not clear, except, as with Dr. Young's opinion, to undermine the Companies' reliance on the Warnings as an adequate source of information for the public.

[310] From the Plaintiffs' perspective, of course, the Companies should have done much more, even after 1988. They would seek the equivalent of self-flagellation in a public place, i.e., that the Companies should have sounded every siren to alert the general public that anyone who smokes will almost certainly succumb to a horrid and painful death after years of suffering from lung cancer or throat cancer or larynx cancer or emphysema, or any of a number of other horrible and dehumanizing diseases.

[311] The Court is not exaggerating. In their Notes, the Plaintiffs propose a series of "adequate warnings" of the type that the Companies should have put on the packs in order to inform the consumer[168]. Two of the Court's favourites are:

- This product is useless apart from relieving the addiction it creates; and

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165 Transcript of January 20, 2014, at pages 76, 77 and 216.

166 The Court assumes that he is speaking of the world as it was during the Class Period, since anyone listening to a pharmaceutical ad on television today would be surprised to hear that.

167 See, for example, his footnote 11, at page 20 of Exhibit 40494.

168 See paragraph 86 of their Notes.

- This product is deadly. It contains many toxic and carcinogenic constituents and poisons every organ in the human body. It will kill half of those who do not succeed in quitting.

[312] Without going quite that far, the Companies should have done much more than they did in warning of the dangers. Today, through their websites and other current communications channels, they move in the direction of raising the alarm. Nothing was stopping them from doing that at any moment of the Class Period using the means available at the time. RBH took the step in 1958[169]. Other than that, however, the Companies chose to do nothing.

[313] Is this equivalent to trivializing or denying or employing a systematic policy of non-divulgation of the risks and dangers? Silence can trivialize and, indirectly, deny, but that is not the important question. The real question is to determine whether the Companies met their duty to warn. The Companies' self-imposed silence leads to only one possible answer there: they did not.

[314] Remaining in the context of what ITL did not say publicly about the risks and dangers of smoking, let us examine if its perception of the public's level of knowledge should flavour our assessment of its behaviour.

II.D.6 WHAT ITL KNEW ABOUT WHAT THE PUBLIC KNEW

[315] As mentioned earlier, in the context of the duty to inform, the Plaintiffs felt it important to spotlight the Companies' knowledge of what the public knew or believed about the dangers of smoking. In this regard, they filed two expert reports by Mr. Christian Bourque (Exhibits 1380 and 1380.2), an executive vice-president at Léger Marketing in Montreal and recognized by the Court as an expert on surveys and marketing research.

[316] The Companies attempted to counter Mr. Bourque's evidence through the testimony of two experts of their own: Professor Raymond Duch, recognized by the Court as an expert in the design of surveys, the implementation of surveys, the collection of secondary survey data and the analysis of data generated from survey research, and Professor Claire Durand, an expert in surveys, survey methods and advanced quantitative analysis

[317] In his principal report (the "**Bourque Report**"), Mr. Bourque stated his mandate to be:

- To determine the Companies' knowledge from time to time of the perceptions or knowledge of consumers concerning certain risks and dangers related to the consumption of tobacco products
- To identify the apparent objectives of the surveys, i.e., to determine the information relating to certain risks and dangers related to the consumption

[169] See our discussion of Mr. O'Neill-Dunne's initiatives in that year in section IV.B of the present judgment.

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> of tobacco products that the Companies sought to obtain, as well as the reasons for the Companies' commissioning these surveys.[170]

[318] In spite of the broad wording of the first item, it is important to clarify that he was not asked to review published survey reports. His scope was limited to the internal survey data available to the Companies, especially ITL's two monthly consumer surveys: the *Monthly Monitor* and the *Continuous Market Assessment* ("**CMA**", together: the "**Internal Surveys**")[171]. He also considered a less-frequently-published report entitled *The Canadian Tobacco Market at a Glance*, which appears to cover industry-wide questions, as opposed to primarily ITL issues.

[319] Apparently exceeding the limits of his mandate, he attempts to draw conclusions from the Internal Surveys about the public's general knowledge of the dangers of smoking. For example, he sees the data on the level of agreement with the survey statement "smoking is dangerous for anyone" as an indication that smokers' knowledge of the dangers of smoking was far below universal, especially early in the Class Period. Mr. Bourque draws that conclusion from *The Canadian Tobacco Market at a Glance* of December 1991, which shows the following results [172]:

Years 1971 to 1990	71 **72** 73 **74** 75 76 77 **78** **79** **80** 81 82 **83** 84 85 86 87 88 **89** 90 91
Dangerous for anyone (%)	48 **59** 56 **63** 64 67 71 **72** **72** **74** 75 76 **76** 77 77 79 77 77 **79** 80 79

[320] As shown below, the CMAs for the same question during that period give a slightly different result, one which Mr. Bourque could not explain from the documents available to him[173]. That said, although the figures are slightly higher in 1972, 1974 and 1983, the differences are small enough so as not to affect the analysis the Court carries out below:

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170 *Déterminer la connaissance qu'avaient ponctuellement les compagnies de tabac quant aux perceptions ou connaissances des consommateurs quant à certains risques et dangers reliés à la consommation des produits du tabac;*
Identifier le(s) but(s) apparent(s) visé(s) par les études, soit de déterminer les renseignements relatifs à certains risques et dangers reliés à la consommation des produits du tabac que les compagnies de tabac cherchaient à obtenir, ainsi que les raisons qui poussaient les compagnies de tabac à réaliser ces études.

171 The Monthly Monitors were monthly reports, eleven a year, prepared by an outside firm on the basis of some 2,000 in-home interviews designed to measure the use of various products, including tobacco, by Canadian adults, i.e., both smokers and non-smokers. They were originally called "8Ms" at the time they were conducted only 8 months a year. The CMA's were monthly telephone surveys of smokers only (people who smoked at least five cigarettes a day) in Canada's 28 largest cities. Also prepared by an outside firm, their purpose was to assess brand performance and brand switching tendencies among the various demographic segments of the smoking population.

172 From page 11 of the Bourque Report, Exhibit 1380 citing Exhibit 987.1, at pdf 7. The underlined figures correspond to the years cited by Mr. Bourque for the CMAs, as set out in the following paragraph.

173 The explanation might lie in the fact that the CMAs analyzed smokers only, while the *Canadian Tobacco Market at a Glance* could be canvassing the total population on that question: see the description of "Consumer" at the top of page 5 pdf of Exhibit 987.1.

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Year	1972	1974	1978	1979	1980	1983	1989
Smoking is dangerous for anyone (%)	62	65	71	72	74	78	79[174]

[321] Transposing these results onto actual public knowledge is not necessarily advisable. They contrast sharply with published survey data cited by Professor Duch, which indicates much higher levels of consciousness at earlier dates. In fact, both he and Professor Durand were vociferous in their criticisms of the quality of the questions and the methodology followed in the Internal Surveys. They insisted that neither was in conformity with accepted survey methodology and practice and the results cannot be relied upon for the purpose of evaluating the general public's knowledge of anything.

[322] As for Mr. Bourque, it was not part of his mandate to defend the scientific integrity of the Internal Surveys, nor did he try. His task was to analyze their contents.

[323] Given that, in light of the uncontradicted testimony of Professors Duch and Durand, the Court accepts their advice to exclude the Internal Surveys as a source of reliable information as to the actual knowledge of the general public on the issues dealt with therein. Moreover, it is clear from their design and implementation that that was not the purpose these surveys were meant to serve, as discussed below.

[324] Accordingly, the Court will not rely on the first part of the Bourque Report for the purpose of ascertaining the actual level of public knowledge of the dangers of smoking. Given this conclusion, it is not necessary to analyze the generally ill-focused criticisms by Professors Duch and Durand of Mr. Bourque's analysis of the data[175].

[325] This does not mean, however, that the first part of the Bourque Report serves no useful purpose to the Court. That the Internal Surveys do not meet the highest standards of survey methodology does not render them irrelevant. They cast light on a very relevant issue: what ITL perceived and believed, accurately or not, about the public's knowledge of the dangers of smoking. In this area, the Court is convinced that ITL had confidence in the Internal Surveys.

[326] It is true that Mr. Ed Ricard, a marketing manager, stated that ITL used the CMAs more to understand trends over time than to provide an accurate snapshot at any one point. Nevertheless, when called by the Plaintiffs in May and August 2012, he gave no indication that ITL did not believe that snapshot. In fact, the opposite is the case, as we note below.

[327] When called back by ITL in October 2013, after the testimony of Professors Duch and Durand, he parroted their criticisms of the Internal Surveys. He declared that the CMAs were not representative of the total Canadian population and pointed out that the figures reported in Exhibit 988B, a 1982 CMA report, were "quota samples" of urban Canadian smokers only, as opposed to samples of all Canadians.

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[174] The Bourque Report, Exhibit 1380, at pages 12-13.

[175] They both refused to consider the report from the perspective of Mr. Bourque's mandate, i.e., to analyze the Companies' knowledge, adamantly insisting on focusing only on the weaknesses of the Internal Surveys as a source of the public's knowledge, as determined from published surveys.

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[328] Mr. Ricard's 2013 comments, reflecting, as they do, those of Professors Duch and Durand, appear to be correct, but they do not cohabitate well with his 2012 testimony. At that time, he expressed much more confidence in the CMAs. The transcript of May 14, 2012 shows the following exchange at page 49:

> 33Q- After this study was made, is there a reason why you didn't check with your customers if they were ... or verify the awareness of health risks with your customers?
>
> A- Mr. Justice, it was... I don't know why we would not have spent more time specifically on that question, it was... First of all, I would have to say, just from my own personal assessment, certainly during the time I was there, **based on the level of belief that we were measuring in the marketplace through the CMA, we felt that people knew and were aware of the rest**. And so, from my own personal point of view, I didn't see any need to measure it, because we felt people were aware. (The Court's emphasis)

[329] This is clear proof that, whatever their defects in terms of survey methodology, the CMAs were seen by ITL's management as providing accurate insight into what smokers were thinking[176]. They thus reflect ITL's knowledge about the smoking public's knowledge, or ignorance, of the dangers of smoking. This is relevant in the context of the duty to inform and to our analysis of the second part of the Bourque report.

[330] The Plaintiffs argue that the Companies had to ascertain the public's level of knowledge of the dangers of smoking in order to fulfill their duty to inform. To that end, they asked Mr. Bourque to opine on the apparent objectives of the Internal Surveys.

[331] He states that the Companies' objective was not to measure the level of smokers' knowledge on an ongoing basis in order to inform them of the risks and dangers of smoking but, rather, to see if the information circulating in that regard might pose a threat to the market or affect smokers' perceptions.[177] He saw the objectives of the Internal Surveys as relating almost exclusively to marketing and production planning.[178]

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176 We remind the reader that the CMAs surveyed smokers only, not the general population.

177 *Ceci nous laisse croire que l'objectif de ces manufacturiers de tabac n'était pas de mesurer le niveau de connaissance ou la perception des fumeurs sur une base continue (afin de les informer au besoin), mais plutôt de vérifier si l'information circulant dans l'environnement devenait une menace, ou du moins en quoi elle pouvait affecter leurs perceptions*. (Exhibit 1380, at page 31).

178 Some of Mr. Bourque's comments in this regard are as follows:
En effet, nos recherches nous ont permis de comprendre que des études étaient souvent commandées en réaction à des événements externes, comme la mise en place d'une nouvelle réglementation, la publication d'un rapport lié à la santé et la cigarette ou des campagnes publicitaires anti-tabac, afin d'en mesurer les contrecoups. L'objectif de ces études réactives était de vérifier si de tels événements hors de leur contrôle pouvaient affecter négativement les perceptions des consommateurs (voir section 2.1).
Il appert aussi que le but visé par la conduite d'études à propos de certains risques et dangers reliés à la consommation des produits du tabac était de voir en quoi ces perceptions ou connaissances pouvaient avoir un impact sur les attitudes et comportements des fumeurs. En d'autres mots, on voulait savoir si et en quoi ces perceptions ou connaissances pouvaient amener les fumeurs à arrêter de fumer ou limiter leur consommation de produits du tabac. La démarche s'inscrit donc dans une logique de

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[332] This is not surprising. It coincides with what ITL's representatives consistently stated. No one ever asserted that the role of the Internal Surveys was to measure customers' knowledge of the dangers of smoking. So be it, but that does not erase the Internal Surveys' message to ITL.

[333] From the figures out of *The Canadian Tobacco Market at a Glance* reproduced in the table above, ITL would have concluded that from 52% (in 1971) to 21% (in 1989) of smokers did not feel that smoking was dangerous for anyone. The CMAs over that period reflect the same level of ignorance. They also show that it was not until 1982 that the percentage of respondents who felt that smoking was dangerous for anyone surpassed 75%. This is the level of awareness that ITL's expert, Professor Flaherty, opined is required for something to be "common knowledge"[179].

[334] It is true that the technical credibility of that data might be suspect in the eyes of an expert 30, 40 or 50 years later, but we must view this through ITL's eyes at the time. Mr. Ricard was there, and he confirmed that ITL believed the data and relied on it for important business decisions.

[335] ITL's argument that its customers were already fully informed of the risks and dangers of smoking through the media, school programmes, the medical community, family pressure and, as of 1972, the Warnings loses most of its speed after hitting up against this wall of evidence. Moreover, the Internal Surveys also made ITL aware that the Warnings were far from being major attitude changers on this point.

[336] As seen in the tables above, the degree of sensitivity of smokers increased only gradually after the introduction of the Warnings in 1972. In fact, it dropped from 59% to 56% the following year. After that, it rose only about one percent a year through 1991. Thus, as far as ITL knew, the Warnings were not the panacea it is now claiming them to be.

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suivi des mouvements du marché actuel et potentiel, afin de prévoir la demande, mais également afin d'ajuster les stratégies de marketing (voir section 2.2). (at pages 8 and 9; the Court's underlining)

À la lumière des études trouvées et présentées dans cette section, il semble que bien peu d'études mesuraient les mêmes éléments, en utilisant les mêmes questions, de manière continue dans le temps et portant spécifiquement sur la perception ou la connaissance des risques et dangers. Les compagnies de tabac dont nous avons fait mention obtenaient plutôt des données ponctuelles sur les perceptions et connaissances des consommateurs quant à certains risques et dangers reliés à la consommation de produits du tabac. (at page 29)

Ceci nous laisse croire que l'objectif de ces manufacturiers de tabac n'était pas de mesurer le niveau de connaissance ou la perception des fumeurs sur une base continue (afin de les informer au besoin), mais plutôt de vérifier si l'information circulant dans l'environnement devenait une menace, ou du moins en quoi elle pouvait affecter leurs perceptions. De plus, cette mesure permet la création et l'ajustement des stratégies marketing: les manufacturiers de cigarettes voudront positionner les différentes marques de leur portefeuille selon des dimensions relatives à la santé si celles-ci deviennent importantes pour le consommateur. (at page 31; the Court's underlining)

179 See page 5 of Professor Flaherty's Report (Exhibit 20063) for a definition of "common knowledge". In his testimony on May 23, 2013, Professor Flaherty set "more than 75%" as the threshold figure for the "vast majority" of a group to be aware of a fact, thus making it "common knowledge". In his testimony, Professor Duch preferred the figure of 85%.

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[337] Yet ITL stuck to the industry's policy of silence and made no attempt to warn what it knew to be an unsophisticated public. The Plaintiffs argue that this is a gross breach of the duty to inform of safety defects and demonstrates not just ITL's insouciance on that, but also its wilful intent to "disinform" smokers. The Court agrees.

[338] Here again, ITL's attitude and behaviour portray a calculated willingness to put its customers' well-being, health and lives at risk for the purpose of maximizing profits. There is no question that this violates the principles established in the Civil Code, both with respect to contractual and to general human relations. It also goes much further than that.

[339] It aggravates the Company's faults and pushes its actions so far outside the standards of acceptable behaviour that one could not be blamed for branding them as immoral. Moreover, as seen below in our analysis of the other Companies, they, too, are guilty of similar acts, although to a lesser degree. This is a factor to be considered in our assessment of punitive damages.

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II.D.7 COMPENSATION

[340] In the context of the present files, compensation is a process of "oversmoking" by which smokers who switch to a lower-yield brand of cigarette, i.e., lower tar and nicotine, modify their smoking behaviour in order to obtain levels of tar, and especially nicotine, closer to what they were getting from their previous brand[180]. It is generally thought to be an unconscious adjustment[181] made by "switchers" who do not get as much nicotine from their new lower-tar cigarette, since a reduction in the latter will result in a corresponding reduction in the former[182].

[341] In his expert's report, Dr. Michael Dixon for ITL spoke of compensation in the following terms:

> Many researchers claim compensation is based on the theory that smokers seek to maintain an individually determined nicotine level and that those who switch from a higher to a lower yield cigarette will smoke more intensively to compensate. The term "compensation", as related to cigarette smoking, only applies to those smokers who switch from one cigarette to another that has a different standard tar and nicotine yield to their original cigarette. Compensation can best be described by using the following hypothetical example.
>
> If a smoker switches from a product with a machine derived nicotine rating of 1 mg to one with a 0.5 mg rating and as a consequence of the switch halves his intake of nicotine, then this would be described as zero (or no) compensation. If a smoker following the switch did not reduce his/her intake of nicotine, then this would

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180 Compensation can theoretically occur in the opposite direction, i.e., where a smoker moves to a higher yield cigarette he might "undersmoke" it, but this aspect is not relevant to the present cases.

181 Although the evidence did not deal directly with the point, it appears that smokers do not compensate consciously, i.e., in a pre-meditated fashion. This seems logical, since, if it was done on purpose, it would make no sense to switch to the lower-yield brand.

182 The natural tar to nicotine ratio in tobacco smoke is about ten to one and will remain at that proportion even if the tar level is reduced, so that a reduction in tar will generally result in a proportionate reduction in nicotine.

> represent full, complete or 100% compensation. Partial (or incomplete) compensation would be deemed to have occurred if the reduction in intake was between the zero and full compensation levels.[183]

[342] Compensation can occur through a number of techniques, such as:

- Increased number of cigarettes smoked per day,
- Increased number of puffs per cigarette, resulting in smoking the cigarette "lower down", i.e., closer to the filter,
- More frequent puffs,
- Increased volume of smoke per puff: Dr. Dixon's choice as the most often used technique for compensation,
- Increased depth of inhalation per puff,
- Increased length of time holding the smoke in and
- Blocking of filter-tip ventilation holes by the fingers or lips.[184]

[343] Smoking machines do not compensate. It follows that machine-measured delivery of tar and nicotine, although allowing one to distinguish the relative strength of one brand compared to another, will not generally reflect the actual amount of tar and nicotine ingested by a smoker. In the same vein, since people's smoking habits and manners, including their degree of compensation, vary individually, the amount of tar and nicotine derived by any one smoker will be different from that of his neighbour.

[344] One cannot examine compensation without first examining the evolution of cigarette design during the Class Period.

[345] Very summarily, with the ostensible goal of reducing smokers' intake of tar, the Companies modified certain design features of their cigarettes during the 1960s, 70s and 80s. Filters became almost universal during this time, to which were often added ventilation holes in the cigarette paper to bring in air to dilute the smoke. More porous cigarette paper, expanded tobacco and reconstituted tobacco were also used to the same end. There is no need to delve into the details of these for present purposes.

[346] It is sufficient to note that these design features resulted in cigarettes whose tar and nicotine delivery, as measured by a smoking machine, were lower than before. These "lower-yield" products were labelled with descriptors, such as "light" or "mild"[185]. They had less tar, as measured by smoking machines, but they also had less nicotine, flavour and "impact". Enter compensation.

[347] People who switch to a "lighter" brand of cigarette can – and generally do – compensate, at least initially. As a result of compensation, although they might well ingest less of the toxic components of smoke than with their previous brand, they still

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183 Exhibit 20256.1, pages 14-15.

184 See Dr. Dixon's report, Exhibit 20256.1, page 21 and Dr. Castonguay's report, Exhibit 1385, at pages 50 and following.

185 We discuss the effect of these descriptors below, in section II.E.2.

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receive significantly more than would be expected from a linear application of the machine-measured reduction of tar content.

[348] Dr. Dixon opined that, although compensation occurred in many if not most cases, it was temporary and, even then, only partial: about half[186]. Thus, a smoker who changed to a cigarette showing a smoking-machine-measured reduction of tar and nicotine of 30% would only have reduced them by about 15% because of compensation. Rather than ingesting 70% of the previous amounts, the smoker would be taking in about 85%.

[349] Thus, lower-yield cigarettes end up having what could be called a "hidden delivery" of tar and nicotine. Replying to a question from the Court in this area, Dr. Dixon responded as follows:

> 910Q-Okay. All right. And I'm thinking of the effect of compensation on the smoker, and my question to you is, is full compensation a danger that should be associated with the use of low-yield cigarettes?
>
> A- Sorry, is it a danger?
>
> 911Q-Is it a danger? Is there a risk or danger associated with the use of low-yield cigarettes?
>
> A-I don't think there's any more risk or danger in their use than there is with the high-yield cigarettes. If full compensation was the norm, then there would be no point in having the low-tar cigarettes, because there would be no benefit in terms of exposure reduction and, therefore, one would not expect to see any benefit in terms of the health risk reduction.
> But if it's partial compensation, then you are seeing a reduction in exposure which, hopefully, would be reflected ultimately in a risk reduction for certain diseases.
>
> 17 912Q-But it wouldn't eliminate the risk.
>
> 18 A- It certainly wouldn't eliminate the risk, no.
>
> 913Q-It wouldn't eliminate the danger, smoking a low-yield...
>
> 21 A- Oh, of course. No no.
>
> 22 914Q-... even smoking a lower-yield cigarette?
>
> 23 A- No. I mean, a lower yield cigarette is dangerous, but maybe not quite as dangerous as a high-yield cigarette.[187]

[350] The arguments that compensation is generally partial and temporary, i.e., that after a while the switcher stops compensating, seem logical and the Court is convinced

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186 See, for example, Exhibit 40362, research published by RJRUS in 1996.
187 Transcript of September 19, 2013, at pages 273 and following.

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that the Companies believed that to be the case. Nevertheless, even with only partial and temporary compensation, there is still a hidden delivery.

[351] Given all this, should compensation or its hidden delivery be considered a safety defect in reduced tar and nicotine cigarettes and did ITL know, or was it presumed to know, of that risk or danger? If so, it would have had a duty to warn consumers about it, unless another defence applies.

[352] ITL does not deny that it was aware from very early in the Class Period that compensation occurred.[188] In fact, the proof shows that it was the Companies, either individually or through the CTMC, that warned Health Canada of the likelihood of this essentially from the beginning, as seen from the following paragraph in RBH's Notes:

> **664.** Defendants themselves advised the federal government that compensation would occur and negate at least some of the potential benefit of lower tar cigarettes for some smokers. Indeed, on May 20, 1971 the CTMC met with members of Agriculture Canada and National Health and Welfare's Interdepartmental Committee on Less Hazardous Smoking. At the meeting, in response to the Interdepartmental Committee's request for reduced nicotine levels, the CTMC warned the Interdepartmental Committee of compensation issues, including a tendency among smokers to "change smoking patterns to obtain a minimum daily level of nicotine when they switched to low nicotine brands at that this could increase the total intake of tar and gases."[189]

[353] In spite of its awareness, Health Canada embraced reduced tar and nicotine and put forth the message that, if you can't stop smoking, at least switch to a lower tar and nicotine cigarette.

[354] We are not saying that Canada was wrong in going in that direction. It reflects the knowledge and beliefs of the time, and its principal message: "STOP SMOKING", was incontestably well founded. On the other hand, Health Canada certainly appears to have been occupying the field with respect to information about reduced-delivery products.

[355] Once they had warned Health Canada of the situation regarding compensation, it is difficult to fault the Companies for not intervening more aggressively on that subject. To do so would have undermined the government's initiatives and possibly caused confusion in the mind of the consumer. Perhaps more importantly, at the time it was genuinely thought that reduced delivery products were less harmful to smokers, even with compensation.

[356] The defence set out in the second paragraph of article 1473 gives harbour to the Companies on this point and we find no fault on their part for not doing more than they did with respect to warning of the dangers associated with compensation.

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188 The Court agrees with ITL's reply (in its Appendix V) to the Plaintiffs' argument at paragraph 537 of their Notes. The BAT document cited (Exhibit 391-2M) contains little more than speculative musings and there is no indication that ITL ever took any of it seriously.

189 See Exhibit 40346.244, at page 3.

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II.D.8 THE ROLE OF LAWYERS

[357] The Plaintiffs made much of the fact that over the Class Period ITL seemed to seek prior approval from lawyers for almost every corporate decision regarding smoking and health. Its policies and practices relating to document retention/destruction, in particular, were scrutinized and implemented by lawyers, generally outside counsel, including those representing BAT and its US subsidiary, Brown and Williamson.

[358] There is nothing wrong with a large corporation "checking with the lawyers" within its decision-making process, especially for a tobacco company during the years when society was falling out of love with the cigarette. In fact, not to take this precaution in that atmosphere could have been outright negligent in certain cases. That said, there are, of course, limits as to how much a law firm should do for its client.

[359] In that vein, the Plaintiffs argue that ITL and its outside counsel crossed over the line on the question of the destruction of scientific research reports held in ITL's archives in the early 1990s. Some background information is necessary.

[360] In a 1985 "file note"[190], J.K. Wells, an in-house attorney for Brown & Williamson, advocated purging the company's scientific files of "deadwood", a term he used seven times in a two-page document. This smacked of overkill and seemed curiously out of the ordinary, all the more so in light of his admonition not to make "any notes, memo or lists" of the discarded "deadwood". Antennae twitch.

[361] Two years later, BAT lawyers expressed concern about certain aspects of the BAT group's internal documents, including research reports and research conference minutes[191]. Then, in a November 1989 memo[192], the same Mr. Wells presented a "synopsis of arguments that it is crucial to avoid the production of scientific witnesses and documents at this time, even if production were to occur in the indefinite future". Writing with reference to the trial of the constitutional challenge to the TPCA before the Quebec Superior Court, he identified the following points:

- The documents will be difficult for company witnesses to explain and could allow plaintiffs to argue that scientists in the company accepted causation and addiction;
- Company witnesses will not be prepared in order to explain the documents adequately and preserve credibility of management's statements on smoking and health and to deal with "sharp cross examination on smoking and health questions certain to be suggested by government experts"[193];
- The company's Canadian lawyers are unprepared to deal with the science or the language of the documents or to prepare or defend witnesses adequately or to cross examine opposing experts.

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190 Exhibit 1467.1.
191 Exhibit 1467.3, at pdf 2: "About three years ago we took initiatives …".
192 Exhibit 1467.2.
193 Exhibit 1467.2, at page 1.

[362] Mr. Wells went on to express concern over documents from Canada and remarks that "the Canadian case is in an especially disadvantageous posture for document production. The government is likely to go directly to the heart of the Canadian and BATCo research documents most difficult to explain".

[363] About that time, BAT was attempting to repatriate to Southampton, England all copies of all research documents emanating from its laboratories there. They seemed to have concerns similar to those expressed by Brown & Williamson, in that, as explained by its former external counsel, John Meltzer, "(BAT) was concerned that those documents may be produced in litigation, or in other situations, where there wouldn't be an opportunity to put those documents in their proper context or to explain the language that was used in them by the authors of the documents"[194].

[364] To BAT's consternation, and that does not appear to be an exaggeration, ITL was not cooperating with the repatriation. ITL's head of research and development, Dr. Patrick Dunn, was furious with the command to send all BAT-generated research reports back to England, particularly since ITL had contributed to the cost of most of those and had contractual rights to them. Negotiations ensued between the two companies.

[365] Enter Ogilvy Renault. ITL's in-house attorney, Roger Ackman, testified that he hired the Montreal law firm of Ogilvy Renault to assist him in the matter. After negotiation, it was agreed that, following the repatriation to Southampton, BAT would fax back to ITL any research report that ITL scientists wished to consult. That decided, in the summer of 1992 lawyers at Ogilvy Renault supervised the destruction of some 100 research reports in ITL's possession[195].

[366] Mtre. Ackman, whose memory was either hot or cold depending on the question's potential to harm ITL[196], made the following statements concerning his engagement of an outside law firm in this context:

> 396Q-Can you give us any reason why Imperial would involve outside counsel, or counsel of any kind, to destroy research documents in its possession?
>
> A- I hired the Ogilvy Renault firm, Simon Potter, to help me in this exercise.
>
> 397Q-Which exercise?
>
> A- The destruction of the documents. And he did most of the negotiations for us.
>
> 398Q-But what negotiations?
>
> A- With BAT.

---

194 Transcript of the examination by rogatory commission of John Meltzer filed as Exhibit 510, at page 16.

195 See the series of documents in Exhibits 58 and 59. Though the documents had been destroyed, plaintiffs in other cases managed to obtain copies of all of them and they were deposited into court-created public archives, including the Legacy Tobacco Documents Library at the University of California at San Francisco used by the Plaintiffs here.

196 The Court rejected Mtre. Ackman's motion to quash his subpoena based on medical reasons. In cross examination, it came out that ITL was paying all his expenses related to that motion.

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399Q-Negotiations for what?

A- You just said, the destruction of documents.

400Q-There was a negotiation of an agreement between...

A- I have no idea whether there was a negotiation; I wasn't part of that discussion. It was a long time ago, sir.

401Q-So you hired Simon Potter?

A- Yes, sir.

402Q-To destroy the documents?

A- I did not hire him... to meet with BAT and settle a matter.

403Q-Settling a matter implies that there is a matter; what was the matter?

A- I have no idea other than what I just said.

404Q-Did Simon Potter ever give you reason to believe that he had expertise in research documents, did he have any science background?

A- I don't know that, sir.[197]

[367] Much time was spent on this issue in the trial, but it interests us principally in relation to its possible effect on punitive damages. As such, its essence is contained in two questions:

- Was it ITL's intention to use the destruction of the documents as a means to avoid filing them in trials?
- Was it ITL's intention in engaging outside counsel for that exercise to use that as a means to object to filing the documents based on professional secrecy[198]?

[368] On the first point, it appears that this clearly was the intention, since that is exactly what ITL did in a damage action before an Ontario court. Lyndon Barnes, a partner in the law firm of Osler in Toronto who worked on ITL matters for many years, testified before us as follows:

A- I would think... probably the first case that we did an affidavit was in a case called *Spasic* in Ontario.

197 Transcript of April 2, 2012, at pages 138-139.
198 This is the Quebec term for attorney-client privilege.

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> 83Q- So did you produce the documents in that case that were destroyed in this letter? That were destroyed as identified in this letter of Simon Potter's (sic) of June nineteen fifty-two (1952)... h'm, nineteen ninety-two (1992)?[199]
>
> A- I think it would have been hard to produce documents that had been destroyed.
>
> 84Q- It would have been very hard.
>
> A- Yes.
>
> 85Q- So that's when you found out that the documents didn't exist?
>
> A- Well, no. The original documents did exist, they were at BAT.
>
> 86Q- So did you produce the original BAT documents in that case?
>
> A- No, they weren't in our control and possession.
>
> 87Q- They weren't in your control or in your possession.
>
> A- No.
>
> 88Q- And therefore, they were not produced?
>
> A- No, they weren't.[200]

[369] There is thus no doubt that ITL used the destruction as a way to avoid producing the documents, based on the assertion that they were not in its control or possession. One could query as to whether, under Ontario law, the arrangement with BAT to provide copies by fax meant that the documents were, in fact, in ITL's control, but that is not necessary. There is enough for us to conclude that ITL's actions in this regard constitute an unacceptable, bad-faith and possibly illegal act designed to frustrate the legal process.

[370] As for the second question, there is no evidence that ITL has ever raised the objection based on professional secrecy. That, however, does not speak to ITL's intentions when Mtre. Ackman decided to hire lawyers to shred the research reports. That is what is relevant here.

[371] In addition to his testimony cited above on this topic at question 396 in the transcript, Mtre. Ackman, who, we remind the reader, was ITL's top person in the matter of the destruction of these research reports and who personally engaged Ogilvy Renault, provided the following "clarification":

> 391Q-Which leads me to my next question; can you give us any reason why lawyers were involved in the destruction of research documents?

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199 Exhibit 58 in these files.

200 Transcript of June 18, 2012, at page 33.

> A- I don't have an answer for that, sir. I can't give you the specific reason, or any reason. Unless the companies agreed between themselves ... that agreement between the companies was done, that's the way it was done. [201]

[372] It is more than surprising that his recollection was so, let us say, "vague" on such a major issue, one on which he recalled many other much less important details. Later in that transcript, at page 203, he states that he hired Ogilvy Renault because "I wanted the best legal advice I could get". That was crystal clear to him, but as to why he needed such good legal advice in order to destroy research documents, he could not give specific reasons, or any reason.

[373] Mtre. Ackman's testimony cannot but leave one suspicious about ITL's motives in hiring outside attorneys to destroy documents from its research archives. Mtre. Barnes testified that Mtre. Meltzer came from England shortly before with three lists ranking the documents to be returned or destroyed. Although Mtre. Meltzer refused to answer many questions about the lists on the grounds of professional secrecy, all agreed that these lists existed.

[374] Given that, what special expertise of any sort was required to pack up the documents on the lists and ship them to BAT, much less legal expertise? Yet, instead of shipping them across the Atlantic, ITL shipped them across town. There they were held, and later destroyed, by lawyers.

[375] The litigation-based objectives of ITL in ridding itself of these documents lead inexorably to a litigation-based conclusion as to the motive for using outside lawyers to carry out the deed: ITL was attempting to shield this activity behind professional secrecy.

[376] If there could have been another plausible reason, none come to mind and, more importantly, none were offered by ITL. In fact, Mtre. Ackman, the person in charge of the exercise, and who was "concerned with the potential impact that those documents would have were they produced (in court)", as Mr. Metzer stated[202], could not suggest any other explanation.

[377] As a result, the Court is compelled to draw an adverse inference with respect to ITL's motives behind this incident. It was up to ITL to rebut this inference, yet the evidence it adduced had nothing but the opposite effect. We therefore find that it was ITL's intention to use the lawyers' involvement in order to hide its actions behind a false veil of professional secrecy.

[378] This constitutes an unacceptable, bad-faith and possibly illegal act designed to frustrate the legal process. This finding will play its part in our assessment of punitive damages.

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201 Transcript of April 2, 2012, at page 137.

202 See Exhibit 510, Mtre. Meltzer's testimony, at pages 44 and 45.

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II.E. DID ITL EMPLOY MARKETING STRATEGIES CONVEYING FALSE INFORMATION ABOUT THE CHARACTERISTICS OF THE ITEMS SOLD?

[379] The *Oxford Dictionary of English* defines marketing as "the action or business of promoting and selling products or services, including market research and advertising". Thus, the Companies' marketing activities can be divided into two main areas: market research, including surveys of various kinds, and advertising, in all its forms. We have already said much about the Companies' market research, so here we shall focus on their advertising and sponsorship activities, which seems to be the intent of the question in any event.

[380] The Plaintiffs see tobacco advertising during the Class Period as being pervasive, persuasive and fundamentally false and misleading. They explain their position in their Notes as follows:

> **695**. Tobacco promotion is inherently injurious to the consumer. The problem is the nature of the product: a useless, addictive and deadly device. It's a fault to advertise it. It's a greater fault to market it as a desirable product.
>
> **696**. It's an even greater fault to market it as a desirable product to children, who cannot be expected to have the capacity to filter out tobacco advertising from information they otherwise receive as credible and informative. The vast majority of class members became addicted while they were children. Defendants claimed that they never targeted these members when they were children, and that the only goal of their marketing was to influence their brand choice after they were over 18 and after their decision to smoke had been established (i.e. once they were addicted).
>
> **697**. The defendants used other aspects of marketing to convey false information about their products. They packaged them in colours and designs intended to undermine health concerns. They branded them with names - like "light", "smooth" and "mild" that implied a health benefit. They designed their cigarettes with features - like filters and ventilation - which changed to users' experience (sic) in ways that made smokers think these were safer products.

[381] ITL is not of the same view. Its Notes speak of the company's marketing strategies during the Class Period in the following words:

> **724**. In summary, there is no evidence that ITL employed marketing strategies which conveyed "false information about the characteristics of the items sold". Indeed, the claims asserted by Plaintiffs in support of this common question – even if they could be established on the evidence (which they cannot) – do not amount to conveyance of "false information" about cigarettes. Really, Plaintiffs' complaint is that ITL promoted cigarettes in a positive light, and committed a fault in so doing. This position has no foundation in law.
>
> **725**. The fact of the matter is that ITL's marketing of its products were at all times regulated (either by the Voluntary Codes or by legislation), were in compliance with applicable advertising standards, and contained not a single misrepresentation as to the product characteristics of cigarettes. Indeed, ITL's marketing never made any representations about the "safety" of its products, other than the express warnings that were included on all print advertising as of 1975.

> **726**. Moreover, there is absolutely no evidence in the record – from Class Members or otherwise – to substantiate Plaintiffs' bald assertions that ITL's marketing somehow misled or confused Class Members.

[382] Since it was not saying anything at all about smoking and health other than what was in the Warnings, ITL wonders how it could have conveyed false information about that. And putting that aside, what proof is there that what they did say in their advertising until it was banned in 1988 affected any person's decision to start or continue smoking?

[383] The Plaintiffs' proof on this topic was made through their expert, Dr. Richard Pollay. For the most part, the conclusions in his report (Exhibit 1381) neither surprise the Court nor particularly condemn the Companies' advertising practices. The following partial extracts are examples:

> 18.1 Advertising and promotion are selling tools – Firms spend on advertising in the belief that this will increase sales and profits over what they would be in the absence of advertising.
>
> 18.3 Advertising is carefully managed and well financed.
>
> 18.4 Ads are carefully calibrated – Some ads appeal to the young but are careful not to appear too young.
>
> 18.5 Cigarette ads are not informative – Consumers learn next to nothing about the tobacco, the filters, the health risks, etc.
>
> 18.6 Health information is totally absent – The only health information that is ever contained is just the minimum that has mandated in law (sic).
>
> 18.8 Creating "Friendly Familiarity" – Repeated exposure (to brand names and logos) would give these a "friendly familiarity" such that their risks would be under estimated.
>
> 18.9 Brand Imagery – With good advertising some brands are made to seem young, or male, or adventuresome, or "intelligent" or sophisticated, or part of the good life.
>
> 18.13 Ads designed to recruit new smokers – Strategies toward this include making brands seem "independent", "self-reliant", "adventuresome", risk-taking, etc.

[384] These are hardly troubling indictments. For the most part, they say little more than what the Companies already admit: they were not using their advertising dollars to warn consumers about the risks and dangers of smoking. As for portraying smoking in a positive light, we hold further on that advertising a legal product within the regulatory limits imposed by government is not a fault, even if it is directed at adult non-smokers[203].

[385] This said, in addition to his conclusions with respect to marketing to youth, which we consider below, the strongest accusations Professor Pollay makes are in the two following conclusions:

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[203] See section II.E.4 of this judgment.

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> 18.11 Ads designed to reassure and retain conflicted smokers – The ads for many brands seek to reassure smokers with health anxieties or to off-set their guilt for continuing to smoke. … Strategies toward this end include making brands seem "intelligent" or "sophisticated".
>
> 18.12 Ads designed to mislead. The advertising executions for many brands were explicitly conceived and designed to reassure smokers with respect to health risks. In so doing, since no cigarettes marketed were indeed safe, these ads were designed to mislead consumers with respect to their safety and healthfulness. It is also my opinion that when deployed they would indeed have a tendency to mislead.

[386] These accusations merit analysis.

[387] Concerning paragraph 18.11, a perusal of Professor Pollay's report indicates that this point centers on low-tar brands of cigarettes, for example in his paragraphs 6.6, 14.4 and 14.5. In the section of this judgment examining Delhi Tobacco[204], we conclude that Health Canada was the main advocate of reduced-delivery products in conjunction with its "if you can't stop smoking, at least switch to a lower tar and nicotine cigarette" campaign.[205] We also note that the Companies were under pressure to cooperate with that by producing low-tar brands.

[388] Under such circumstances, it was simply normal business practice to research the market for such brands. If that research showed that some smokers switched as a way of easing their guilt or anxiety about smoking, it would be normal to use that knowledge in developing advertising for them. The Court sees no fault in that.

[389] As for paragraph 18.12, Professor Pollay's analysis of ads that might have been misleading does not focus on ones that were misleading with respect to smoking and health so much as ones that could have misled with respect to certain attributes of a cigarette brand. His long study in his chapter 10 of the "less irritating" claims for Player's Première is a good example of that. He does not connect that situation to health issues.

[390] It is not the Court's mandate to evaluate the general accuracy of the Companies' ads or their degree of compliance with advertising norms and guidelines. To be relevant here, the misleading content of ads must be with respect to smoking and health.

[391] In that regard, Professor Pollay concentrates on the issue of "light" and "mild" descriptors. The Court will deal with that below.

[392] But first, one cannot examine marketing in this industry without considering the history of the restrictions imposed on the Companies' marketing activities through their own initiatives: the Voluntary Codes.

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[204] See section II.C.3 of this judgment.

[205] See also Exhibits 20076.13 and 20119, where Health Canada foresees using the Companies' advertising to promote "less hazardous" low tar and nicotine products.

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II.E.1 THE VOLUNTARY CODES

[393] The Plaintiffs see the Voluntary Codes as a gimmick that the Companies adopted principally with the goal of staving off more stringent measures by the Canadian government. As they say in their Notes:

> **698**. Peculiar to the world of cigarette marketing was the adoption by the defendants of their own set of rules to validate their marketing actions. As will be shown later, the Code was a ruse to prevent consumers from receiving genuine protection in the form of government regulation. But it was also a public relations deceit: the defendants never had the intention to follow most of its rules, nor did they follow them.

[394] Starting in 1972[206], the Companies agreed among themselves to the first of a series of four "Cigarette and Cigarette Tobacco Advertising and Promotion Codes", with the participation and approval of the Canadian Government (the "**Voluntary Codes**" or the "**Codes**")[207]. The first rule of the first Voluntary Code excluded cigarette advertising on radio and television, and that code imposed several other restrictions on advertising. Those limitations changed little over the next 16 years.

[395] In 1988 the Government passed the TPCA, which for the first time imposed a total ban on the advertising of tobacco products in Canada by section 4(1): "No person shall advertise any tobacco product offered for sale in Canada". JTM and ITL successfully challenged that law and the relevant parts of it, including section 4(1), were ruled unconstitutional in 1995.

[396] Two years later the government passed the *Tobacco Act*[208], containing what could be considered a softening of the prohibition, although it is doubtful that the Companies take much comfort from it. Section 22(1), remains in force today and reads as follows:

22.(1) Subject to this section, no person shall promote a tobacco product by means of an advertisement that depicts, in whole or in part, a tobacco product, its package or a brand element of one or that evokes a tobacco product or a brand element.[209]	**22.(1)** Il est interdit, sous réserve des autres dispositions du présent article, de faire la promotion d'un produit du tabac par des annonces qui représentent tout ou partie d'un produit du tabac, de l'emballage de celui-ci ou d'un élément de marque d'un produit du tabac, ou qui évoquent le produit du tabac ou un élément de marque d'un produit du tabac.

[397] Despite Canada's legislative initiatives as of 1988, it appears that the Codes remained in force throughout the Class Period, with modifications being made at least

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206 There was, in fact, a 1964 "Cigarette Advertising Code": Exhibit 40005B. It is certainly the forerunner of the later Codes in several aspects, but the evidence is not clear as to whether Canada was consulted on its composition.

207 Filed as Exhibits 20001-20004. Certain extracts are reproduced in Schedule I to the present judgment.

208 S.C. 1997, c. 13.

209 The other provisions of section 22 of the Tobacco Act appear to have been used to such a limited extent that it is not necessary to analyze them for present purposes. They are reproduced in Schedule H to the present judgment.

twice, once in 1975 and again in 1984. As well, they covered more than strictly advertising. It is noteworthy that they were the vehicle through which the Warnings were introduced, and modified at least once. Concerning advertising practices, they embraced, in particular, the following concepts[210]:

- no cigarette advertising on radio and television;
- no sponsorship of sports or other popular events;
- cigarette advertising will be solely to increase individual brand shares (as opposed to growing the overall market);
- cigarette advertising shall be addressed to "adults 18 years of age and over";
- cigarette advertising shall not make or imply health-related statements, nor claims relating to romance, prominence, success or personal advancement;
- cigarette advertising shall not use athletes or entertainment celebrities;
- models used in cigarette advertising must be at least 25 years of age.

[398] The Companies' witnesses assured the Court that they scrupulously complied with the Codes and the evidence, in fact, turns up very few contraventions. Moreover, on the rare occasion when a Company did stray from the agreed-upon course, the others were quick to call it to order, since it was perceived that any delinquency in this regard could lead to an unfair advantage over one's competitors.

[399] In any event, this is not the forum to police the Companies' compliance with the Voluntary Codes. The Court's concern here is limited to the conveyance of false information about the characteristics of cigarettes with respect to smoking and health. We see nothing in the Codes that does that.

[400] There could be some truth, however, in the Plaintiffs' charge that the Codes were nothing more than "a ruse to prevent consumers from receiving genuine protection in the form of government regulation". The Companies certainly viewed the Codes as a means to avoid legislation in the area.

[401] On the other hand, the government understood that and tried to use it to the advantage of the Canadian public. Marc Lalonde, Minister of Health from 1972 to 1977, testified that he used the threat of legislation as a means of getting the Companies to publish Warnings that delivered the message that Canada thought was in the public interest[211].

[402] Although Canada had its eyes open when negotiating the Codes, it cannot be denied that the Companies were attempting to divulge through them as little as possible about the dangers of their products. It is probable that part of their overall strategy of silence included making concessions in order to avoid being obliged to say more. Those concessions form the nucleus of the Voluntary Codes.

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210 The Voluntary Codes deal at length with Warnings.

211 See the transcript of June 17, 2013, at pages 51, 139, 153. See also footnote 57 to the present judgment concerning Minister Munro's actions.

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[403] As such, we find that the Companies did not commit a fault by creating and adhering to the Voluntary Codes.

II.E.2 "LIGHT AND MILD" DESCRIPTORS

[404] The Plaintiffs argue that the Companies championed the use of descriptors, such as "light", "mild", "low tar, low nicotine", etc., in association with reduced-delivery cigarettes[212] as a marketing strategy to mislead smokers into thinking that those products were safer than ones that delivered more tar.

[405] It might surprise to learn that such terms as "light" and "mild" had no defined meaning within the industry and were not based on any absolute scale of delivery. The concepts were very much brand-family specific. All they indicated was that the "light" version of a brand delivered less machine-measured tar and nicotine than the "parent product" within that brand family. In other words, Player's Lights delivered less tar and nicotine than Player's Regulars and nothing more.

[406] As such, everything depended on the tar and nicotine contents of the parent product within that brand family. In fact, a "light" version of a very strong brand often delivered more tar and nicotine than the "regular" version of a less strong brand, whether of the same Company or of one of the other Companies.[213]

[407] The use of these descriptors within brand names affected smokers' choice of products. Fairly quickly, smokers came to rely on them more than on the tar, nicotine and carbon monoxide rankings printed on the packs. The Plaintiffs see fault in the fact that the Companies used them without explaining them and never warned smokers that reduced-delivery cigarettes were still dangerous to health. They fault the Companies as well for "colour coding" their packs: using lighter pack colours to suggest milder products[214].

[408] In his report, Professor Pollay states:

> 9.2 Perceptions are Key. Because there are no standards or conventions to the use of the terminology describing cigarettes in Canada, consumers are confused and this makes consumer "strength perceptions" at variance with, and more important than, actual tar deliveries.

[409] He opines that ITL knew that the use of the term "lights" might be misleading. He bases this on the fact that BAT had a 1982 document stating that "There are those who say that either low tar is no safer or, in fact, low tar is more dangerous". BAT expressed fear that wide publication of this type of opinion could undermine "the credibility of low tar cigarettes".[215]

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212 Those containing lower tar and nicotine than traditional cigarettes.

213 In section II.D.7 of the present judgment we analyze the effect of compensation and how it can distort the actual amount of tar and nicotine ingested as opposed to machine-measured amounts, and we shall not repeat that here.

214 Exhibit 1381, section 9.5.

215 Exhibit 1381, section 11.2.1.

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[410] Early on, Canada opposed the use of the terms "light" and "mild". Health Minister Lalonde testified that the Ministry found the terms to be confusing. A May 1977 letter from Dr. A.B. Morrison of Health Canada to Mr. Paré, representing the CTMC, presents a concise summary of the issue:

> May I suggest that the Council (the CTMC) review its position on the use of such terminology on packages and in advertising so that we may discuss it along with other matters in our forthcoming meeting. Notwithstanding the fact that there are no standards for determining the appropriateness of the terms "mild" or "light" from a public health point of view, these would appear to be inappropriate when applied to cigarettes having tar and nicotine levels exceeding 12 milligrams of tar and 0.9 milligrams of nicotine. We do not think that the appearance of tar and nicotine levels on packages or in advertisements for cigarettes which are marketed as "light" and "mild" overcomes the risk that consumers will associate these terms with a lower degree of hazard. Inevitably, I believe, some people will come to the conclusion that cigarettes with quite high tar and nicotine levels are among the more desirable from a health point of view.[216]

[411] It appears that Canada would have preferred calling reduced-delivery products something along the lines of "low tar cigarettes".[217] It is not immediately obvious that this would have been less misleading. Though they might have been lower in tar than other products within their brand family, these products were not generally low in tar in an absolute sense and they still brought risk and danger to those who smoked them.

[412] There seems to have been a fair degree of confusion among all concerned as to how to market reduced-delivery products to the consumer. Accepting that, the Court does not see any convincing evidence that the use of the descriptors "light" or "mild", in the context of the times, was any more misleading than any other accurate terms would have been, short of adding a warning containing all the relevant information that the Companies knew about their products.

[413] As such, we do not find a fault in the Companies' use of those descriptors.

II.E.3 DID ITL MARKET TO UNDER-AGE SMOKERS

[414] The Plaintiffs made much of what they allege to be a clear policy by the Companies of marketing to underage youth, i.e., to persons under the "legal smoking age" in Québec as it was legislated from time to time ("**Young Teens**")[218]. That age moved from 16 years to 18 years in 1993.[219]

[415] Two of the conclusions in Professor Pollay's report (Exhibit 1381) refer specifically to youth marketing:

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216 Exhibit 50005.

217 See Exhibits 20076.13, at page 2 and 20119, at page 3.

218 The term "legal smoking age" is a misnomer; it is more a "legal selling age". The law does not prohibit smoking below a certain age but, rather, prohibits the sale of cigarettes to persons below a certain age. Thus, the "legal age" refers to the minimum age of a person to whom a vendor may legally sell cigarettes.

219 See *Tobacco Sales to Young Persons Act*, section 4(1) – Exhibit 40002B.

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> 18.4 Ads are carefully calibrated. Guided by research and experience ads are carefully crafted. For examples, some ads appeal to the young, but are careful not seem too young; some ads portray enviable lifestyles, but rely on those which consumers aspire to and believe to be attainable; some ads show people associated with athletic activities, but are careful to show them in a moment of repose, lest the ad invoke associations of breathlessness.
>
> 18.13 Ads designed to recruit new smokers. The marketing and advertising strategies of Canadian firms were conceived to attract viewers to start smoking. This was done primarily by associating some brands of cigarettes with lifestyle activities attractive to youth, and to associate these brands with brand images resonant with the psychological needs and interests of youth. Strategies toward this end made brands seem "independent", "self-reliant", "adventuresome," "risk-taking," etc.

[416] Professor Pollay accurately notes that the "younger segment" of the population is one that was of particular interest for all the Companies. He cites a number of internal documents attesting to that, including the following extracts from 1989 memos, the first from ITL and the second from RJRUS:

> I.T.L. has always focused its efforts on new smokers believing that early perceptions tend to stay with them throughout their lives. I.T.L. clearly dominates the young adult market today and stands to prosper as these smokers age and as it maintains its highly favorable youthful preference.
>
> The younger segment represents the most critical source of business to maintain volume and grow share in a declining market. They're recent smokers and show a greater propensity to switch than the older segment. Export has shown an ability to attract this younger group since 1987 to present.[220]

[417] There are many documents in which the Companies underline the importance of the "young market" or the "younger segment", without specifying what that group encompasses. Several documents do, however, show that it can extend below the legal smoking age. For example, Dr. Pollay cites a 1997 RBH memo discussing "Critical Success Factors" that states: "Although the key 15-19 age group is a must for RBH, there are other bigger volume groups that we cannot ignore".[221]

[418] ITL denies ever targeting Young Teens and indicates that to do so would be neither appropriate nor tolerable (Notes, para. 614). Nevertheless, they query the legal relevance of the issue in the following terms (Notes, para. 611):

> However, as a preliminary matter, the legal significance of such an allegation is not plainly evident. [ ] There is no free-standing civil claim for "under-age marketing". No fault can be established on such a practice alone, and thus no liability can be imposed. [ ] Rather, they apparently urge this Court to find that "youth marketing" is both a fault and an injury – in and of itself – without any legal or factual basis for advancing such a position.

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220 Exhibit 1381, at page 14.
221 Exhibit 1381, at page 14.

[419] The evidence is not convincing in support of the allegation of wilful marketing to Young Teens. There were some questionable instances, such as sponsorships of rock concerts and extreme sports but, in general, the Court is not convinced that the Companies focused their advertising on Young Teens to a degree sufficient to generate civil fault.

[420] This said, the evidence is strong in showing that, in spite of pious words[222] and industry marketing codes[223] to the contrary, some of the Companies' advertising might have borne a sheen that could appeal to people marginally less than 18 years of age[224]. That, however, cannot be an actionable fault, given that the federal and provincial legislation in force allowed the sale of cigarettes to anyone 16 years of age or older until 1993 and that from 1988 to 1995 the Companies were not advertising at all.

[421] It is true that the Companies sought to understand the consumption practices of Young Teens in studies such as RJRM's Youth Target Study in 1987 and ITL's Plus/Minus projects and its Youth Tracking Studies. In fact, the 1988 version of the latter looked into "the lifestyles and value systems of young men and women in the 13 to 24 age range"[225]. As well, a number of the Companies' marketing-related documents and surveys include age groups down to 15-year-olds[226].

[422] The Companies explain that this was to coincide with Statistics Canada's age brackets, which appears to be both accurate and reasonable. They also explain that, in the face of the reality that many young people under the legal purchasing age did nonetheless smoke[227], they needed to have an idea of the incidence in that age group in order to plan production amounts, as they did with all other age groups. This is not, in itself, a fault.

[423] There is also the fact that, as discussed above, the Voluntary Codes stipulated that "Cigarette advertising shall be addressed to adults 18 years of age and over". None of the Companies would permit a competitor to gain an advantage by breaking the rules

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222 See the discovery of John Barnett, president of RBH, at Exhibit 1721-080529, at Question 63 and following.

223 See, for example, Rule 7 of the 1975 Voluntary Code at Exhibit 40005G-1975: "Cigarette or cigarette tobacco advertising will be addressed to adults 18 years of age or over and will be directed solely to the increase of cigarette brand shares". The latter point implies that it will not target non-smokers.

224 Company marketing executives were adamant that the Companies always respected the provisions of the Voluntary Codes, including the prohibition against advertising to persons under 18 years age as of 1972. They also admitted that it is inevitable that "adult" advertising would be seen by Young Teens.

225 See Exhibit 1381, at pages 40-41.

226 ITL's two monthly surveys, the Continuous Marketing Assessment and the Monthly Monitor, regularly canvassed smokers as young as 15 years old, at least until the legal age of smoking was increased to 18. One 1991 survey relating to Project Viking shows that consultants for ITL compiled statistics on age segments going as low as "eight or under", but this is clearly an anomaly. See Exhibit 987.21A, pages 33 and 35.

227 Table 18-1 of Exhibit 987.21A (page 35 PDF) indicates that about 24% of Quebec smokers started smoking "regularly" at 14 years of age or less, with another 11.1% and 15.7% starting at 15 and 16 years old, respectively, for a total of 50.8%. Another ITL study (Exhibit 139) indicates that "2. Although about 20% start before 15, 30% start after the age of 18", i.e., that 70% start at 18 years of age or less.

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imposed by the Codes and the inter-company policing in that regard was most attentive, as was the surveillance done by groups like the Non-Smokers Rights Association[228].

[424] This said, it is one thing to measure smoking habits among an age group and another to target them with advertising. Here, the proof does not support a finding that ITL, or the other Companies, were guilty of such targeting.

[425] Let us be clear. Were there adequate proof that the Companies did, in fact, target Young Teens with their advertising, the Court would have found that to be a civil fault. If it is illegal to sell them cigarettes, by necessary extension, it must be, if not exactly illegal, then certainly faulty - dare one say immoral - to encourage them to light up[229].

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II.E.4 DID ITL MARKET TO NON-SMOKERS

[426] Dr. David Soberman was called by the Companies as an expert witness in the area of marketing[230]. His task was to advise whether JTM's advertising over the Class Period had the goal of inducing youth or non-smokers to start smoking, and whether that advertising had the intention or effect of misleading smokers about the risks of smoking.

[427] On "starting" generally, he states at page 2 of his report (Exhibit 40560) that there is no suggestion that JTM designed marketing to target adult non-smokers and that there is "no support for the premise that JTIM's marketing had any impact on decisions made by people in Quebec to start smoking when they would not otherwise have done so". He attributes "no statistically significant role" to tobacco marketing in the decision to start smoking: "the evidence is consistent with the expected role of marketing in a mature market".

[428] His sees the exclusive role of advertising in a mature market, like the one for cigarettes, as being to assist a company in "stealing" market share from competitors, as well as in maintaining its own market share. This is reflected in the Voluntary Codes' provision to the effect that advertising should be "directed solely to the increase of cigarette brand share"[231].

[429] He refused to believe that attractive cigarette ads, even though they might have the primary goal of increasing market share, would also likely have the effect of attracting non-smokers – of all ages – to start smoking. He reasons at page 3 that "Tobacco marketing is unlikely to be relevant to, and is therefore likely largely to be ignored by, non-smokers (unless they have an independent, pre-existing interest in the product category)".

[430] After reviewing much of JTM's advertising planning and execution during the Class Period for which there was documentation, i.e., after RJRUS's acquisition of the company, he opines at page 4 that he does "not believe that it was either the intention or the

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228 See, for example, Exhibits 40407 and 40408.

229 The witnesses, including essentially all the former executives of the Companies, were unanimous in declaring that it would be wrong to encourage Young Teens to start smoking. In fact, John Barnett, the president of RBH, extended this taboo even to adult non-smokers: "Because it wouldn't be the right thing to do" (Exh 1721-080529, at Question 63 and following).

230 Although he was called by JTM, his evidence is relevant to the situation of all the Companies.

231 See, for example, Rule 7 of the 1975 code: Exhibit 40005K-1975. All the codes are produced in the 40005 series of exhibits.

effect of JTIM's marketing to mislead smokers about the risks of smoking, to offer them false reassurance, or to encourage those who were considering quitting not to do so".

[431] The Court cannot accept Dr. Soberman's view, although much of what he says, in the way he phrases it, is surely true. It is simply too unbelievable to accept that the highly-researched, professionally-produced and singularly-attractive advertising used by JTM under RJRUS, and by the other Companies, neither was intended, even secondarily, to have, nor in fact had, any effect whatsoever on non-smokers' perceptions of the desirability of smoking, of the risks of smoking or of the social acceptability of smoking. The same can be said of the effect on smokers' perceptions, including those related to the idea of quitting smoking.

[432] His testimony boils down to saying that, where a company finds itself in a "mature market", it loses all interest in attracting any new purchaser for its products, including people who did not use any similar product before. This flies so furiously in the face of common sense and normal business practice that, with respect, we must reject it.

[433] Hence, the Court finds that, perhaps only secondarily, the Companies' targeted adult non-smokers with their advertising. So be it, but where is the fault in that? Not only did the law allow the sale of cigarettes to anyone of a certain age, but also the Companies respected the government-imposed limits on the advertising of those products.

[434] There is no claim based on the violation of those limits or, for that matter, on the violation of any of the Voluntary Codes in force from time to time. Consequently, we do not see how the advertising of a legal product within the regulatory limits imposed by government constitutes a fault in the circumstances of these cases.

[435] This is not to say that the Companies' marketing of their products could not lead to a fault. The potential for that comes not so much from the fact of the marketing as from the make-up of it. For a toxic product, the issue centers on what information was, or was not, provided through that marketing, or otherwise. That aspect is examined elsewhere in this judgment, for example, in section II.D.

II.E.5 DID THE CLASS MEMBERS SEE THE ADS?

[436] The Companies insist that the Plaintiffs must prove that each and every Member of both Classes saw misleading ads that would have caused him or her to start or to continue smoking. Like a tree falling in an abandoned forest, can advertising that a plaintiff does not hear make any noise? Or cause any damage?

[437] In view of the meagre findings of fault on this Common Question, it is not necessary to go into great detail as to why we reject the Companies' arguments on this point. Summarily, let us say that we would simply follow the same logic the Companies' historians espoused: there were so many newspaper and magazine articles about the dangers of smoking that people could not have avoided seeing them. For the same reason, it seems obvious that people could not have avoided seeing the Companies' ads appearing alongside those articles in the very same newspapers and magazines.

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II.E.6 CONCLUSIONS WITH RESPECT TO COMMON QUESTION E

[438] We find no fault on the Companies' part with respect to conveying false information about the characteristics of their products. It is true that the Companies' ads were not informative about smoking and health questions, but that, in itself, is not necessarily a fault and, in any event, it is not the fault proposed in Common Question E.

II.F. DID ITL CONSPIRE TO MAINTAIN A COMMON FRONT IN ORDER TO IMPEDE USERS OF ITS PRODUCTS FROM LEARNING OF THE INHERENT DANGERS OF SUCH USE?

[439] The relevance of this question is not so much in determining fault as in finding the criteria to justify a solidary (joint and several) condemnation among the Companies under article 1480 of the Civil Code.[232]

[440] As to the facts, if there was a "common front" among the Companies, it seems logical to assume that the CTMC, the successor to the Ad Hoc Committee, would have served as the principal vehicle for it. We shall thus analyze the role of the CTMC in some detail but, before going there, let us examine an event that took place even before the creation of the Ad Hoc Committee in 1963 that, in hindsight, appears to have been the genesis of inter-Company collaboration in Canada: the "Policy Statement".

II.F.1 THE 1962 POLICY STATEMENT

[441] In October 1962 the presidents of all eight (at the time) Canadian tobacco products companies signed a document entitled the "Policy Statement by Canadian Tobacco Manufacturers on the Question of Tar, Nicotine and Other Tobacco Constituents That May Have Similar Connotations" (Exhibits 154, 40005A). Among the signatories were ITL, Rothmans of Pall Mall Canada Limited, Benson & Hedges (Canada) Ltd. and Macdonald Tobacco Inc.

[442] The Policy Statement followed closely on the heels of the publication by the Royal College of Physicians in Great Britain of its report on Smoking and Health in 1962 (Exhibit 545). The Royal College's analysis concluded that:

> 41. The strong statistical association between smoking, especially of cigarettes, and lung cancer is most simply explained on a causal basis. This is supported by compatible, though not conclusive, laboratory and pathological evidence …[233]

[443] Reflecting the heightened awareness of a potential causal link between smoking and disease, two companies, Benson & Hedges and Rothman, who were not yet merged, started advertising certain of their brands with reference to their relatively lower levels of tar compared with other companies' products. This appears to have been the fuse that ignited the move by ITL's president, Edward Wood, to embark on the Policy Statement initiative.

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[232] The Plaintiffs also refer to the collaboration between the Companies and their respective parent or *de facto* controlling companies in England and the United States. The obvious collaboration between such related companies is not relevant to the consideration at play for the application of article 1480 and the Court will not analyze that aspect in the present context.

[233] Exhibit 545, at page 27.

[444] For its part, the "Policy Statement" is a one-paragraph undertaking, with a five-point preamble and a six-point appendix. It reads as follows:

> We, the undersigned, (company name) conceive it to be in the public interest to agree to refrain from the use, direct or implied, of the words tar, nicotine or other smoke constituents that may have similar connotations, in any and all advertising material or any package, document or other communication that is designed for public use or information.[234]

[445] The reason behind such a policy is ostensibly set out in the preamble to the document, particularly at item 5 thereof. The preamble reads:

> 1. Whereas there has been wide publicity given to studies and reports indicating an association between smoking and lung cancer;
> 2. Whereas the conclusions reached in these studies and reports are based essentially on statistical data;
> 3. Whereas no cause-and-effect relationship has been found through clinical or laboratory studies;
> 4. Whereas research on an international basis is being continued on an intensified scale to determine the true facts about smoking;
> 5. Whereas any claim, reference or use in any manner in advertising of data pertaining to tar, nicotine or other smoke constituents that may have similar connotations may be misleading to the consumer and therefore contrary to the public interest;

[446] The primary concern expressed there refers to misleading the consumer and acting contrary to the public interest. That, however, do not appear to be the dominant motivator of Mr. Wood. In his letter urging the presidents of the other companies to adopt the proposed policy (Exhibit 154A), he seems much more preoccupied with avoiding both the suggestion that the industry knew there was a connection between smoking and hazards to health as well as the spectre of government intervention:

> There is no doubt in my mind that we as manufacturers contribute to the public apprehension and confusion by reference to tar and nicotine in our advertising. If our desire is to reassure the smoker, there is the real danger of misleading him into believing that we as manufacturers know that certain levels of tar and nicotine remove the alleged hazard of smoking. In so doing I believe we are performing a disservice to the smoker and to ourselves for we are assisting in the creation of a climate of fear that is contrary to the public interest and, incidentally, damaging to the entire industry.
>
> Moreover, I am quite clearly of the conviction that to permit tar and nicotine and the public apprehension associated with it to become an area of competitive advertising will, in due course, compel government authority to take a firm stand on this matter. In the hope that we as leaders of our industry can prevent such intervention by agreeing to take the necessary steps to keep our own house in order, I have drafted and attach to this letter a statement of policy to which I would urge your agreement.

[234] Exhibit 154.

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[447] The Appendix to the Policy Statement opens with the question: "If asked by the press or other media to comment on specific 'Health Attacks' on the industry what is the action to be taken?".[235] Its contents are also relevant to the issue of collusion among the Companies in that, as the sixth point specifies, these documents "form the common basis for comments at the present time". The Appendix reads as follows:

> 1. Individual companies are completely free to comment on the general subject of smoking and health, as their knowledge dictates and as prudence indicates, when asked by responsible outside sources. Volunteering or stimulating comment will be avoided.
> 2. Any comments will deliberately avoid the association of a brand or a group of brands with health benefits.
> 3. Any comments will deliberately avoid the promotion of health benefits of types of tobacco products (i.e. pipe tobacco or cigars) as compared to cigarettes, or vice versa.
> 4. Information on smoke constituents of a particular brand or a group of brands will not be given.
> 5. Some consideration will be given to Canadian comments as they relate to the smoking and health problem in the English-speaking world and elsewhere.
> 6. The attached Memorandum on Smoking and Health will form the common basis for comments at the present time.

[448] The Policy Statement was renewed in October 1977, although not in the exact form as in the original. Appearing to confirm the Plaintiffs' assertion that this was a "secret agreement", the Companies specified that the agreement was binding on them but it would not become part of the Voluntary Codes[236].

[449] Thus, it appears to be incontrovertible that, by adhering to the Policy Statement, these companies colluded among themselves in order to impede the public from learning of health-related information about smoking, a collusion that continued for many decades thereafter. They thereby jointly participated in a wrongful act that resulted in an injury, which is a criterion for solidary liability under article 1480 of the Civil Code.

[450] The preamble to the Policy Statement also provides a preview of the industry's mantra for the coming decades: studies and reports based on statistical data do not provide proof of any cause-and-effect relationship between smoking and disease - only clinical or laboratory studies can credibly furnish such proof. In fact, even when the CTMC began to admit that smoking "caused certain health risks" in the late 1980s[237], it and the Companies continued to sow doubt by insisting that science had never identified the physiological link between smoking and disease.

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235 Exhibit 154B-2M.
236 Exhibit 1557, at page 12.
237 Testimony of William Neville: transcript of June 6, 2012, at page 45.

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II.F.2 THE ROLE OF THE CTMC

[451] The Ad Hoc Committee appears to have been created at a meeting of the Canadian tobacco industry held at the Royal Montreal Golf Club in August of 1963. The purpose of the meeting was to prepare the industry's representations to the conference on smoking and health convened by Health and Welfare Canada for November of that year: the LaMarsh Conference.

[452] The US public relations firm, Hill & Knowlton, attended and counselled the Companies, as it had already been doing for years in the United States. In fact, the same representative, Carl Thompson, also attended the now-infamous meeting at the Plaza Hotel in 1953 where the scientific-controversy strategy was created by the US tobacco presidents[238].

[453] At the LaMarsh Conference, several executives of Canadian tobacco companies, mostly from ITL, presented the position of the Canadian tobacco industry on the question of the link between smoking and disease. As opposed to the Policy Statement, which was not announced in the media, in making these presentations the industry was publicly acting with one voice[239].

[454] As appears from the press release issued by the Ad Hoc Committee on November 25, 1963 (Exhibit 551A), its spokesperson, John Keith, the president of ITL, toed the industry line and preached the scientific controversy and the lack of hard scientific proof of causation. Here is the summary of the committee's presentation, as reported in that press release:

> Any causal relationship of smoking to these diseases is a disputed and open question, according to the Industry which cited the findings of scores of medical scientist throughout the world. Among the points made were:
>
> - Exaggerated charges against smoking are frequently repeated but remain unproved.
> - Knowledge of lung cancer is scanty.
> - Statistical studies on smoking and disease are of questionable validity.
> - Many environmental factors affect lung cancer incidence and mortality.
> - Chemical and biological experiments have completely failed to support an association between smoking and lung cancer.
> - Examination of smokers' lungs after death from causes other than lung cancer usually reveals no evidence of pre-cancerous conditions.

[455] In light of the Companies' numerous objections as to the relevance of the situations in the US and UK, it is ironic to note that both the trade associations and the Companies regularly sought out the assistance and expertise of US and British tobacco industry representatives and consultants in preparing the Canadian industry's position, *inter alia*, for presentation to government inquiries. A good example of this is seen in a 1964 memo by Leo Laporte of ITL:

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238 Transcript of November 28, 2012, Professor Proctor, at pages 30 and following.

239 See Exhibit 551C, at pdf 2.

> In the preparation of the pertinent scientific information, we will undoubtedly use the services of Carl Thompson of Hill & Knowlton, Inc., New York. H & K were largely responsible for the preparation of our brief on scientific perspectives presented on behalf of the Canadian Tobacco Industry to the Conference on Smoking and Health of the Department of National Health and Welfare in 1963. We will also seek whatever information and guidance we can obtain from the Council for Tobacco Research in New York, as well as from our friends in the U.S. and, if necessary, the U.K.[240]

[456] Some five years later, in front of the Isabelle Committee of the House of Commons, the Companies once again acted in unison through the Ad Hoc Committee, with regular assistance from US industry representatives. There the Ad Hoc Committee, this time through the mouthpiece of ITL's then president, Paul Paré, continued the same message that the industry had been voicing for several years, as seen in a press release issued the day of Paré's testimony:

> In a fully-documented brief to the Standing Parliamentary Committee on Health, Welfare and Social Affairs, the Industry made these points:
>
> 1 - There is no scientific proof that smoking causes human disease;
>
> 2 - Statistics selected to support anti-smoking health charges are subject to many criticisms and, in any case, cannot show a causal relationship.
>
> 3 - Numerous other factors, including environmental and occupational exposures, are suspect and being studied in relation to diseases allegedly linked with smoking;
>
> 4 – "Significant beneficial effects of smoking," as recognized by the US Surgeon General's report, are usually overlooked and should be given consideration.
>
> 5 - Measures being proposed for control of tobacco and its advertising and marketing are not warranted, would have serious adverse effects, and would create dangerous precedents for the Canadian economy and public.[241]

[457] Some of these types of statements, carefully worded as they are, are technically true when taken on a point-by-point basis. For example, it is accurate to say that other factors are suspected as causes of certain smoking-associated diseases and that science had not, and still has not, explained the specific causal mechanism between smoking and disease. On the other hand, some of them are only partly true or, on the whole, patently false.

[458] It is the overall look and feel of the message, however, that most violates the Companies' obligation to inform consumers of the true nature of their products. By attempting to lull the public into a sense of non-urgency about the health risks, this type of presentation, for there were many others, is both misleading and dangerous to people's well-being.

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240 Exhibit 1472, at pdf 1-2; see also Exhibits 544D, 544E, 603A, 745 and 1336 at pdf 2. It is also revealing that the CTMC often circulated, cited and relied on publications of the Tobacco Institute, the US tobacco industry's trade association. See, for example, Exhibits 486, 964C and 475A.

241 Exhibit 747, at pdf 1-2.

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[459] Strong evidence existed at the time to support a causal link between cigarettes and disease and it was irresponsible for the Canadian tobacco industry to attempt to disguise that Sword of Damocles. By working together to this end, the Companies conspired to impede the public from learning of the inherent dangers of smoking and thereby committed a fault, a fault separate and apart from – and more serious than - that of failing to inform.

[460] As for the Isabelle Committee, in spite of the industry's polished representations, it issued a report (Exhibit 40347.11) advocating recommendations that read like a list of the Companies' worst nightmares, at least for the time. Yet Dr. Isabelle and the other members did nothing much more than consider evidence easily available to anyone wishing to consider the question. In applying that evidence, their common sense approach to the risks of smoking - and the conclusions to which this so obviously led - defy rebuttal even over forty years later:

> However, it is perhaps best to consider the relationship between cigarette smoking and disease in its simplest terms - the fact that cigarette smokers have an increased overall death rate. This observation, made in various studies in different parts of the world, depends only on counting deaths, is completely independent of diagnosis and, thereby, any argument about improved diagnostic skills and errors or changes in reporting and classification of deaths between various places and times. It is only necessary to compare the numbers of deaths among smokers and non-smokers.[242]
>
> […]
>
> These findings would appear to be sufficient, from a public health viewpoint, to decide that cigarette smoking is a serious hazard to health and should be actively discouraged. They are, nevertheless, buttressed by the fact that the increased death rates of cigarette smokers are largely due to diseases of the respiratory and circulatory systems which are the systems that are intimately exposed to cigarette smoke or its components. Also, death rates from lung cancer, chronic bronchitis and emphysema and coronary heart disease increase with the number of cigarettes smoked and decrease when smoking is discontinued, thus indicating a dose-response relationship[243].

[461] One cannot but be amazed that the truly brilliant minds running the Companies at the time were apparently unable, even when grouping their wisdom and intelligence together within the CTMC, to work out such a straightforward syllogism. In fact, it mocks reason to think that they did not.

[462] Nevertheless, the publication of that report in December 1969 renewed and refined the message of the LaMarsh Conference of some six years earlier. In addition, it contained pages of recommendations and proposed legislation to assist in moving towards, if not a solution, then at least a lessening of the problem that was causing the sickness and death of thousands of Canadians every year.

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242 Exhibit 40347.11, at pdf 22.
243 *Ibidem*, at pdf 25.

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[463] The reaction of the Canadian tobacco industry, through the CTMC[244], was to continue its efforts not only to hide the truth from the public but, as well, to delay and water down to the maximum extent possible the measures that Canada wished to implement to warn consumers of the dangers of smoking. The Plaintiffs' Notes cite the following example of Canada's frustration with the industry's attitude some ten years after the Isabelle Report:

> **1171**. Another two years hence, in November of 1979, the deputy minister in turn informed the Minister that their "experience with CTMC is that its members do no more than they have to, to carry out voluntary compliance" and that for the department the "essential question is whether to continue with the present frustratingly slow and only marginally effective slow process of negotiation and voluntary compliance with the CTMC or whether to take a more aggressive stance and introduce legislation".[245]

[464] In a January 1975 memo discussing a research proposal from an outside scientist to the CTMC Technical Committee, Mr. Crawford of RJRM states: "I stressed that we are following the same attitude here as in the U.S. - namely that the link between smoking and lung cancer has not been proven"[246]. This shows not only that the Companies, through the CTMC, were still sticking to their position at the time, but also that they were marching in step with the US industry's strategy.

[465] The CTMC also spearheaded the industry's rearguard campaign on the question of addiction. The keystone document on that issue was the 1988 Surgeon General report entitled "*Nicotine Addiction*". The Companies knew that this US document would receive broad publicity in Canada and that they had to deal with it.

[466] Rather than embracing its findings, the industry, centralizing its attack through the CTMC, chose to make every effort to undermine its impact. The May 16, 1988 memo to member companies capsulizing the CTMC's media strategy with respect to the report (Exhibit 487) merits citation in full:

> It has been agreed that the CTMC (either Neville or LaRiviere) will handle any media queries on the S-G' s Report on Nicotine Addiction.
>
> The comments fall into three broad categories:
>
> 1- The report flies in the face of common sense -
>
> - Thousands of Canadians and millions of people all over the world stop smoking each year without assistance from the medical community.
> - How can you describe someone who lights up a cigarette only after dinner as an "addict"?

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244 The CTMC was formally incorporated by federal Letters Patent only in 1982 as the industry's trade association (Exhibit 433I), but an unincorporated version had replaced the Ad Hoc Committee as of around 1971. As with most trade associations, its mandate was to coordinate the Companies' activities on industry-wide issues and to share the work and the cost thereof. It did not deal in matters related to the business competition among the Companies.

245 Citing Exhibit 21258 at pdf 2-3.

246 Exhibit 603A.

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- The word addiction has been overextended in the non-scientific world: some people are "addicted" to soap operas, to chocolate and to quote Saturday's Montreal Gazette, "to love".

2- The S-G's Report is another example of how the smoking issue has been politicized. This is another transparent attempt to make smoking socially unacceptable by warming up some old chestnuts. We don't think the S-G is adding to his credibility by trading on the public confusion between words like "habit" and "dependence" and "addiction".·

3- The S-G's Report also trivializes the very serious illegal drug problem in North America. It is (ir)responsible to suggest that to use tobacco is the same as to use Crack? (sic)

[467] This posture was continued in the CTMC's reaction to the passage of the *Tobacco Products Control Act* later in 1988. In a letter to Health Canada in August, it vigorously opposed adding a pack warning concerning addiction, stating that "(c)alling cigarettes 'addictive' trivializes the serious drug problems faced by our society, but more importantly, the term 'addiction' lacks precise medical or scientific meaning"[247].

[468] In August 1989, the Royal Society of Canada issued its report mandated by Health Canada entitled: "Tobacco, Nicotine, and Addiction".[248] The Smokers' Freedom Society had commissioned Dr. Dollard Cormier, professor emeritus and Head of the Research Laboratory on Alcohol and Drug Abuse at the Université de Montréal, to write a critique of the report.[249]

[469] The SFS was a close ally, the Plaintiffs would say a puppet, of the tobacco industry and the CTMC circulated Professor Cormier's report widely, especially to members of the Canadian government and the opposition. This critique served as a foundation for the CTMC's aggressive campaign against adding a Warning about tobacco dependence. Its approach is reflected in an April 1990 letter from the CTMC president to Health Canada:

> Suffice it to say here that we regard the Royal Society report as a political document, not a credible scientific review, and we look upon any attempt to brand six million Canadians who choose to smoke as 'addicts' as insulting and irresponsible.
>
> While we do not and would not support any health message on this subject, we would note that the proposed message on addiction misstates and exaggerates even the Royal Society panel conclusion [...][250].

[470] Concerning the issue of whether or not to attribute the Warnings to Health Canada, the CTMC's attitude on behalf of the Companies is summarized in its 1986 letter to Minister Epp:

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247 Exhibit 694 at pdf 10.
248 Exhibit 212.
249 Exhibit 9A.
250 Exhibit 845 at pdf 6. See also Exhibit 841-2M, a 1986 letter from the CTMC to Minister Epp, at page 5.

> More specifically, we do not agree that your proposed health warnings are "scientifically correct" as stated in Appendix I to your letter of October 9, 1986. Such a proposal not only amounts to asking us to condemn our own product, but also would require us to accept responsibility for statements the accuracy of which we simply do not accept. Any admission, express or implied, that the tobacco manufacturers condone the health warnings would be inconsistent with our position.[251]

[471] On the subject of sponsoring research, the Plaintiffs criticize the CTMC for funding scientific "outliers" who dared question the long-accepted position that smoking caused disease and dependence. What is wrong with that? Some of the greatest discoveries in science have come from people who were considered "outliers" and "crackpots" because of their willingness to challenge the scientific establishment. That is not, in itself, a fault.

[472] Nor do we see it necessarily as a fault for a company not to fund research to further and refine current scientific understanding of a question. That is its prerogative. On the other hand, depending on the circumstances, a line can be crossed that turns such a practice into a fault.

[473] The circumstances here, according to the Plaintiffs, is that the Companies were publicly calling for additional objective research and yet were funding research that was anything but objective. The Court is uncomfortable in accepting such a proposition without a comprehensive analysis of all the research funded by the Companies, an exercise that goes beyond our capabilities and for which no expert's report was filed.

[474] As a result, we do not see Company or CTMC-sponsored research as playing a critical role in a finding of fault in the present affair. Where fault can be found, however, is in the failure or, worse, the cynical refusal to take account of contemporaneous, accepted scientific knowledge about the dangers of the Companies' products and to inform consumers accordingly.

[475] On the basis of the preceding and, in particular, the clear and uncontested role of the CTMC in advancing the Companies' unanimous positions trivializing or denying the risks and dangers of smoking[252], we hold that the Companies indeed did conspire to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use. A solidary condemnation in compensatory damages is appropriate.

II.G. DID ITL INTENTIONALLY INTERFERE WITH THE RIGHT TO LIFE, PERSONAL SECURITY AND INVIOLABILITY OF THE CLASS MEMBERS?

[476] This Common Question mirrors the language of the second paragraph of section 49 of the Quebec Charter and is a call for an award of punitive damages under that statute. This, however, does not cover the Plaintiffs' full argument for punitive damages, since they claim them also under the *Consumer Protection Act*.

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[251] Exhibit 841-2M, at page 5.

[252] We are not unaware of RBH's withdrawal from the CTMC for a short time during the Class Period but consider that immaterial for these purposes.

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[477] Although the CPA portion of their actions is not technically part of Common Question G, it makes sense to examine all phases of the punitive damages issue at the same time. We shall, therefore, analyze the claim under the CPA in the present chapter.

[478] In order to do that under both statutes, it is first necessary to determine if the Companies would be liable for compensatory damages under them. It is therefore logical within the present analysis of punitive damages to consider that question also.

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II.G.1 LIABILITY FOR DAMAGES UNDER THE QUEBEC CHARTER

[479] This Common Question is based on sections 1 and 49 of the Quebec Charter. They read:

> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.
>
> **49.** Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.
>
> In case of unlawful and intentional interference (with a right or freedom recognized by the Charter), the tribunal may, in addition, condemn the person guilty of it to punitive damages.

[480] In this context, the Quebec Charter does not target the intentionality of defendant's conduct so much as the intentionality of the consequences of that conduct. The defendant must be shown to have intended that his acts result in a violation of one of plaintiff's Quebec Charter rights. As the Supreme Court stated in the *Hôpital St-Ferdinand* decision:

> Consequently, there will be unlawful and intentional interference within the meaning of the second paragraph of s. 49 of the *Charter* when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause.[253]

[481] Thus, this question must be examined in two phases: Did the Companies' actions constitute an unlawful interference with the right to life, security and integrity of the Members and, if so, was that interference intentional? A positive response to the first opens the door to compensatory damages whether or not intentionality is proven.

[482] To start, the Court held above that the Companies manufactured, marketed and sold a product that was dangerous and harmful to the health of the Members. As noted, that is not, in itself, a fault or, by extension, an unlawful interference. That would depend both on the information in the users' possession about the dangers inherent to smoking and on the efforts of the Companies to warn their customers about the risk of the Diseases or of dependence, which would include efforts to "disinform" them.

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[253] *Le syndicat national des employés de l'Hôpital St-Ferdinand et al. v. le Curateur public du Québec et al.*, EYB 1996-29281 (S.C.C.), at paragraph 121. See also paragraphs 117-118.

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[483] We have held that the Companies failed under both tests, and this, for much of the Class Period. With respect to the Blais Class, we held that the Companies fault in failing to warn about the safety defects in their products ceased as of January 1, 1980, but that their general fault under article 1457 continued throughout the Class Period. In Létourneau, the fault for safety defects ceased to have effect as of March 1, 1996, while the general fault also continued for the duration of the Class Period.

[484] Given the consequences of these faults on smokers' health and well-being, this constitutes an unlawful interference with the right to life, security and integrity of the Members over the time that they lasted. Compensatory damages are therefore warranted under the Quebec Charter.

[485] On the second question, we found that the Companies not only knowingly withheld critical information from their customers, but also lulled them into a sense of non-urgency about the dangers. That unacceptable behaviour does not necessarily mean that they malevolently desired that their customers fall victim to the Diseases or to tobacco dependence. They were undoubtedly just trying to maximize profits. In fact, the Companies, especially ITL, were spending significant sums trying to develop a cigarette that was less harmful to their customers.

[486] Pending that Eureka moment, however, they remained silent about the dangers to which they knew they were exposing the public yet voluble about the scientific uncertainty of any such dangers. In doing so, each of them acted "with full knowledge of the immediate and natural or at least extremely probable consequences that (its) conduct will cause".[254] That constitutes intentionality for the purposes of section 49 of the Quebec Charter.

[487] Common Question G is therefore answered in the affirmative. Punitive damages are warranted under the Quebec Charter.

[488] We look in detail at the criteria for assessing punitive damages in Chapter IX of the present judgment. At that time we also consider the fact that the Quebec Charter was not in force during the entire Class Period, having come into force only on June 28, 1976.

II.G.2 LIABILITY FOR DAMAGES UNDER THE CONSUMER PROTECTION ACT

[489] Section 272, *in fine*, of the CPA creates the possibility for an award of extracontractual and punitive damages[255]. The full provision reads:

272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the	**272.** Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, un règlement ou un engagement volontaire souscrit en vertu de l'article 314 ou dont l'application a été étendue par un décret pris en vertu de l'article 315.1, le consommateur, sous réserve des autres recours prévus par la

254 Ibidem.

255 The *Consumer Protection Act* was first enacted in 1971, at which time it did not include the provisions on which Plaintiffs rely: articles 215-253 and 272. Those came into force on April 30, 1980.

other recourses provided by this Act,

(a) the specific performance of the obligation;
(b) the authorization to execute it at the merchant's or manufacturer's expense;
(c) that his obligations be reduced;
(d) that the contract be rescinded;
(e) that the contract be set aside; or
(f) that the contract be annulled.

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

présente loi, peut demander, selon le cas:

(a) l'exécution de l'obligation;
(b) l'autorisation de la faire exécuter aux frais du commerçant ou du fabricant;
(c) la réduction de son obligation;
(d) la résiliation du contrat;
(e) la résolution du contrat; ou
(f) la nullité du contrat,

sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.

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[490] In claiming those damages, the Plaintiffs allege that the Companies contravened three provisions of the CPA:

- failing to mention an important fact in any representation made to a consumer, in contravention of section 228;
- making false or misleading representations to a consumer, in contravention of section 219; and
- ascribing certain special advantages to cigarettes, in contravention of section 220(a).

[491] As a preliminary question, there are five conditions to meet in order for the CPA to apply. They are:

a. A contract must be entered into;
b. One of the parties to the contract must be a "consumer";
c. One of the parties must be a "merchant";
d. The "merchant" must be acting in the course of his or her business; and
e. The contract must be for goods or services.[256]

[492] Although in these files the "merchants" involved in the contracts with the Members are not the Companies, that is not an obstacle. The Supreme Court cast that argument aside in *Time* when it stated that

> To be clear, this means that a consumer must have entered into a contractual relationship with a merchant or a manufacturer to be able to exercise the recourse provided for in s. 272 C.P.A. against the person who engaged in the prohibited practice.[257] (the Court's emphasis)

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[256] *Op. cit., Time*, Note 20, at paragraph 104, citing Claude MASSE, *Loi sur la protection du consommateur* : *analyse et commentaires*, (Cowansville : Les Éditions Yvon Blais Inc., 1999) at page 72.

[257] *Op. cit., Time*, Note 20, at paragraph 107.

[493] Thus, the initial hurdle to a claim damages under the CPA is vaulted. The Companies, however, see several others.

II.G.2.a THE IRREBUTTABLE PRESUMPTION OF PREJUDICE

[494] In *Time*, the Supreme Court supports the existence of an absolute or irrebuttable presumption of prejudice under section 272 once four threshold conditions are met. In the Plaintiffs' view, those conditions are met here and the Companies are without defence to a claim for compensatory damages.

[495] The four conditions are:

a. that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act;

b. that the consumer saw the representation that constituted a prohibited practice;

c. that the consumer's seeing that representation resulted in the formation, amendment or performance of a consumer contract, and

d. that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract, meaning that that the prohibited practice must be one that was capable of influencing a consumer's behaviour with respect to the formation, amendment or performance of the contract.[258]

[496] These conditions represent the cornerstones of an action in damages under the CPA. One might wonder as to what more is needed once they are met; in other words, of what use is a presumption of prejudice once these four elements are proven? The Supreme Court had this to say on the subject:

> [123] We greatly prefer the position taken by Fish J.A. in *Turgeon*[259], namely that a prohibited practice does not create a *presumption* that a merchant has committed fraud but in itself *constitutes* fraud within the meaning of art. 1401 C.C.Q. (para. 48). […] In our opinion, the use of a prohibited practice can give rise to an absolute presumption of prejudice. As a result, a consumer does not have to prove fraud and its consequences on the basis of the ordinary rules of the civil law for the contractual remedies provided for in s. 272 C.P.A. to be available. As well, a merchant or manufacturer who is sued cannot raise a defence based on "fraud that has been uncovered and is not prejudicial".[260] (Emphasis in the original)

[497] It thus appears that the only practical effect of this presumption is to ease the consumer's burden of proof concerning fraud: "the consumer does not have to prove that the merchant intended to mislead, as would be required in a civil law fraud case."[261]

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258 *Op. cit., Time*, Note 20, at paragraph 124.
259 *Turgeon v. Germain Pelletier Ltée*, [2001] R.J.Q. 291 (QCCA), ("***Turgeon***") at paragraph 48.
260 *Op. cit., Time*, Note 20, at paragraph 123.
261 *Op. cit., Time*, Note 20, at paragraph 128.

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[498] The Companies contest the establishment of an irrebuttable presumption of any use to the Plaintiffs here. They argue that such a presumption can apply only with respect to the contractual remedies set out in sub-sections "a" through "f" of section 272, and not to a claim in damages and punitive damages mentioned in the final paragraph of the section. In its Notes, RBH explains as follows:

> **1255.** Under the CPA, a plaintiff must prove fault, causation, and prejudice in order to succeed on a claim. As discussed earlier in Section I.C.2., at paras. 207-209, proving the four elements set forth in *Richard v. Time Inc.* leads to a presumption of prejudice sufficient to support an award of the contractual remedies provided in CPA Section 272(a) - (f). But those are not the remedies sought here. To recover compensatory damages, Plaintiffs must prove that their injuries were the result of the CPA violation, and to recover punitive damages, Plaintiffs must also prove some need for deterrence.

[499] The Supreme Court's language in *Time* appears at first sight to support RBH's contention limiting the effect of the presumption to the contractual remedies enumerated. For example, in paragraph 123 the court specifies "the contractual remedies provided for in s. 272 C.P.A.", and in the last sentence of paragraph 124 one reads: "This presumption thus enables the consumer to demand, in the manner described above, one of the contractual remedies provided for in s. 272 C.P.A." So be it, but, to the extent that such a presumption has any relevance to these cases, it is not obvious why such a restriction should exist.

[500] Where a presumption of prejudice is established, why should its benefit to the consumer be limited to only some of the sanctions mentioned in article 272? This seems to go against "the spirit of the Act", something the Supreme Court is clearly desirous of preserving and advancing[262]. We see no justification for excluding extracontractual remedies from the ambit of the presumption, not to mention contractual remedies other than those enumerated in subsections "a" through "f", should any exist.

[501] *Time* is a case between the two contracting parties and, in it, the Supreme Court decided only what needed to be decided. In doing so, it did not rule out a broad application of the presumption.

[502] In fact, such a broad application is supported in several places in the decision. In paragraph 113, admittedly after it has spoken of a consumer obtaining "one of the contractual remedies provided for in s. 272 CPA", the Supreme Court goes on to cite the Quebec Court of Appeal in *Beauchamp*[263] to the effect that "(t)he legislature has adopted an absolute presumption that a failure by the merchant or manufacturer to fulfil any of these obligations causes prejudice to the consumer, and it has provided the consumer with the range of recourses set out in s. 272".

[503] There is also its statement at the end of paragraph 123 in *Time* that "The severity of the sanctions provided for in s. 272 *C.P.A.* is not variable: the irrebuttable presumption of prejudice can apply to all violations of the obligations imposed by the Act." As we have noted above, the obligations imposed by the Act include extracontractual ones, for example, where the merchant is not the person who engaged in the prohibited practice.

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262 *Op. cit., Time*, Note 20, at paragraph 123.

263 *Beauchamp v. Relais Toyota inc.*, [1995] R.J.Q. 741 (C.A.), at page 744.

[504] This tendency is carried through in paragraph 128 of *Time*:

> According to the interpretation proposed by Fish J.A. in *Turgeon*, a consumer to whom the irrebuttable presumption of prejudice applies has also succeeded in proving the fault of the merchant or manufacturer for the purposes of s. 272 C.P.A. The court can thus award the consumer damages to compensate for any prejudice resulting from that extracontractual fault.

[505] As for punitive damages, they would seem, again at first sight, to be excluded, given that the presumption is one of prejudice, and prejudice is not directly relevant to this type of damages. That, however, is misleading. As noted, the presumption's true effect is with respect to the merchant's fraudulent intentions: "the consumer does not have to prove that the merchant intended to mislead, as would be required in a civil law fraud case.[264]"

[506] We noted earlier that section 49 of the Quebec Charter targets the intentionality of the consequences of faulty conduct and not of the conduct itself. We also noted that "intention" in that context refers to "a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct".[265] To the extent that an analogy can be made between the two statures, a merchant's intention to mislead a consumer, i.e., to commit a fraud, meets that test. The irrebuttable presumption thus touches on issues relevant to punitive damages and can assist the consumer in a claim for those.

[507] Consequently, to the extent that it is necessary to decide this case, the Court holds that the irrebuttable presumption of prejudice, where it applies, assists with respect to all the types of damages mentioned in section 272 of the CPA. In harmony with that, we shall model our analysis of the alleged violations under the CPA around the four-part test for establishing this presumption.

[508] Before turning to that analysis, we note that one of the Companies' principal arguments against the award of any sort of damages under the CPA is that the Members lack sufficient interest. ITL puts it this way in its Notes:

> **134.** ITL submits that the requirement to demonstrate "legal interest" is an insurmountable hurdle for Plaintiffs to overcome in relation to the positive representations or advertisements that are alleged to be at issue in these proceedings. Plaintiffs simply assert that the legal interest requirement is satisfied because "the class members have all purchased cigarettes". And yet they make no attempt whatsoever to demonstrate that there is any temporal connection, however loose, between the purchase of cigarettes by particular class members and the existence of any misleading representation in the market at any particular time. In fact, there is no evidence at all that any class member read or saw any particular representations.

[509] Since the structure of the analysis we conduct below of the alleged contraventions, based on the four conditions precedent to the irrebuttable presumption, considers the Companies' concerns over the Members' interest, no more need be said about that at this point.

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264 *Op. cit., Time*, Note 20, at paragraph 128.

265 *Le syndicat national des employés de l'Hôpital St-Ferdinand et al. v. le Curateur public du Québec et al.*, EYB 1996-29281 (S.C.C.), at paragraph 121

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II.G.2.b THE ALLEGED CONTRAVENTION UNDER SECTION 228 CPA

[510] Section 228 reads as follows:

> **228.** No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

[511] The Plaintiffs sum up their position on this allegation in their Notes, which specifies that this argument applies to both Classes:

> **153.** The evidence further reveals that the Defendants never voluntarily provided any information on the dangers inherent in the use of their products because they had adopted a joint strategy to deny these important facts. This systematic, intentional omission violates article 228 *CPA*. As a systematic failure to communicate, this violation reaches every member in both classes and extends in time from the entry into force of the *CPA* until the class period ends.

[512] In sections II.D.5 and 6 of the present judgment, we hold that the Companies were indeed guilty of withholding critical health-related information about cigarettes from the public, i.e., important facts. Since a "representation" includes an omission[266], the Companies failed to fulfil the obligation imposed on them by section 228 of Title II of the CPA. We also hold that their failure to warn lasted throughout the Class Period, including some twenty years while the relevant portions of the CPA were in force.

[513] On the question of whether the Members saw the representations, the Companies insist that the Plaintiffs must prove that every member of both classes saw them. Whether or not that is true, an omission to inform must be approached from a different angle, since, by definition, no one can see something that is not there. Every member of society was thus subjected to the omission to mention these important facts. Hence, the condition is met, even according to the Companies' standard.

[514] The question of whether the Members' "seeing" the representation resulted in the formation of the contract to purchase cigarettes is similar to the one examined in sections VI.E and F of the present judgment in the context of causation. There we hold, based on a presumption of fact, that the Companies' faults were one of the factors that caused the Members to smoke and that this presumption was not rebutted by the Companies. A similar presumption and rebuttal process apply here.

[515] Based on the reasoning in the above-mentioned sections, the Court accepts as a presumption of fact that the absence of full information about the risks and dangers of smoking was sufficiently important to consumers that it resulted in their purchasing cigarettes. Since there is no proof to the contrary, the third condition is met.

[516] The final condition is also met. The Companies' omission to pass on such critical, life-changing information about the dangers of smoking was incontestably capable of influencing a consumer's behaviour with respect to the decision to purchase cigarettes. It need not be shown that no one would have smoked had the Companies been

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[266] Section 216 of the CPA: "For the purposes of this title, representation includes an affirmation, a behaviour or an omission".

forthcoming. It suffices to find that proper knowledge was capable of influencing a person's decision to begin or continue to smoke. How could that not be the case?

[517] Consequently, there is a contravention of section 228 CPA here and the Members may claim moral and punitive damages pursuant to section 272 CPA, subject to the other holdings in the present judgment.

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II.G.2.c THE ALLEGED CONTRAVENTION UNDER SECTION 219 CPA

[518] Section 219 reads as follows:

> **219.** No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

[519] Section 218 is also relevant for these purposes. It reads:

> **218.** To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.

[520] With respect to the general impression mentioned there, it is "the impression of a commercial representation on a credulous and inexperienced consumer".[267]

[521] The Plaintiffs argue at paragraph 154 of their Notes that "Throughout the class period, (the Companies) contrived and executed an elaborate strategy that used affirmations, behaviour, and omissions to deny the true nature of their toxic, useless product or mislead consumers about these important facts". In paragraph 155, they add:

> **155.** Throughout the class period, the Defendants not only failed to inform consumers but also used every form of public interaction available to them to deny the harms and extent of risk associated with cigarette consumption. In the rare circumstances where they acknowledged that cigarettes could be dangerous or harmful, the Defendants trivialized those harms and the intensity of the risk. They further falsely represented cigarettes as providing smokers with benefits when they knew that were selling a pharmacological trap.

[522] For reasons that are not clear, the Plaintiffs do not focus on marketing activities under this section of the CPA, reserving that for their arguments under section 220(a). In our view, that discussion should occur in the present section, and we shall proceed accordingly.

[523] The extent of the Companies' representations to consumers during the part of the Class Period when this provision was in force was to advertise their products between 1980 and 1988, as well as between 1995 and 1998, and to print Warnings on the packages. This was the period of their Policy of Silence, so they were making no direct comments about smoking and health.

[524] In section II.E.6 of the present judgment, we found no fault on the Companies' part with respect to conveying false information about the characteristics of their products. That is relevant to this question but, in light of sections 216 and 218, it is not conclusive. A different test is called for under the CPA.

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[267] *Op. cit., Time*, Note 20, at paragraph 70.

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[525] In similar fashion, our rulings in section II.B.1 that the Companies' faults with respect to the obligation to inform about safety defects ceased as of January 1980 for the Blais File and March 1996 for the Létourneau File is not relevant to the CPA-based claims. Under the CPA, the consumer's knowledge of faulty representations does not exculpate the merchant.

[526] As stated in *Turgeon*, the CPA is "a statute of public order whose purpose is to restore the contractual [balance] between merchants and their customers".[268] Its method is to sanction unacceptable behaviour on the part of merchants, regardless of the effect on the consumer[269]. Hence, the defence of consumer knowledge open to a manufacturer under article 1473 of the Civil Code is not available.

[527] Even though the Companies' ads did not convey false information, since they conveyed essentially no information, under the CPA the question is whether their representations would have given a false or misleading impression to a credulous and inexperienced consumer. For that, it would not be necessary for them to go so far as to say that smoking was a good thing. The test is whether the general impression is true to reality[270]. It would be enough if they suggested that it was not harmful to health.

[528] ITL and RBH plead a lack of proof, coupled with a complaint about overly general allegations and lack of interest. JTM argues in its Notes as follows:

> **215.** As will be demonstrated below, there is nothing misleading or inappropriate with lifestyle advertising. The methods used by JTIM for its marketing were legitimate and similar to those used by other companies in other areas. JTIM's advertisements did not make any implicit or explicit health claims, and there is no evidence whatsoever that any class member was misled by any of JTIM's advertisements.

[529] JTM cites a 2010 Court of Appeal decision dealing with the purchase of a motor home that supports the position that banal generalities in advertising do not constitute false or misleading representations.[271] Although not directly on point, that reasoning is relevant here.

[530] The Companies' argument about overly general allegations is well founded. The Plaintiffs point to few if any specific incidents in support of their argument. Their reference to paragraph 18.12 of Professor Pollay's report does them little good. We have already concluded that it is unconvincing on this question.

[531] The Plaintiffs accuse the Companies of using "labelling and lifestyle advertising to create a 'friendly familiarity' with (the Companies') product in order to falsely convince consumers that cigarette smoking was consistent with a healthy, successful lifestyle"[272], without explaining

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268 *Op. cit., Turgeon*, Note 259, at paragraph 36.

269 *Op. cit., Time*, Note 20, at paragraph 50.

270 In *Time*, the Supreme Court calls for a two-step analysis for questionable representations: describe the general impression on a credulous and inexperienced consumer and then determine whether that general impression is true to reality: *Op. cit.*, Note 20, at paragraph 78.

271 *Martin v. Pierre St-Cyr auto caravans ltée*, EYB 2010-1706, at paragraphs 24 and 25.

272 Plaintiffs' Notes at paragraph 157.

how they see that process working. In the absence of further explanation, the Court does not see the evidence as supporting this general statement.

[532] All this seemingly leads to a conclusion that the Companies did not violate section 219. The problem is that none of it looks directly at the evidence in the record, i.e., the typical ads used by the Companies since 1980. It is by viewing them – through the eyes of a credulous and inexperienced consumer – that the Court can assess whether there is a contravention of this provision.

[533] It should not be controversial to assert that every single cigarette ad since 1980 for every single brand of the Companies' products attempted to portray those cigarettes in a favourable light. That does not necessarily mean that they all suggested that smoking was not harmful to health.

[534] A good example of a "neutral" ad is Exhibit 40480. It simply shows the packages of the three sub-brands of Macdonald Select cigarettes, with a short message aimed at "those who select their pleasures with care". There are other ads of this sort and none of them constitute violations of section 219 CPA. They, however, are the exception.

[535] As a general rule, the ads contain a theme and sub-message of elegance, adventure, independence, romance or sport. As well, they use attractive, healthy-looking models and healthy-looking environments, as seen in the following exhibits:

- Exhibit 1381.9 – Macdonald Select ad of 1983 showing an elegantly-dressed couple apparently about to kiss;
- Exhibit 1040B – Export A 1997 ad portraying extreme skiing
- Exhibit 1040C – Export A 1997 ad portraying mountain biking
- Exhibit 1381.33 – Belvedere 1988 ad showing young adults on a beach
- Exhibit 152 – two Player's Light 1979 ads[273] portraying horseback riding and canoeing in the Rockies
- Exhibit 1532.4 – Belvedere 1984 ad from *CROC* magazine showing a tanned couple on the beach
- Exhibit 243A – Vantage 1980 ad from *The Gazette*, text only, explaining how Vantage delivers taste but "cuts down substantially on what you may not want"
- Exhibit 40436 – two Export A 1980 ads showing loggers and truckers
- Exhibit 40479 – two Export A 1982 ads showing a mountain lake and a man on top of a mountain
- Exhibit 573C – Export A 1983 ad portraying a windsurfer
- Exhibit 771A – Player's Light 1987 ad seeming to portray a windsurfer in Junior Hockey Magazine
- Exhibit 771B – Export A 1985 ad in Junior Hockey Magazine portraying alpine skiing and Viscount 1985 vaunting it as the mildest cigarette

[273] Although this ad is from 1979, we assume it carried over at least into the next year.

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[536] From the viewpoint of a "credulous and inexperienced" consumer, ads such as these would give the general impression that, at the very least, smoking is not harmful to health. In this manner, the Companies failed to fulfil one of the obligations imposed by Title II of the CPA.

[537] As for each and every Member of both Classes seeing the infringing representations, we dealt with this issue in an earlier section. The Companies admit that all Members would have seen newspaper and magazine articles warning of the dangers of smoking. Since the ads appeared, *inter alia*, in the same media, it is reasonable to conclude that all Members would have seen them, as well.

[538] We come to the third condition: that seeing the representation resulted in the Members' purchasing of cigarettes. In their proof, the Companies consistently emphasized that the purpose of their advertising was to win market share away from their competitors. To that end, they spent millions of dollars annually on marketing tools and advertising. Moreover, the Court saw the result of such marketing efforts, particularly through the success of ITL at the expense of MTI in the 1970s and 80s.

[539] This is sufficient proof to establish the probability that the Companies' ads induced consumers to buy their respective products. The third condition is met.

[540] The same evidence and reasoning shows that the final condition: that the prohibited practice was capable of influencing a consumer's behaviour with respect to the decision to purchase cigarettes, is also met.

[541] As a result, there is a contravention of section 219 CPA here. The Members may claim moral and punitive damages pursuant to section 272 CPA, subject to the other holdings in the present judgment.

II.G.2.d THE ALLEGED CONTRAVENTION UNDER SECTION 220(a) CPA

[542] Section 220(a) reads as follows:

> **220**. No merchant, manufacturer or advertiser may, falsely, by any means whatever,
>
> (a) ascribe certain special advantages to goods or services**;**

[543] Concerning this section, the Plaintiffs allege that the Companies' faults were in falsely ascribing a healthy, successful lifestyle to cigarette smoking and, especially, in marketing "light and mild" cigarettes as a healthier alternative to regular cigarettes, while knowing all along that this was not true. The Plaintiffs describe this assertion as follows in their Notes:

> **158.** Finally, each Defendant clearly violated article 220 a) of the CPA by deliberately employing a variety of marketing techniques to falsely ascribe a healthy, successful lifestyle to cigarette consumption. They notably consistently marketed "light and mild" cigarettes as a healthier alternative to their "regular" cigarettes. The Defendants knew all along that the attribution of this advantage was absolutely false.

[544] We reject the Plaintiffs' arguments under section 220(a). In addition to the fact that we have already dismissed their claims relating to light and mild cigarettes, we simply do not see how mere lifestyle advertising, to the extent it was used, constitutes the act of falsely ascribing special advantages to cigarettes. The special advantages referred to there go beyond the "banal generalities" conveyed in lifestyle advertising.

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III. JTI MACDONALD CORP.[274]

[545] JTM was acquired by Japan Tobacco Inc. of Tokyo from R.J. Reynolds Tobacco Inc. of Winston-Salem, North Carolina ("**RJRUS**") in 1999. RJRUS had owned the company since 1974, when it purchased it from the Stewart family of Montreal. The company, then known as Macdonald Tobacco Inc., had been in business in Quebec for many years prior to the opening of the Class Period.

III.A. DID JTM MANUFACTURE, MARKET AND SELL A PRODUCT THAT WAS DANGEROUS AND HARMFUL TO THE HEALTH OF CONSUMERS?

[546] As mentioned earlier, none of the Companies today denies that smoking can cause disease in some people, although each steadfastly denies any general statement that it is the major cause of any disease, including lung cancer.

[547] In section II.A, we explain our interpretation of what is a "dangerous" product. We conclude that a product that is "harmful to the health of consumers" means that it would cause either the Diseases in the Blais Class or tobacco dependence in the Létourneau Class. We also conclude in section II.C that tobacco dependence is dangerous and harmful to the health of consumers. These rulings apply to all three Companies.

[548] In its Notes, JTM sums up its position on this Common Question as follows:

> **369.** JTIM admits that cigarettes can cause numerous diseases, including the class diseases at issue in *Blais*. However, class members were at all material times throughout the class period aware of serious health risks associated with smoking, including the fact that it can be difficult for some to quit.
>
> **370.** JTIM admits that cigarettes may be "addictive" in accordance with the common usage of that term. There was, however, no consensus in the public health community as to whether smoking should be labelled an "addiction" until at the earliest 1989. Indeed, the various editions of the most authoritative diagnostic manual, the DSM-V, have rejected the use of that term.

[549] In response to a request from the Court as to when each Company first admitted that smoking caused a Disease, JTM stated that during the Class Period it never denied that smoking could be risky for some people and could be habit forming. Nor did it deny that there was a "statistical association" between smoking and certain diseases, but it did not accept that this constituted "cause".[275]

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[274] The witnesses called by any of the parties who testified concerning matters relating to JTM are listed in Schedule E to the present judgment.

[275] This document is not an exhibit. In JTM's case, it is entitled: "JTIM'S RESPONSE TO THE COURT'S NOVEMBER 21, 2014 QUESTION".

[550] It added in the same series of admissions that "(i)n 2000, in a public statement before a Senate Committee, Mr. Poirier acknowledged the serious incremental risks to health from smoking and that different combination of risks can cause cancer, expressly acknowledging that smoking is one of those risks." This appears to be the first public admission by this Company that smoking can cause a Disease, putting aside the government-imposed Warnings of 1988 and 1994.

[551] Michel Poirier is JTM's current president and, before us, he made the following statements:

> ON SEPTEMBER 18, 2012:
>
> Q58: A- … because there is no such thing as a safe cigarette.[276]
>
> Q85: A- Since the year two thousand (2000), since I became president, I did say publicly that there's a long list of diseases associated or that consumers... Sorry, let me rephrase that. Smokers incur risk such as lung cancer, heart disease, et cetera. There's a long list.
>
> Q87: A- We've always said that there is risk attached with smoking. When I say "always"... you know, in my tenure anyway, we always said that there is risk attached to smoking and we do spell out that there is strong risk associated with lung cancer, et cetera. So there's a long list.
>
> Q120: A- Well, again, I... from my perspective, the health risks attached to smoking have been known since the early sixties (60s), even late fifties (50s). This was all over the media. I remember growing up in Montreal as a five (5)-year old, the expression at the time... – this is going back fifty (50) years now, or forty-nine (49) years - the expression at the time in Montreal, in my surroundings anyway, was that every cigarette is a nail in your coffin. So I think, from that, that people knew about the risks of smoking, that it was not good for your health.
>
> Q127: A- The position of our company: that there (are) serious risks and people should be informed of those risks, as adults, before they smoke.
>
> Q200: Do you agree that cigarette smoking causes cancer, lung cancer?
>
> A- I agree that it does, in some smokers, yes.
>
> Q201: What about heart conditions, do you agree that smoking causes heart attacks?
>
> A- It causes heart disease, heart attack, yes, in some of the smokers, yes.
>
> Q202: And what about emphysema, do you agree that smoking causes emphysema?
>
> A- In some smokers, yes.

[276] "There is no safe cigarette": Exhibit 562, the website of JTI.

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Q203: And this finding or... is it your personal opinion or is it the position of JTI-MacDonald?

A- Both.

[552] Although he added a number of qualifiers at other points in the same way that Mme. Pollet did for ITL, Mr. Poirier's candid admissions provide a clear answer to this first question. JTM clearly did manufacture, market and sell a product that was dangerous and harmful to the health of consumers during the Class Period[277].

[553] Since we have already established the date at which the public knew or should have known of the risks and dangers of smoking, the issue now is to determine when JTM learned, or should have learned, that it was dangerous and harmful and what obligations it had to its customers as a result. We deal with those points below.

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III.B. DID JTM KNOW, OR WAS IT PRESUMED TO KNOW OF THE RISKS AND DANGERS ASSOCIATED WITH THE USE OF ITS PRODUCTS?

III.B.1 THE BLAIS FILE

III.B.1.a AS OF WHAT DATE DID JTM KNOW?

[554] The testimony of Peter Gage was both enthralling and enlightening[278]. He is a spry and dapper nonagenarian who emigrated from England in 1955 to work at Macdonald Tobacco Inc. Initially working under Walter Stewart, the owner, and his son, David, he became the number two man there after Walter's death in 1968. He remained in that position until 1972, when he moved to ITL.

[555] By the time David Stewart took over the reins of the company from his father, he was sensitive to and deeply concerned about the effect of smoking on health. Mr. Gage reports a meeting that David Stewart organized with a number of doctors from the Royal Victoria Hospital in 1969:

Q And what was the relationship between the hospital and the Stewart family or Macdonald that you witnessed?

A David Stewart called a meeting of the leading doctors in the hospital. We had a meeting at his mother's home on Sherbrooke Street. And it was just David and myself and I think Bill Hudson was there and about seven or eight doctors.

And David more or less said he wanted to know what Macdonald Tobacco could do to combat the health problem and smoking. And he made it clear that Macdonald Tobacco would finance it to a very high figure. I can't remember if he mentioned a figure at the meeting or not. I know he told me that he was quite prepared to put $10 million into it.

Q He was prepared to put $10 million?

---

277 The epidemiological proof of the likelihood that smoking causes the Diseases was discussed in the chapter of the present judgment examining the case of ITL. That analysis and our conclusions apply to all three Companies.

278 Mr. Gage testified by videoconference from Victoria, British Columbia, where he lives.

A M'mm-hmm.

Q Okay.

A I don't think he said that at the meeting. I can't remember. It was - it was a significant meeting because the doctors were very frank in their speeches and answers. And they really told David that the only sure way was to just stop people smoking. And although research was going on, they personally didn't feel optimistic about the results.
It had a big influence on David.

Q What do you mean it had a big influence on David Stewart?

A I think the first time he recognized (sic) that the health factor was all important, and it bothered him. I think at first -- that was when he first thought of selling the business.[279]

[556] It is thus clear that MTI knew of the risks and dangers associated with its products by at least 1969 - and likely earlier. Although there was testimony to the effect that the company had done no research on the question, David Stewart's concerns must have been present for some time prior to this meeting. His motivation for convening it did not hatch overnight. That said, the doctors' words appear to have genuinely shaken him, crystallizing his worst fears and pushing him to sell the company a few years later.

[557] There is also evidence of earlier concern by the Stewarts. Although MTI might not have been doing any smoking and health research on its own, it appears that it had a hand in financing some as early as the 1950's. In a 1962 press release, ITL states that "For some years, Imperial Tobacco Company of Canada Limited and W.C. Macdonald, Inc. have provided financial grants for support of independent research in Canada into questions of smoking and health".[280] One does not spend money on scientific research into smoking and health unless one believes that smoking is a danger to health.

[558] All this tends to confirm MTI's awareness of a link between smoking and disease from very early on in the Class Period.

[559] For the twenty-five years following its acquisition of MTI in 1974, RJRUS was at the helm of its Montreal subsidiary, RJRM. RJRUS's current Executive Vice President of Operations and Chief Scientific Officer, Jeffrey Gentry, came from North Carolina to testify. He stated that, based on his review of company records and on conversations with colleagues, RJRUS was aware that smoking was linked to chronic diseases as of the 1950s. He also testified, as was confirmed by Raymond Howie, a Montreal-based JTM witness, that RJRUS shared its technical knowledge with RJRM through its "Center of Excellence" program.

[560] Mr. Poirier admits that "the health risks attached to smoking have been known since the early sixties (60s), even late fifties (50s). This was all over the media". If that was the case

279 Transcript of September 5, 2012 at pages 39-40.
280 Exhibit 546 at pdf 2.

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for the general public, as is confirmed by Professors Flaherty and Lacoursière, we must assume that any tobacco company executive or scientist worth his salt would also have known by then, and undoubtedly a good while earlier. JTM's knowledge of its products was surely far in advance of that of the general public both in substance and in time[281].

[561] Thus, the Court concludes that at all times during the Class Period JTM knew of the risks and dangers of its products causing one of the Diseases.

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III.B.1.b AS OF WHAT DATE DID THE PUBLIC KNOW?

[562] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.B.1.b.1 THE EXPERTS' OPINIONS: THE DISEASES AND DEPENDENCE

[563] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.B.1.b.2 THE EFFECT OF THE WARNINGS: THE DISEASES AND DEPENDENCE

[564] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.B.2 THE LÉTOURNEAU FILE

III.B.2.a AS OF WHAT DATE DID JTM KNOW: TOBACCO DEPENDENCE?

[565] In the Chapter of the present judgment on ITL, we cited Professor Flaherty to the effect that, since the mid-1950s, it was common knowledge that smoking was difficult to quit, and that by that time "the only significant discussion in the news media on this point concerned whether smoking constituted an addiction, or whether it was a mere habit"[282].

[566] Consistent with our reasoning throughout, we conclude that if the Companies believed that the public knew of the risk of dependence by the 1950s, each of the Companies had to have known of it at least by the beginning of the Class Period.

III.B.2.b AS OF WHAT DATE DID THE PUBLIC KNOW: TOBACCO DEPENDENCE?

[567] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.C. DID JTM KNOWINGLY PUT ON THE MARKET A PRODUCT THAT CREATES DEPENDENCE AND DID IT CHOOSE NOT TO USE THE PARTS OF THE TOBACCO CONTAINING A LEVEL OF NICOTINE SUFFICIENTLY LOW THAT IT WOULD HAVE HAD THE EFFECT OF TERMINATING THE DEPENDENCE OF A LARGE PART OF THE SMOKING POPULATION?

[568] The analysis and conclusions set out in Chapter II.C of the present judgment apply to all three Companies.

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281 In *Hollis, op. cit.,* Note 281, at paragraphs 21 and 26, the Supreme Court comes to a similar conclusion with respect to relative level of knowledge, going so far as to qualify the difference in favour of the manufacturer as an "enormous informational advantage".

282 Exhibit 20063, at page 4.

III.D. DID JTM TRIVIALIZE OR DENY OR EMPLOY A SYSTEMATIC POLICY OF NON-DIVULGATION OF SUCH RISKS AND DANGERS?

III.D.1 THE OBLIGATION TO INFORM

[569] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.D.2 NO DUTY TO CONVINCE

[570] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.D.3 WHAT JTM SAID PUBLICLY ABOUT THE RISKS AND DANGERS

[571] In section II.D.4 of the present judgment, we analyze what ITL told the public about the risks and dangers of smoking. Given the dominant role of ITL in the CTMC, especially early on, we included a number of examples of public statements made by ITL executives on behalf of that trade association. In chapter II.F, we find that, in light of the clear and uncontested role of the CTMC in advancing the Companies' unanimous positions trivializing or denying the risks and dangers of smoking[283], the Companies conspired to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use.

[572] JTM played down its role on the Ad Hoc Committee, arguing that it made little if any input to its positions and that its representatives attended only one or two meetings[284]. Nevertheless, its Mr. DeSouza did attend the planning meeting for the LaMarsh Conference presentations at the Royal Montreal Golf Club in 1964 (see Exhibit 688B), Mrs. Stewart signed the 1962 Policy Statement (see Exhibit 154) and it never disassociated itself from anything either that committee or the CTMC ever said or did. As well, Messrs. Crawford and Massicotte, among others, played active roles in the CTMC.

[573] The Court thus rejects JTM's argument and finds that its ruling in chapter II.F of the present judgment applies to JTM. It follows that the factual analysis in section II.D.4 referring to representations by the Ad Hoc Committee or the CTMC also apply to it.

[574] In general, JTM followed the path of the industry-wide Policy of Silence. It confirms this in its Notes:

> **1347.** In fact, JTIM rarely communicated directly with the public on the subject of smoking, health or addiction, and generally expressed its positions and beliefs when requested to do so by the relevant authorities. Moreover, from 1972 to 1989, and again from 1995 until 2000, JTIM voluntarily included a Federal Government-approved warning on all of its packages sold in Quebec. This was also true for its advertising from 1973.

[575] We have dealt with all these arguments in the ITL Chapter of the present judgment and our findings there also apply here.

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283 We are not unaware of RBH's withdrawal from the CTMC for a short time during the Class Period but consider that immaterial for these purposes.

284 See paragraphs 1357-1358 of its Notes.

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[576] Nevertheless, we must cite a glaring example of the attitude of the RJ Reynolds group towards the scientific controversy even quite late in the Class Period. In a 1985 memo, Mr. Crawford reported on a visit to RJRM by two of the head people in RJRUS's R&D Department. He states that they advised that one of the five goals of that department was "Promotion of all aspects that relate to the statement that "There is a body of information that is contrary to the hypothesis that smoking causes diseases."[285]

[577] That JTM's parent company's head scientists would sign on to such a mandate at that late date defies comprehension. Admittedly, this was not JTM directly, but the link was clear and strong, as was the controlling power that RJRUS wielded over its Canadian subsidiary.

III.D.4 WHAT JTM DID NOT SAY ABOUT THE RISKS AND DANGERS

[578] As JTM specifies above, it rarely said anything to the public about smoking's risks and dangers. It followed this practice in spite of its knowing more about that than either the public or the government throughout the Class Period.

[579] Within the company, the interest of upper management on this subject focused almost exclusively on how to stave off government measures that might threaten the bottom line. There appears to have been a total absence of concern over the fact that its products were harming its consumers' health.

[580] An example of this attitude appears in Exhibit 1564, a report by Derrick Crawford, RJRM's director of research and development, on a two-day meeting called by NHWCanada in June 1977 and attended by the CTMC member companies. The subject was Canada's efforts to develop a "less hazardous cigarette".

[581] The overall tone of the memo is one of ridicule and condescendence by the author, but that is not the point that most draws the Court's attention. What is of real concern is the fact that, after spending some seven pages detailing the inefficiency of Canada's efforts, he concludes as follows:

> 7. One had to leave this meeting with a sense of frustration — so much time spent and so little achieved. On the other hand it leaves one with a degree of optimism for the future as far as the industry is concerned. They are in a state of chaos and are uncertain where to turn next from a scientific point of view. They want to be seen to be doing the right thing, and to keep their Dept. in the forefront of the Smoking & Health issue. However it appears they simply do not have the funds to tackle the problem in a proper scientific manner. Our continuing dialogue can continue for a long time, as they feel meetings such as these are beneficial. Pressure must be off shorter butt lengths for a considerable time.
>
> I am far more optimistic in answering the Morrison technical questions in the way we have, as a result of this meeting. They have not presented any scientific evidence which need cause us concern, and I consider that the programme that all companies are pursuing, namely of more and more low tar brands is an adequate reflection of the moves we are making to satisfy the Dept of Health & Welfare and that they appreciate this. (The Court's emphasis)

[285] Exhibit 587.

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[582] Admittedly, Canada wished to maintain its independence from the Companies on this project and would not have accepted strong participation on the tobacco industry's part, but that does not justify or explain the fact that JTM would essentially rejoice at the government's problems. JTM obviously felt that Canada was its adversary on this topic. But what was the topic? It was the programme to develop a less hazardous cigarette in order to protect the health of smokers: JTM's customers.

[583] One would have expected JTM to lament the fact that the development of a safer cigarette was not progressing well and that its customers would not have access to its possible benefits. In an environment of collaboration – and concern for one's customers - it would have been normal to search for ways to assist the process, for example, by offering to help, or at least by providing all the information in its possession. Instead, JTM expressed joy at the chaos within the project and relief that pressure was off shorter butt lengths! More importantly, it chose to keep to itself the broad range of relevant information in its possession.

[584] The gravity of such conduct is magnified by the reality that, at the time, everyone believed that this "safer-cigarette" project would likely have positive consequences for the health and well-being of human beings. Hence, the longer it took to progress toward that end, the longer smokers would be exposed to greater – and unnecessary - health risks. These are circumstances that must be considered in the context of assessing punitive damages.

[585] In summary, JTM argues that it had no legal obligation to say anything more than what it did. The Quebec public was aware of the risks and dangers of smoking, and "There is no obligation to warn the warned"[286]. As well, it alleges that it did not know any more than Canada did on that.

[586] We have rejected these arguments elsewhere in the present judgment and we reject them anew here.

III.D.5 COMPENSATION

[587] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.[287]

III.E. DID JTM EMPLOY MARKETING STRATEGIES CONVEYING FALSE INFORMATION ABOUT THE CHARACTERISTICS OF THE ITEMS SOLD?

[588] The analysis and conclusions set out in chapter II.E of the present judgment apply to all three Companies.

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286 See paragraph 1492 of its Notes.

287 An indication of JTM's level of knowledge about compensation is found in the 1972 confidential "Research Planning Memorandum on a New Type of Cigarette Delivering a Satisfying Amount of Nicotine with a Reduced "Tar"-to-Nicotine Ratio": Exhibit 1624, in particular, at PDF 8.

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III.F. DID JTM CONSPIRE TO MAINTAIN A COMMON FRONT IN ORDER TO IMPEDE USERS OF ITS PRODUCTS FROM LEARNING OF THE INHERENT DANGERS OF SUCH USE?

[589] The analysis and conclusions set out in chapter II.F of the present judgment apply to all three Companies.

III.G. DID JTM INTENTIONALLY INTERFERE WITH THE RIGHT TO LIFE, PERSONAL SECURITY AND INVIOLABILITY OF THE CLASS MEMBERS?

[590] The analysis and conclusions set out in chapter II.G of the present judgment apply to all three Companies.

IV. ROTHMANS BENSON & HEDGES INC.[288]

[591] RBH was created in 1986 by the merger of Rothmans of Pall Mall Canada Inc. ("**RPMC**"), a subsidiary of the Rothmans group of companies based in London, England, and Benson & Hedges Canada Inc. ("**B&H**"), a subsidiary of the Philip Morris group of companies based in New York City. Through the balance of the Class Period, the Rothmans interests owned 60% of the shares of RBH, while the Philip Morris group owned 40%[289].

[592] As well, we note that RPMC began doing business in Canada in 1958, some eight years after the beginning of the Class Period. For its part, B&H had apparently been doing business in Canada since before 1950.

IV.A. DID RBH MANUFACTURE, MARKET AND SELL A PRODUCT THAT WAS DANGEROUS AND HARMFUL TO THE HEALTH OF CONSUMERS?

[593] As mentioned earlier, none of the Companies today denies that smoking can cause disease in some people, although each steadfastly denies any general statement that it is the major cause of any disease, including lung cancer.

[594] In section II.A, we explain our interpretation of what is a "dangerous" product. We conclude that a product that is "harmful to the health of consumers" means that it would cause either the Diseases in the Blais Class or tobacco dependence in the Létourneau Class. We also conclude that tobacco dependence is dangerous and harmful to the health of consumers. These rulings apply to all three Companies.

[595] In its Notes, RBH sums up its position on this Common Question as follows:

> **686.** RBH did not manufacture, market, and sell a product that was more dangerous than class members were entitled to expect in light of all the circumstances because:
>
> - Knowledge of the health risks from smoking, including the difficulty of quitting, has been widely known and common knowledge since at least when the class period began, and RBH does not have any legal duty to inform those who already knew of the risks, and indeed overestimated them;

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288 The witnesses called by any of the parties who testified concerning matters relating to RBH are listed in Schedule F to the present judgment.

289 Since 2008, the Philip Morris group, as a result of the acquisition by Philip Morris International Inc. of Rothman's Inc., controls all the shares of RBH.

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- The level of safety that the class members were entitled to expect was set by their government – a government that has understood the health risks from smoking since at least the 1950s or early 1960s and with that knowledge decided that, instead of banning cigarettes, the risk was acceptable so long as (1) the government informed the public of those risks so that individuals could decide whether or not to accept those risks (and the class members chose to do so), and (2) the government worked to develop a safer alternative traditional cigarette, which occurred in the form of lower tar cigarettes manufactured by Defendants;
- RBH's has always complied with the government's requests and direction relating to the smoking and health issue, including voluntary restrictions, legislative-mandated warnings, and the manufacturing and promotion of a lower tar cigarette – and the government commended RBH for doing so;
- RBH developed and implemented product modifications to reduce the health risks posed by smoking, primarily by producing lower and lower tar cigarettes, and reduction of TSNAs; and
- Plaintiffs have conceded that there is nothing RBH could have done to make its product safer.

687. RBH sold a legal product heavily regulated by the government and for which the risks were known, or should have been known, by the class members. The court has been told of no practical way in which these risks could likely have been reduced further. RBH's manufacturing, marketing and selling of cigarettes is not – in light of the circumstances – a civil fault.

688. The government agreed that smokers were responsible for their own behaviour. According to former Health Minister Lalonde, "*en autant que la cigarette n'était pas déclarée un produit illégal, les citoyens finalement étaient responsables de leur propre conduite à ce sujet.*"[657] The law in Québec does not permit consumers knowingly to take a risk to health and then, when the foreseen risk materializes, (with or without a backward look over half a century) sue the manufacturer on the ground the risk should not have been offered.

[596] These representations go well beyond the scope of Common Question A and are dealt with in other parts of the present judgment.

[597] In its response as to when it first admitted that smoking caused a Disease, it asserted that "It has been RBH's publicly disclosed position since 1958 that smoking is a risk factor for lung cancer and other serious diseases and that the more one smokes the more likely one is to get such diseases". It is referring to a 1958 incident created by Patrick O'Neill-Dunne, the president of Rothmans of Pall Mall Canada Limited. We look at that in the following section.

[598] Getting to the substance of Common Question A, as with the other Companies, the Court considers the testimony of their top executives to be conclusive.

[599] John Barnett, RBH's current president and CEO, testified before the Court on November 19, 2012. At that time, the following exchange took place:

72Q- It says on your website[290] that cigarettes are dangerous and addictive; correct?

A- Yes.

73Q- Do you have any reason to believe that cigarettes are less dangerous or less addictive than they were in the nineteen sixties (1960s)?

A- I've got no basis for saying that they are less dangerous or less addictive today than they were in the sixties (60s), no.

74Q- In the second sentence, under the "Smoking and Health" paragraph it states - for the record, I'm always referring to the same exhibit, Your Lordship - that, "There is overwhelming medical and scientific evidence that smoking causes lung cancer, heart disease, emphysema, and other serious diseases". Let's deal first with that part of the sentence that says there is overwhelming medical and scientific evidence that smoking causes lung cancer; do you have any reason to believe that smoking, which causes lung cancer today according to the statement on your website, did not cause lung cancer in the nineteen sixties (1960s)?

A- No, I don't. I started smoking when I was in England. I started smoking in front of my parents when I was seventeen (17), when I started to work, and incurred the wrath of my mother …

And cigarettes were known as coffin nails and cancer sticks in England in nineteen sixty-one (1961) when I started smoking. That was my basis of saying that I don't believe there was any difference in nineteen sixty-one (1961) as towards today.

77Q- And would your answer be the same... with respect to overwhelming medical and scientific evidence that smoking causes heart disease, emphysema and other serious diseases, it would have been the same in the nineteen sixties (1960s) as it is today according to your website statement?

A- Yes, sir.

[600] Mr. Barnett's candid testimony, coupled with the contents of the website, provide a clear answer to the first Common Question. RBH clearly did manufacture,

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290 The document referred to is Exhibit 834, which is actually the RBH page from the website of Philip Morris International as at October 22, 2012. The copyright information on it appears to date from 2002, four years after the end of the Class Period. The text referred to reads as follows:

Smoking and Health - Tobacco products, including cigarettes, are dangerous and addictive. There is overwhelming medical and scientific evidence that smoking causes lung cancer, heart disease, emphysema and other serious diseases.

Addiction - All tobacco products are addictive. It can be very difficult to quit smoking, but this should not deter smokers who want to quit from trying to do so.

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market and sell a product that was dangerous and harmful to the health of consumers during the Class Period[291].

[601] As with the other Companies, it remains to be determined when RBH learned, or should have learned, that its products were dangerous and harmful and what obligations it had to its customers as a result. The other Common Questions deal with those points.

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IV.B. DID RBH KNOW, OR WAS IT PRESUMED TO KNOW OF THE RISKS AND DANGERS ASSOCIATED WITH THE USE OF ITS PRODUCTS?

IV.B.1 THE BLAIS FILE

IV.B.1.a AS OF WHAT DATE DID RBH KNOW?

[602] In its Notes, RBH sums up its position on this question as follows:

> **713.** Yes, RBH knew of the risks associated with its product, just as the public, including the class members, government, and public health community knew. But the relevant legal question is whether, in light of all the circumstances, class members were entitled to expect a safer cigarette than RBH manufactured, marketed, and sold. The answer to that question is "no" for the reasons summarized in Section IV.A., at paras. 261-265. As a result, RBH's knowledge of the risks – which was not materially greater than that of the public, government and public health community – cannot equate to a civil fault.

[603] William Farone testified for the Plaintiffs. From 1976 to 1984, he was the Director of Applied Research at Philip Morris Inc. in Richmond, Virginia. He declared that, over that period, it was generally accepted by the scientific personnel at PhMInc. that smoking caused disease.

[604] John Broen, who worked for over 30 years in RBH-related companies starting in 1967, testified that it was generally believed in the industry that smoking was risky and bad for you, although not necessarily dangerous to all people. He added that the government had assumed the responsibility for warning smokers of that fact and that the Companies kept silent in order to avoid "muddying the waters".

[605] Steve Chapman, who started with RBH in 1988 and remains there today, was the designated spokesperson for the company in these files. In that role, he reviewed corporate documents and interviewed long-term employees with respect to the issues in play here. His research convinced him that the "operating philosophy" of the company from the beginning of his employment, and well before, was that there are risks associated with smoking and that this philosophy was the motor behind RBH's efforts going back to the 1960s to develop lower tar cigarettes. RBH, like Health Canada, believed that low tar is "less risky". He also confirmed that company records show that RBH's "parent companies" shared their scientific information with it.

[606] In fact, there is documentary proof that the major shareholder of this company was of this belief well before the dates mentioned above. In 1958, the year that

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[291] Proof of the likelihood that smoking causes the Diseases was discussed in the chapter of the present judgment examining the case of ITL. That analysis and our conclusions apply to all three Companies.

Rothmans of Pall Mall Canada Limited started doing business in Canada, Rothmans International Research Division issued at least one press release and published several full-page "announcements of major importance" in Canadian publications. They speak volumes of what the Rothmans group of companies knew of the risks and dangers associated with smoking at that time and it is worth quoting from them at length.

[607] In one advertisement, which ran in *Readers' Digest* (Exhibit 536A), the following appears:

> On July 6-12th in London, England, 2,000 scientists from 63 countries attending the 7th International Cancer Congress - an event held every four years - were given the latest data on cancer and smoking by the world's foremost cancer experts. Rothmans Research scientists were also there and have examined the papers submitted along with their own findings,
>
> 1. Rothmans Research accepts the statistical evidence linking lung cancer with heavy smoking. This is done as a precautionary measure in the interest of smokers.
> 2. The exact biological relationship between smoking and cancer in mankind is still not known and a direct link has not been proved.
>
> …
>
> 9. Some statistical studies indicate a higher mortality rate from lung cancer among cigarette smokers than among smokers of cigars and pipes. However, in laboratory experiments, the carcinogenic activity from cigar and pipe smoke was found to be greater than in cigarette smoke, because, burning at a high temperature for a longer time, combustion is more complete in cigars and in pipes.
> 10. The tobacco-cancer problem is difficult and nebulous. It has brought forth many conflicting theories and evidences. But great knowledge and a better understanding have been gained through research. The controversy is a matter of public interest. The tar contents of the world's leading brands of cigarettes are today under the scrutiny of medical and independent research.
>
> Rothmans Research Division welcomes this opportunity to reiterate its pledge:
>
> (1) to continue its policy of all-out research,
>
> (2) to impart vital information as soon as it is available, and
>
> (3) to give smokers of Rothmans cigarettes improvements as soon as they are developed.
>
> In conclusion, as with all the good things of modern living, Rothmans believes that with moderation smoking can remain one of life's simple and safe pleasures.
>
> (The Court's emphasis)

[608] In another advertisement published in *The Globe and Mail* on June 21, 1958 (Exhibit 536), one finds the following statements:

> On June 18th, at Halifax, N.S., 1500 delegates attending the annual meeting of the Canadian Medical Association were shown a graphic display which suggested a link between smoking and lung cancer.

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> THIS IS NOT the first time that a warning has been issued by Canadian doctors but, hitherto, it appears to have gone comparatively unheeded by Canadian smokers and the Canadian tobacco industry.
>
> Since 1953, similar pronouncements of varying intensity have also been made by medical associations in Britain and in the U.S.A., where such warnings have been more generally accepted.
>
> Rothmans would like it known that the problem of the relationship between cancer and smoking has for many years engaged the attention of the Research Division or its world-wide organization.
>
> Several years ago the Rothmans Research Division had already accepted the thesis that:
>
> > "*The greater the tars reduction in tobacco smoke, the greater the reduction in the possible risk of lung cancer."*
>
> Therefore, as an established and leading member of the industry, Rothmans accepts that it is its duty to find a solution to the problem, either through co-operation with independent medical research-or, if necessary, alone.
>
> …
>
> Finally, if in addition to all the foregoing, smokers will practise moderation, Rothmans Research Division believes that smoking can still remain one of life's simple and safe pleasures. (The Court's emphasis)

[609] In an August 1958 letter to Sydney Rothman, the chairman of the Rothmans board in London[292], Patrick O'Neill-Dunne defended the audacious statements of Rothmans of Pall Mall Canada:

> The upshot of my recent P.R. release, however irritating it might have been to you, Plumley and Irish, has made front-page news in certain British papers, most of the Canadian and Australian papers and front page, second section in the New York Times. You cannot buy this for any money. …
>
> I am certain that the stand I have chosen will be copied by the leading U.S.A. manufacturers shortly as the only way of getting themselves out of the rat race of deceit into which they have plunged themselves at a cost of $30 million per annum in advertising per brand to remain alive as a major seller. (The Court's emphasis)

[610] As alluded to in the letter, Rothmans' announcements raised the ire of a number of tobacco executives and led to a colourful exchange of correspondence between some of them and Mr. O'Neill-Dunne that, in earlier times, could likely have culminated in duelling pistols at dawn[293].

[611] Although it is not clear what happened to Mr. O'Neill-Dunne as a result of his campaign of candour, the proof indicates that for the rest of the Class Period Rothmans, and later RBH, never reiterated the position Rothmans so famously took in 1958. Thereafter, it toed the industry line, crouching behind the Carcassonnesque double wall of

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292 Exhibit 918.

293 Exhibits 536C through 536H.

the Warnings, backed up by the "scientific controversy" of no proven biological link and the need for more research.

[612] Nonetheless, based on Rothmans' 1958 announcements and Mr. O'Neill-Dunne's comments, it is clear that the company knew of clear risks and dangers associated with the use of its products and that this knowledge was gained well before 1958, in all probability going back to at least the beginning of the Class Period. That answers this Common Question, but there is more to be learned from this incident.

[613] It demonstrates that by 1958 RBH was able to accept publicly "the statistical evidence linking lung cancer with heavy smoking" even though "the exact biological relationship between smoking and cancer in mankind is still not known and a direct link has not been proved"[294]. This is significant. It shows that the lack of a complete scientific explanation was not an impediment to admitting – publicly - that smoking is dangerous to health.

[614] In any case, incomplete scientific knowledge of such a danger is no defence to a failure to warn. Once again, the *Hollis* breast implant case provides guidance on the point:

> … "unexplained" ruptures, being unexplained, are not a distinct category of risk of which they could realistically have warned. In my view, these arguments fail because both are based upon the assumption that Dow only had the obligation to warn once it had reached its own definitive conclusions with respect to the cause and effect of the "unexplained" ruptures. This assumption has no support in the law of Canada. Although the number of ruptures was statistically small over the relevant period, and the cause of the ruptures was unknown, Dow had an obligation to take into account the seriousness of the risk posed by a potential rupture to each user of a Silastic implant. Indeed, it is precisely because the ruptures were "unexplained" that Dow should have been concerned.[295]

[615] Nonetheless, all three Companies rely on the scientific uncertainty as to how smoking specifically causes disease as a justification for not saying more about the risks and dangers of their products[296]. The Rothmans announcements of 1958 puncture the hull of that argument. What sinks the ship is the admission by all the current company presidents that cigarettes are dangerous, and they admit this in spite of the fact that, even today, the exact biological cause has still not been identified.

[616] In summary, there is no reason to believe that Mr. O'Neill-Dunne, in spite of what appears to have been a prodigious ego, knew any more about the question – or knew it any earlier - than other tobacco executives of the time. In that light, his characterization of the American position in 1958 as a "rat race of deceit" leads one to

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294 Exhibit 536A.

295 *Op. cit.*, *Hollis*, Note 40, at paragraph 41.

296 An example of this for RBH is presented in Exhibit 758.3. There, citing the "latest figures" of the American Cancer Society, Mr. O'Neill-Dunne in the conclusions to his "Sales Lecture No. 3" under the heading "What is known", notes that studies show that the death rate from lung cancer is 64 times greater among heavy smokers than among nonsmokers, and that a nonsmoker has 1 chance in 275 of getting lung cancer, whereas a heavy smoker has 1 chance in 10. Under "What is not known" he lists "the exact relationship between smoking and lung cancer". A year later, he did not let the latter impede him from issuing the statements we have already seen.

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presume that the industry insiders were far from ignorant of the dangers of their products as early as the beginning of the Class Period in 1950.

[617] The Court thus concludes that at all times during the Class Period RBH knew of the risks and dangers of its products causing one of the Diseases.

IV.B.1.b AS OF WHAT DATE DID THE PUBLIC KNOW?

[618] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

IV.B.1.b.1 THE EXPERTS' OPINIONS: THE DISEASES AND DEPENDENCE

[619] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

IV.B.1.b.2 THE EFFECT OF THE WARNINGS: THE DISEASES AND DEPENDENCE

[620] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

IV.B.2 THE LÉTOURNEAU FILE

IV.B.2.a AS OF WHAT DATE DID RBH KNOW: TOBACCO DEPENDENCE?

[621] In the chapter of the present judgment analyzing the case of ITL, we cited Professor Flaherty to the effect that since the mid-1950s it was common knowledge that smoking was difficult to quit, and that by that time "the only significant discussion in the news media on this point concerned whether smoking constituted an addiction, or whether it was a mere habit"[297].

[622] Consistent with our reasoning throughout, we conclude that if the Companies believed that the public knew of the risk of dependence by the 1950s, each of the Companies had to have known of it at least by the beginning of the Class Period.

IV.B.2.b AS OF WHAT DATE DID THE PUBLIC KNOW: TOBACCO DEPENDENCE?

[623] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.C. DID RBH KNOWINGLY PUT ON THE MARKET A PRODUCT THAT CREATES DEPENDENCE AND DID IT CHOOSE NOT TO USE THE PARTS OF THE TOBACCO CONTAINING A LEVEL OF NICOTINE SUFFICIENTLY LOW THAT IT WOULD HAVE HAD THE EFFECT OF TERMINATING THE DEPENDENCE OF A LARGE PART OF THE SMOKING POPULATION?

[624] The analysis and conclusions set out in chapter II.C of the present judgment apply to all three Companies.

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[297] Exhibit 20063, at page 4.

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IV.D. DID RBH TRIVIALIZE OR DENY OR EMPLOY A SYSTEMATIC POLICY OF NON-DIVULGATION OF SUCH RISKS AND DANGERS?

IV.D.1 THE OBLIGATION TO INFORM

[625] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.D.2 NO DUTY TO CONVINCE

[626] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.D.3 WHAT RBH SAID PUBLICLY ABOUT THE RISKS AND DANGERS

[627] Similar to the case for JTM, the factual analysis in section II.D.4 referring to representations by the Ad Hoc Committee and the CTMC applies to RBH.[298]

[628] The other evidence reveals precious few public pronouncements by RBH about the risks and dangers of smoking. RBH does shine much light on the 1958 hiccup emanating from Mr. O'Neill-Dunne, but we have already said what we have to say on that. Otherwise, it expends most of its energy denying that it officially and publicly said anything that could be misleading or false. In its conclusion to this section in its Notes, RBH puts it succinctly:

> After 1958, RBH did not make any statements intended for the public, did not publish any statements and did not run any marketing campaigns on the smoking and health issue;[299]

[629] Recognizing that this is true, its near-perfect silence on the issues does not assist RBH in defending against the principal faults we find that it committed. It is revealing, however, to note the manner in which that silence was broken in a 1964 speech by its then-president, Mr. Tennyson, to the Advertising and Sales Association in Montreal. It is difficult, and demoralizing (among other sensations), to read his concluding remarks:

> As tobacco people, we have a three-fold interest in this matter.
>
> 1. As human beings, we are, of course, concerned with the health of our fellow man and we would certainly voluntarily refrain from contributing to their detriment.
>
> 2. But, as citizens, we have a natural interest in protecting the economic welfare of the many people who are dependent on tobacco, from irresponsible and hasty actions on the part of well-meaning but misguided people.
>
> 3. As businessmen, we have a responsibility to our personnel and to our shareholders and l do not think that we may sacrifice their interests on the flimsy evidence which has thus far been presented.
>
> [...]

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298 We are not unaware of RBH's withdrawal from the CTMC for a short time during the Class Period but consider that immaterial for these purposes.

299 At paragraph 895.

> The good things in life are simple. A variety of small pleasures make up living, as one learns to recognize and enjoy them. Smoking has been and will continue to be one of these uncomplicated and simple pleasures of life.[300]

[630] Spoken only six years after the company's "coming-out" under Mr. O'Neill-Dunne, these comments smack of hypocrisy, dishonesty and blind self-interest at the expense of the public. They are typical of what the Companies were saying throughout most of the Class Period and show why punitive damages are warranted here.

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IV.D.4 WHAT RBH DID NOT SAY ABOUT THE RISKS AND DANGERS

[631] In its Notes, RBH essentially lauds its compliance with the Policy of Silence.

> **886.** RBH's policy to refrain from making statements directly to the public about smoking and health cannot be deemed a trivialization or denial of health risks where those risks have been common knowledge since the early 1950s and where the government occupied the field on whether, when, and what information of health risks was disseminated to the public. If RBH had made any statements to the public about the smoking and health issue after 1958, Plaintiffs surely would contend that those statements were insufficient or otherwise trivialized the risks. Plaintiffs cannot have it both ways.
>
> **889.** […] there is no civil fault for not warning of risks that are already generally known ... the best, and only available course of action, was not to say anything to the public which might muddy the waters of the clear and dire warnings preferred by government and public health authorities.

[632] This reflects the defence enunciated in the first paragraph of article 1473 of the Civil Code: consumer knowledge. We have previously held that this is a valid argument as of January 1, 1980 for the Blais File, and March 1, 1996 for Létourneau, but only insofar as the fault with respect to a safety defect is concerned. It is not a full defence to the other three faults.

IV.D.5 COMPENSATION

[633] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.E. DID RBH EMPLOY MARKETING STRATEGIES CONVEYING FALSE INFORMATION ABOUT THE CHARACTERISTICS OF THE ITEMS SOLD?

[634] The analysis and conclusions set out in chapter II.E of the present judgment apply to all three Companies.

IV.F. DID RBH CONSPIRE TO MAINTAIN A COMMON FRONT IN ORDER TO IMPEDE USERS OF ITS PRODUCTS FROM LEARNING OF THE INHERENT DANGERS OF SUCH USE?

[635] The analysis and conclusions set out in chapter II.F of the present judgment apply to all three Companies.

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300 Exhibit 687, at pdf 21.

IV.G. DID RBH INTENTIONALLY INTERFERE WITH THE RIGHT TO LIFE, PERSONAL SECURITY AND INVIOLABILITY OF THE CLASS MEMBERS?

[636] The analysis and conclusions set out in chapter II.F of the present judgment apply to all three Companies.

[637] In its Notes, RBH sums up its position on this question as follows:

> **1071.** Nothing RBH did was intentional inference with the right to life, personal security and inviolability of the class members, and all of it was at the behest or with the approval of the government. As already explained, simple proof of erroneous statements or sales of a dangerous product is not sufficient to prove the element of fault under the Charter. As the Supreme Court stated in *Bou Malhab*, "conduct that interferes with a right guaranteed by the Charter does not necessarily constitute civil fault. The interference must also violate the objective standard of conduct of a reasonable person under art. 1457 CCQ." Intent alone cannot be the basis for liability, and as already shown, RBH's conduct does not satisfy the fault element of any conceivable cause of action or claim.
>
> **1072.** No industry has ever been more tightly regulated and closely scrutinized or done more to comply with every law, voluntary and legislated, and to remain out of sight and mind, while researching ways to make a safer product. Plaintiffs have offered no evidence that the class members were even exposed to RBH's alleged misconduct – let alone that such exposure caused an infringement of their right to life under Section 1 or dignity under Section 4.

[638] The Court has dealt with these arguments earlier in the present judgment and there is nothing new to add. There is, however, an additional factual element that should be considered in the present context: the timing of RBH's use of "indirect-cured" tobacco.

[639] In indirect curing, the tobacco does not come into contact with heat-generating elements, as is the case for direct curing. By this "new" technique, the heat comes from a heat exchanger, so no combustion residue touches the tobacco, as compared to direct curing.

[640] Mr. Chapman testified that near the end of the Class Period it was discovered that indirect curing dramatically reduced the presence of carcinogenic nitrosamines in tobacco, often called "TSNA". The reduction of TSNA was in the order of 87%.[301] Later the same day, he replied to the Court's questions as follows:

> 752Q- But don't I have to assume that, by your going full blown to indirect-cured tobacco at some point, the company made the decision that this was going to reduce the nitrosamines in its cigarettes; is that not a fair assumption?
> A- We did do that for that reason, absolutely.
>
> 753Q- And therefore, it's a less hazardous cigarette as a result; is that a fair statement?
> A- We had no way to know, sir. But it was just the right thing to do, because it had been identified as a component of smoke that could be...

[301] Transcript of October 23, 2013, at page 21.

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754Q- All right. So why didn't you do right away, go as whole as a bullet (sic) right away with what you looked at as...
A- Because we had...

755Q- a potentially safer cigarette?
A- We didn't know for sure it would be safer, and we had inventories of tobacco to deplete.[302]

[641] The "inventories of tobacco to deplete", it must be remembered, consisted of tobacco that had been cured using direct heat, and thus contained 87% more carcinogenic nitrosamines. The Court recognizes that RBH's use of those inventories took place just after the end of the Class Period, but the incident casts light on the Company's general attitudes and priorities at the time. It was more important to use up its inventories than to protect the health of its customers.

[642] This is just one example among many of the Companies' lack of concern over the harm they were causing to their customers and goes directly to intentionality. It is consistent with the attitudes of the Companies throughout the Class Period and with our conclusions in Chapter II.F of the present judgment.

V. SUMMARY OF FINDINGS OF FAULT

[643] To recapitulate, the Court finds that the Companies committed faults under four different headings:

a. the general rules of civil liability: article 1457 of the Civil Code;

b. the safety defect in cigarettes: articles 1468 and following of the Civil Code;

c. an unlawful interference with a right under the Quebec Charter: article 49;

d. a prohibited practice under the Consumer Protection Act: articles 219, 228.

[644] We find further that their faults under article 1468 ceased at the knowledge date in each file: January 1, 1980 for Blais and March 1, 1996 for Létourneau. The other faults continued throughout the Class Period.

[645] All four faults potentially give rise to compensatory damages, subject to other considerations, such as proof of causation and prescription issues. The last two faults also permit an award for punitive damages.

[646] As alluded to above, fault alone does not lead to liability for compensatory damages. The Companies correctly point out that proof of causation is a particularly critical element in these cases. There is also the possibility of an apportionment of liability between the Companies and the Members. We examine these and more in the following sections.

VI. CAUSATION

[647] Proof of causation in these files is a multi-link chain involving several intermediate steps. We choose to start from the damages and work back towards the

[302] Transcript of October 23, 2013, at pages 255-256.

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faults. Hence, the following questions must be analyzed in order to determine if the moral damages claimed were caused in the juridical sense by the Companies' faults:

- Were the Members' moral damages caused by the Diseases or by tobacco dependence?
- Were the Diseases or the dependence caused by smoking the Companies' products?
- Was a fault of the Companies a cause of the Members' starting or continuing to smoke?

[648] In order for the Plaintiffs to succeed, all must be answered in the affirmative, but even that will not be enough. The third question has another side to it that could influence liability: by starting or continuing to smoke in spite of adequate knowledge of the risks and dangers of smoking, certain Members would have accepted those risks and dangers. Was this a fault of the type to lead to a sharing of liability?

[649] Before following each of these paths, we shall deal with a type of omnibus argument made by the Plaintiffs to the effect that a *fin de non recevoir* should be applied to block the Companies from even attempting to make a defence in light of the gravity of their faults.

[650] The principle of *fin de non recevoir* is of a nature similar to estoppel in the common law, as further explained in the Plaintiffs' Notes:

> **2163.** A "*fin de non-recevoir*" prevents a party from benefitting from a right which they may be entitled to by law,[303] but which they acquired through their own misconduct: "no one should profit from his own fault or seek the aid of the courts in doing so," wrote Beetz J. in *Soucisse.*[304]

[651] The Plaintiffs' argument is essentially that the mere selling of cigarettes constitutes a violation of the Companies obligation to exercise their rights in good faith[305] and that such violation was so egregious that it should be heavily sanctioned. The sanction they would apply would be to bar the Companies from advancing any defence to the Members' claims.

[652] Even accepting the allegations concerning the Companies' lack of good faith and the gravity of their faults, the Court frankly cannot see how this could justify contravening one of the most sacred rules of natural justice: *audi alteram partem*. Many of the acts of which the Companies are accused were both permitted by law and committed with the full knowledge of, and under direct regulation by, the governments of Canada and Quebec.

[653] In that light, the Court cannot see how it can acquiesce to the Plaintiffs' arguments, all the more so given the fact that the law already provides for a heavy sanction in cases such as these in the form of punitive damages.

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303 See Didier LLUELLES et Benoît MOORE, *Droit des obligations*, 2nd édition, Montréal, Éditions Thémis, 2012, paragraph 2031, page 1159.

304 *National Bank v. Soucisse et al.,* [1981] 2 SCR 339 at p. 358.

305 Articles 6 and 1375 of the Civil Code.

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VI.A. WERE THE MORAL DAMAGES IN THE BLAIS FILE CAUSED BY THE DISEASES?

[654] Let us start by noting that causation relates only to compensatory and not to punitive damages. The latter need not be shown to have been caused to a plaintiff.

[655] We also note that the Plaintiffs' proof of the nature and the degree of the general prejudice suffered by victims of the Diseases was not contradicted by the Companies, nor was the causal link between those injuries and the various Diseases. Hence, the Court need not go into a detailed analysis of each aspect of the evidence in this regard.

[656] This said, in spite of the Companies' assertions that there is no proof on an individual basis, the Court is satisfied that the uncontradicted evidence of the Plaintiffs' experts as to the injuries typically suffered by a person having one of the Diseases or tobacco dependence corresponds to the injuries claimed by the Plaintiffs in each file. The value to be placed on those injuries is a separate issue and will be dealt with in a later section of the present judgment.

[657] As noted earlier, the moral damages claimed in the Blais File are for loss of enjoyment of life, physical and moral pain and suffering, loss of life expectancy, troubles, worries and inconveniences arising after having been diagnosed with one of the Diseases. To prove the occurrence of such moral damages among the victims of the Diseases, the Plaintiffs turned to experts.

[658] In a later section, we look in detail at these experts' reports with respect to the effect of each Disease and tobacco dependence on their victims. That level of detail is not necessary for the specific issue being dealt with at this stage, since we need ascertain nothing more than the causal link between the type of damages claimed and the Diseases or dependence.

[659] For lung cancer, the Plaintiffs filed the expert's report of Dr. Alain Desjardins (Exhibit 1382 - 1382.2 is the English translation). At pages 72 through 79, he describes in detail the physical and mental prejudice typically suffered by persons with lung cancer. As is the case for all the Diseases, the prejudice caused by the treatment itself, both curative and palliative, is a major factor in the diminution of quality of life and in the physical and emotional suffering of the victim. His evidence is uncontradicted and the Court holds that the causal link between that prejudice and lung cancer is established.

[660] For throat and larynx cancer, the Plaintiffs filed the expert's report of Dr. Louis Guertin (Exhibit 1387). It is true that his report considers cancers of the oral cavity, as well as of the larynx and pharynx, while the amended Class description in Blais is restricted to cancers of the larynx, the oropharynx and the hypopharynx. Nevertheless, the Court does not hesitate to apply his broader analysis to the more limited definition. His explanation of the troubles and inconveniences of victims at pages 5 through 8 makes it clear that the nature of the prejudice is similar in all cases.

[661] In that section, Dr. Guertin describes in detail the physical and mental prejudice typically suffered by persons with cancer of the larynx or pharynx, covering both treatable and untreatable cases, and the suffering and loss of quality of life resulting from the

various treatments. His evidence is uncontradicted and the Court holds that the causal link between that prejudice and those cancers is established.

[662] For emphysema, the Plaintiffs again counted on the report of Dr. Desjardins (Exhibit 1382 - 1382.2 in English). As with Dr. Guertin's report, Dr. Desjardins' opinion covers a broader scope than the Disease at issue. He analyzed the case of COPD, Chronic Obstructive Pulmonary Disease, which includes both emphysema and chronic bronchitis. As with the case of throat cancer, based on his explanation of the troubles and inconveniences of COPD victims, the Court does not hesitate to apply his broader analysis to the specific case of emphysema.

[663] Dr. Desjardins describes in detail the physical and mental prejudice typically suffered by persons with emphysema and the suffering and loss of quality of life resulting from the various treatments. He uses what is known as the "GOLD Guidelines" to rank the impact on the quality of life to the relative gravity of the sickness.

[664] His evidence is uncontradicted and the Court holds that the causal link between that prejudice and emphysema is established.

VI.B. WERE THE MORAL DAMAGES IN THE LÉTOURNEAU FILE CAUSED BY DEPENDENCE?

[665] In Létourneau, the moral damages claimed are for an increased risk of contracting a fatal disease, reduced life expectancy, social reprobation, loss of self esteem and humiliation. Here, too, the Plaintiffs relied on an expert to make their proof and filed two reports by Dr. Juan Negrete (Exhibit 1470.1 and 1470.2). The description of the damages is contained in the latter document of some five pages in length and, as above, both that description and the causal link between those damages and tobacco dependence are uncontradicted.

[666] Dr. Negrete describes the physical and mental prejudice suffered by dependent smokers, including that related to the problems typically encountered when trying to break that dependence. He is of the view that the effect of tobacco dependence on one's daily life and lifestyle is such that it can be said that the state of being dependent is, in and of itself, the principal problem caused by smoking.[306]

[667] His evidence is uncontradicted and the Court holds that the causal link between that prejudice and tobacco dependence is established.

VI.C. WERE THE DISEASES CAUSED BY SMOKING?

[668] This is generally known as "medical causation". Given its scientific base, this question must be answered at least in part through experts' opinions. To that end, the Plaintiffs relied on two types of experts: specialists on each Disease and an epidemiologist. They also sought assistance through Quebec's *Tobacco-Related Damages and Health Care Costs Recovery Act* of 2009 (the "**TRDA**")[307], a law created especially for tobacco litigation.

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306 "*L'état de dépendance est, en soi même, le trouble principal causé par le tabagisme*": Exhibit 1470.2, page 2

307 RSQ, c. R-2.2.0.0.1.

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[669] On medical causation between both smoking and lung cancer and smoking and emphysema, the Plaintiffs made their proof through Dr. Alain Desjardins. For smoking and throat and larynx cancer, the Plaintiffs relied on Dr. Louis Guertin.

VI.C.1 THE EVIDENCE OF DRS. DESJARDINS AND GUERTIN

[670] At page 62 of his report (Exhibit 1382 - 1382.2 in English), Dr. Desjardins notes that epidemiological studies report that smoking is the cause of 85 to 90 percent of new lung cancer cases. He also cites the Cancer Prevention Study of the American Cancer Society that states that smoking is responsible for 93 to 97% of lung cancer deaths in males over 50 and 94% in females. As we discuss further below, figures of this magnitude are either admitted or not contested by two of the Companies' experts.

[671] Based on Dr. Desjardins' full opinion, and in the absence of convincing proof to the contrary, the Court is satisfied that the principal cause of lung cancer is smoking at a sufficient level. Determining that "sufficient level" for lung cancer, as for the other Diseases, was the mandate of the Plaintiffs' epidemiologist. We examine his opinion below.

[672] For cancer of the larynx, the oropharynx and the hypopharynx, Dr. Guertin states the following at page 24 of his report (Exhibit 1387):

> For all these reasons, it is clear that the cigarette is the principal etiological agent causing the onset of about 80 to 90 percent of (throat cancers). Moreover, for a number of reasons, it results in an unfavourable prognostic in a great number of patients. Finally, some 50% of patients with a throat cancer will eventually die from it. Those who are cured will undergo a significant change in their quality of life before, during and after treatment.[308]

[673] Based on Dr. Guertin's full opinion, and in the absence of convincing proof to the contrary, the Court is satisfied that the principal cause of cancer of the larynx, the oropharynx and the hypopharynx is smoking at a sufficient level, to be determined through epidemiological analysis.

[674] Dr. Desjardins deals with emphysema in his report through an analysis of COPD, which includes both emphysema and chronic bronchitis. He justifies that approach by noting that a high percentage of individuals with COPD have both diseases, but not all[309]. He opines that "among the risk factors known for COPD, smoking is by far the most important"[310].

[675] Based on Dr. Desjardins' full opinion, and in the absence of convincing proof to the contrary, the Court is satisfied that the principal cause of emphysema is smoking at a sufficient level, to be determined through epidemiological analysis.

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308 Dr. Guertin's report is in French. Although this English citation from it is accurate, the Court must admit that it has no idea whence it comes.

309 Exhibit 1382, at page 12.

310 Exhibit 1382, at page 14: "*Parmi les facteurs de risque établis de la MPOC, le tabagisme est de loin le plus important, […]*".

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[676] As indicated, these opinions are not effectively contradicted by the Companies, who religiously refrain from allowing their experts to offer their own views on medical causation between smoking and the Diseases. In spite of that, the Plaintiffs did manage to squeeze certain admissions out of Doctors Barsky and Marais with respect to lung cancer. In and of themselves, however, these opinions are but a first step to proving the Plaintiffs' case.

[677] It remains to determine what "smoking" means in this context, i.e., how many cigarettes must be smoked to reach the probability threshold on each of the Diseases. For that, the Plaintiffs turn to their epidemiologist, Dr. Jack Siemiatycki. However, before going there, it is necessary to deal with two arguments advanced by the Companies: that section 15 of the TRDA does not apply to these cases and that the Plaintiffs failed to make evidence for each Member.

VI.C.2 SECTION 15 OF THE TRDA

[678] This provision is designed to facilitate a plaintiff's burden in proving causation in tobacco litigation. It reads as follows:

> **15.** In an action brought on a collective basis, proof of causation between alleged facts, in particular between the defendant's wrong or failure and the health care costs whose recovery is being sought, or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling.

[679] Although it appears to be made directly applicable to class actions by the last paragraph of section 25, which states that "Those rules (including section 15) also apply to any class action based on the recovery of damages for the (tobacco-related) injury", ITL submits that section 15 does not apply at all in these files.

[680] It points out that the TRDA creates an exception to the general rule and, therefore, must be interpreted restrictively. Based on that, it argues that section 15 cannot apply to a class action pending on June 19, 2009 because that provision does not contain language similar to that of section 27, which states that it (that section) applies to a class action "in progress on June 19, 2009"[311]. ITL would thus convince the Court that the only provisions of the TRDA that can apply to a class action pending on that date, as are these, are those that specifically say so. Section 15 does not say so.

[681] The Court rejects this submission for five reasons.

[682] On the one hand, it confronts and contradicts the clear intention of section 25 that the rules in question should assist "any" such class action, which we take to mean "all" such class actions. This interpretation is bolstered by the French version, which

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[311] **27.** An action, including a class action, to recover tobacco-related health care costs or damages for tobacco-related injury may not be dismissed on the ground that the right of recovery is prescribed, if it is in progress on 19 June 2009 or brought within three years following that date.

speaks of "*tout recours collectif*"[312]. To override such otherwise unequivocal language would take an even more unequivocal indication of a contrary intention, a test that ITL's "nuancical" reasoning fails to meet.

[683] As well, section 25 opens with the words "Despite any incompatible provision". This is a further indication that the legislator intended that no argument or belaboured interpretation should stand in the way of the application of these rules to all actions to recover damages for a tobacco-related injury.

[684] In addition, the purpose of section 27 is to establish new rules for the prescription of tobacco-related claims, as the title of Division II of the act indicates. To do that, it had to specify the date from which prescription would henceforth run for such actions. That appears to be the sole reason for mentioning that date and it is obvious that it is not meant to serve as a restriction on the application of the other provisions.

[685] Moreover, dates are not mentioned in any other relevant provision of the act. In light of that, to accept ITL's argument would be to strip the TRDA of any effect with respect to actions in damages. This would be a nonsensical result.

[686] Finally, there is the not inconsequential fact that the Court of Appeal has already stated that it applies to these cases at paragraph 48 of its judgment of May 13, 2014[313].

VI.C.3 EVIDENCE FOR EACH MEMBER OF THE CLASSES

[687] The Companies characterize the Plaintiffs' decision not to establish causation for each member of the Classes as a fatal weakness. The case law is to the effect that, for both medical causation and conduct causation (discussed below), "(i)n order to make an order for collective recovery, both of these causal elements (medical and conduct) must be demonstrated with respect to each member of the class".[314] On that basis, the Companies insist that the Plaintiffs had to prove that each and every Member of a Class had suffered identical damages to those of the other Members of that Class.

[688] Taken to the degree that the Companies would impose, essentially each Class member would have had to testify in one way or another in the file. For them, the fact that no Members of either Class testified means that it is impossible to conclude that adequate proof of Class-wide damages has been made.

[689] It is not difficult to see how this approach is totally incompatible with the class action regime. Nevertheless, at first glance the case law appears to favour that position.

[690] The Companies omitted, however, to discuss the effect of the statement that opens paragraph 32 in the *St-Ferdinand* decision. We cite it below in both languages for the sake of greater clarity, noting that, in that Québec-based case, the judgment of the Court was delivered by L'Heureux-Dubé, J. We thus assume that it was originally drafted in French.

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312 *Ces règles s'appliquent, de même, à tout recours collectif pour le recouvrement de dommages-intérêts en réparation d'un tel préjudice.*

313 *Imperial Tobacco v. Létourneau*, 2014 QCCA 944.

314 Notes of JTM at paragraph 2367. See, for example, *Bou Malhab c. Métromédia C.M.R. Montréal inc.*, [2011] 1 SCR 214 and *Bisaillon c. Université Concordia*, [2006] 1 SCR 666.

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32. These general rules of evidence are applicable to any civil law action in Quebec and to actions under statutory law of a civil nature, unless otherwise provided or indicated.[315]

(The Court's emphasis)

32. Ces règles générales de preuve sont applicables à tout recours de droit civil au Québec ainsi qu'aux recours en vertu du droit statutaire de nature civile, à moins de disposition ou mention au contraire.

(The Court's emphasis)

[691] In none of the Supreme Court decisions cited by the Companies did the TRDA apply. That distinction is critical, since section 15 thereof appears to correspond to what Judge L'Heureux-Dubé envisioned when she wrote of a "*disposition ou mention au contraire*"[316]. As such, and in light of the fact that the TRDA does apply here, the Plaintiffs may prove causation solely through epidemiological studies.[317] This has a direct impact on the need for proof for each class member, given that epidemiology deals with causation in a population and not with respect to each member of it.

[692] The objective of the TRDA is to make the task of a class action plaintiff easier, *inter alia*, when it comes to proving causation among the class members[318]. When the legislator chose to favour the use of statistics and epidemiology, he was not acting in a vacuum but, rather, in full knowledge of the previous jurisprudence to the effect that each member of the class must suffer the same or similar prejudice. It thus appears that the specific objective of the act is to move tobacco litigation outside of that rule.

[693] The Court must therefore conclude that, for tobacco cases, adequate proof of causation with respect to each member of a class can be made through epidemiological evidence. The previous jurisprudence calling for proof that each member suffered a similar prejudice is overridden.[319]

[694] Although this rebuts the Companies' plaint over the use of epidemiological evidence to prove causation within the class, it does not relieve the Plaintiffs from making epidemiological proof that is reliable and convincing to a degree sufficient to establish probability. This brings us to an analysis of Dr. Siemiatycki's work and an assessment of the degree to which it is reliable and convincing.

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315 *Québec (Curateur public) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211.

316 Those words can also be translated as "a provision of law or indication to the contrary".

317 We must point out that, even without section 15 of the TRDA, we see no obstacle to considering statistical and epidemiological studies in ascertaining causation in these files. ITL concurs with this position at paragraph 1015 of its Notes, while correctly cautioning that "this evidence still needs to be reliable and convincing".

318 See: Lara KHOURY, *« Compromis et transpositions libres dans les législations permettant le recouvrement du coût des soins de santé auprès de l'industrie du tabac »*, (2013) 43 R.D.U.S. 611, at page 622: "*En d'autres termes, les gouvernements n'ont qu'à démontrer que, selon les données de la science, le tabagisme peut causer ou contribuer à la maladie, et non qu'il l'a fait dans le cas particulier de chaque membre de la collectivité visée. Il s'agit donc d'une preuve allégée de la causalité, confirmant ainsi la perspective collectiviste adoptée pour ces recours*.
Pursuant to section 25 of the TRDA, these provisions apply equally to class actions.

319 It will be interesting to see if the National Assembly eventually chooses to broaden the scope of this approach to have it apply in all class actions. Although such a move would inevitably be challenged constitutionally, its implementation would go a long way towards removing the tethers currently binding class actions in personal injury matters.

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VI.C.4 THE EVIDENCE OF DR. SIEMIATYCKI

[695] Dr. Siemiatycki is a highly-respected member of the world scientific community. A professor of epidemiology at both McGill University and l'Université de Montréal, he has published nearly 200 peer-reviewed articles and is ranked at the top of "Canadian public health research"[320]. He has served in various capacities with the International Agency for Research on Cancer of the WHO in France and sat on the boards of directors of both the American College of Epidemiology and the National Cancer Institute of Canada.

[696] His research areas make his opinions particularly valuable to the Court, since he has worked on a number of studies dealing with smoking-caused cancers over the past twenty years, including an oft-cited 1995 study of the Quebec population[321].

[697] Here, he did not have the luxury of being able to apply standard epidemiological techniques. In his report (Exhibit 1426.1), he describes his mandate as follows:

> The overall purpose of this report is to provide evidence and expert opinion regarding the causal links between cigarette smoking and each of four diseases: lung cancer; larynx cancer; throat cancer; and emphysema. For each disease, the following questions will be addressed:
>
> - Does cigarette smoking cause the disease?
> - How long has it been known in the scientific community that cigarette smoking causes the disease?
> - What is the risk of the disease among smokers compared with non-smokers?
> - What is the dose-response relationship between smoking and the disease?
> - At what level of smoking does the balance of probabilities exceed 50% that smoking played a contributory role in the etiology of an individual's disease?
> - Among all smokers who got the disease in Quebec since 1995, for how many did the balance of probabilities of causation exceed 50%?

[698] He admits that he was obliged to develop a "novel" approach by which he sought to calculate the "critical dose" of smoking at which it is probable that a Disease contracted by the smoker was caused by his or her smoking. At page 33 of his report he describes his methodology in general terms:

> "Using all the studies that provided results according to a given metric of smoking (e.g. pack-years), we needed to derive a single common estimate of the dose-response relationship between this metric and disease risk. There is no standard textbook method for doing this; we had to innovate."

[699] The Companies argue that Dr. Siemiatycki's analysis is insufficient and unreliable because it does not meet recognized scientific standards. Here are some of JTM's comments from its Notes:

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320 See exhibit 1426, page 2.

321 J. SIEMIATYCKI, D. KREWSKI, E. FRANCO and M. KAISERMAN (1995), *Associations between cigarette smoking and each of 21 types of cancer: a multi-site case-control study*, International Journal of Epidemiology 24(3): 504-514.

> **2426.** No court of which JTIM is aware has ever accepted epidemiological evidence alone, whether in the form offered by Dr. Siemiatycki or some analogous form, as sufficient proof of specific causation. As the cases referenced above demonstrate, the courts approach epidemiological evidence with caution.
>
> **2427.** There is all the more reason to approach Dr. Siemiatycki's analysis with caution. Dr. Siemiatycki admitted in cross-examination that his method was "novel" and that the notion of a "critical amount" of smoking was previously unknown in the literature. He invented it, and a method of deriving it, for the purposes of this case. Neither Dr. Siemiatycki's "critical amount" nor his "legally attributable fraction" is part of received scientific methodology. It is a novel science devised exclusively for the purposes of these proceedings.

[700] Although much of what JTM says above is accurate, it appears to go too far in the following paragraphs when it asserts:

> **2429.** There is an additional reason to approach Dr. Siemiatycki's analysis with real caution. Not only was Dr. Siemiatycki's "critical amount" method novel, he had no experience in the techniques required to carry it out. Indeed, Dr. Siemiatycki had to admit on cross examination that he had virtually no experience with meta-analysis - the very technique upon which he relied to produce his critical amount.
>
> **2430.** In short, Dr. Siemiatycki was not an expert, either in the specific method that he employed in the techniques he used to employ the method (sic). That being so, as Dr. Marais pointed out, Dr. Siemiatycki lacked the experiential basis upon which to assess, even subjectively, what he later called his "plausible ranges of error".

[701] Dr. Siemiatycki's cross examination on this point does not lead the Court to the same conclusion with respect to his expertise in applying meta-analyses, to the contrary:

> I would say that, compared to ninety-nine point nine nine nine percent (99.999%) of the world, I'm an expert in meta-analyses. And, that there are people who have more experience in that particular procedure, I would not deny, it's absolutely true, some people spend their careers just doing that now, but I know how to carry one out.[322]

[702] In any event, in their numerous criticisms of Dr. Siemiatycki's methodology, the Companies focused especially on what they saw as omissions.

[703] For example, they chide him for not attempting to show a possible causal connection between a fault by the Companies and the onset of a Disease in any Member, what ITL qualified as a "fatal flaw" (Notes, paragraph 1027). With due respect, as far as Dr. Siemiatycki's work is concerned, this is neither fatal nor a flaw. Although it is a critical issue, it is not something than can be evaluated using epidemiology, nor was it part of his mandate. The Plaintiffs choose to deal with that through other means, as we analyze further on.

[704] The Companies also criticize his work because it does not constitute proof with respect to each member of the Class. The Court has already dismissed that argument.

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[322] Transcript of February 18, 2013, at page 45.

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[705] With respect to the other omissions raised by the Companies, such as the failure to account for genetics, the occupational environment, age at starting, intensity of smoking and the human papillomavirus[323], the evidence is to the effect that, although these might have some effect on the likelihood of contracting a Disease, they all pale in comparison with the impact of having smoked cigarettes. As such, the fact that Dr. Siemiatycki does not build them into his model is not a ground for rejecting his analysis outright.

[706] There remains, however, what the Court considers the most important "omission" from his analysis, what we call the "**quitting factor**". This refers to the salutary effect of quitting smoking and its increasing benefit the longer the abstinence.

[707] The proof is convincing that the quitting factor can significantly reduce the likelihood of contracting a Disease by allowing the body to heal from the smoking-related damage it has suffered. And the longer the abstinence, the greater the recovery. In fact, after a number of smokeless years, in many cases there remain practically no traces of smoking-related damage to the body and no Disease will likely be caused by the previous smoking.

[708] No one denies that. Accordingly, the Companies make much of the fact that Dr. Siemiatycki's model does not take such an important element into account. They would have the Court reject his opinion, *inter alia*, for that reason.

[709] Although it is true that his model ignores the quitting factor, it is not completely omitted from his overall calculations. It is indirectly, but effectively, accounted for through the second condition of the Blais Class definition: to have been diagnosed with one of the Diseases.

[710] The principal use of Dr. Siemiatycki's model is to identify the amount of smoking necessary to contract one of the Diseases. This is then used to determine the number of persons in the Class. To that end, he uses the *Registre des tumeurs du Québec* as a base.

[711] It is there, in the make-up of that registry, that the quitting factor has its effect. Former smokers whose quitting has allowed their bodies to heal won't be counted in the *Registre des tumeurs* because they will never have been diagnosed with a Disease. *Ergo*, they won't be included in the Blais Class.

[712] Thus, the requirement of diagnosis with a Disease as a condition of eligibility for the Blais Class assures that the quitting factor is taken into account. Accordingly, the Companies' criticism of the Siemiatycki model on that point is ungrounded and does not present an obstacle to using his work for the purposes proposed by the Plaintiffs.

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[323] Dr. Barsky, an expert in pathology and cancer research called by JTM, noted that the latest studies indicate that the human papillomavirus is present in two to five percent of lung cancers, but with a much higher presence in head and neck cancers, including at the back of the tongue (Transcript of February 17, 2014, page 148). Dr. Guertin for the Plaintiffs stated that where HPV is present in a smoker, the primary cause of any ensuing throat cancer is the smoking (Transcript of February 11, 2013, pages 108 ff.). Dr. Barsky's long comment on that (pages 144-147) does not seem to contradict Dr. Guertin's opinion on that.

[713] This still leaves the question of whether his "novel" analysis is sufficiently reliable and convincing for it to be adopted by the Court.

VI.C.5 THE USE OF RELATIVE RISK

[714] Dr. Siemiatycki's thesis is that, by determining the critical amount of smoking for which the relative risk of contracting a Disease is at least 2, one can conclude that the probability of causation of a Disease meets the legal standard of "probable", i.e., greater than 50%. Perhaps the Court should defer to Dr. Siemiatycki's own language:

> The mandate that I received was to estimate under what smoking circumstances we can infer that the balance of probabilities was greater than 50% that smoking caused these diseases. It turns out that this is equivalent to the condition that PC (probability of causation) > 50%, and that there is a close relationship between PC and RR, such that PC > 50% when RR > 2.0. This means that in order to answer the mandate, it is necessary to determine at what level of smoking the RR > 2.0. This is not a well-known question with a well-known answer. It required some original research to put together the available published studies on smoking and these diseases in a way to answer the questions.[324]

[715] The Companies wholeheartedly disagree with such an approach, with ITL citing a judgment by Lax J. of the Ontario Superior Court of Justice that supposedly rejects "the concept that a RR (sic) in excess of 2.0 necessarily translates to a probability of causation greater than 50%".[325]

[716] With respect, the Court searched in vain for such rejection.

[717] What we did find was the judge adopting an RR of 2.0 as a presumptive threshold in favour of the claimant in that case:

> [555] […] It is apparent to me, as the plaintiffs point out, that the WSIAT (Ontario Workers Safety and Insurance Tribunal) employs a risk ratio of 2.0[326] as a presumptive threshold, as opposed to a prescriptive threshold, for individual claimants.
>
> [556] Where the epidemiological evidence demonstrates a risk ratio above 2.0, then individual causation has presumptively been proven on a balance of probabilities, absent evidence presented by the defendant to rebut the presumption. On the other hand, where the risk ratio is below 2.0, individual causation has presumptively been disproven, absent individualized evidence presented by the class member to rebut the presumption. That is, whether or not the risk ratio is above 2.0 determines upon whom the evidentiary responsibility falls in determining individual causation. […]
>
> ...
>
> [558] This approach is entirely consistent with the case law. The defendants did not present any case law that supported their contention that I should use a risk ratio of 2.0 as a prescriptive standard without regard to the potential for

[324] Exhibit 1426.1, pages 2-3.
[325] *Andersen v. St. Jude Medical*, 2012 ONSC 3660, ("***Andersen***"), at paragraphs 556-558.
[326] Lax J.'s risk ratio corresponds to RR or relative risk in the Siemiatycki model.

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> individualized factors relevant to particular class members. In fact, as detailed above, *Hanford Nuclear, Daubert II*, the U.S. *Reference Manual on Scientific Evidence*, and the procedure employed by the WSIAT all support the use of a risk ratio of 2.0 as a presumptive, rather than prescriptive, standard for individual causation.
>
> [559] As such, this is this approach that I believe is appropriate. (Emphasis added)

[718] Thus, rather than depreciating Dr. Siemiatycki's methodology, this judgment encourages us to embrace it as at least creating a presumption in favour of causation. Since that presumption is rebuttable, we must consider the countervailing proof the Companies chose to make.

VI.C.6 THE COMPANIES' EXPERTS

[719] On that front, the Companies studiously avoided dealing with the base issue of the amount of smoking required to cause a Disease. Their strategy with almost all of their experts was to criticize the Plaintiffs' experts' proof while obstinately refusing to make any of their own on the key issues facing the Court, e.g., how much smoking is required before one can conclude that a smoker's Disease is caused by his smoking. The Court finds this unfortunate and inappropriate.

[720] An expert's mission is described at article 22 of the new Quebec Code of Civil Procedure, which comes into force in at the end of this year. It reads:

> **22.** The mission of an expert whose services have been retained by a single party or by the parties jointly or who has been appointed by the court, whether the matter is contentious or not, is to enlighten the court. This mission overrides the parties' interests.
>
> Experts must fulfill their mission objectively, impartially and thoroughly.

[721] This is not new law. For the most part, it merely codifies the responsibilities of an expert as developed over many years in the case law[327]. As such, the Companies' experts were bound by these terms and, for the most part, failed to respect them.

[722] The Court would have welcomed any assistance that the Companies' experts could have provided on this critical question, but they were almost always compelled by the scope of their mandates to keep their comments on a purely theoretical or academic level, never to dirty their hands with the actual facts of these cases. This was all the more disappointing given that the issues in question fell squarely within the areas of expertise of several of these highly competent individuals. It is also quite prejudicial to their credibility.

[723] Before looking at the evidence of the Companies' experts, let us start by dealing with a constant criticism levelled at Dr. Siemiatycki's work: that his model and methodology do not conform to scientific or academic standards and sound scientific practice.

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[327] See the magisterial analysis of the issue done by Silcoff J. in his judgment in *Churchill Falls (Labrador) Corporation Ltd. v. Hydro Québec*, 2014 QCCS 3590, at paragraphs 276 and following, wherein he analyzes Quebec, Canadian common law and British precedents on the point.

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[724] The Court recognizes that sound practice in scientific research rightly imposes strict rules for carrying out experiments and arriving at verifiable conclusions. The same standards do not, however, reflect the rules governing a court in a civil matter. Here, the law is satisfied where the test of probability is met, as recognized in Québec by article 2804 of the Civil Code:

> **2804**. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.

[725] Here, there is clear demonstration that smoking is the main cause of the Diseases. We have also found fault on the Companies' part. Given that, and the fact that the law does not require "more convincing proof" in this matter, we must apply the evidence in the record to assess causation on the basis of juridical probability, using article 2804 as our guidepost.

[726] Baudouin notes that a plaintiff is never required to prove the scientific causal link, but need only meet the simple civil law burden.[328] He further notes that the requirements of scientific causality are much higher than those for juridical causality when it comes to determining a threshold for the balance of probabilities.[329]

[727] In the case of *Snell c. Farrell*, Sopinka J. of the Supreme Court of Canada provided valuable guidance in this area:

> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. […] It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.[330]

[728] Hence, it is not an answer for the experts to show that the Plaintiffs' evidence is not perfect or is not arrived at by "a method of analysis which has been validated by any scientific community" or does not conform to a "standard statistical or epidemiological method"[331].

[729] Given its unique application, Dr. Siemiatycki's system has never really been tested by others and thus cannot have been either validate or invalidated by any scientific community. He, on the other hand, swore in court that its results are probable, even to the point of being conservative. We place great confidence in that.

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328 Jean-Louis BAUDOUIN and Patrice DESLAURIERS, *La responsabilité civile (7th Édition)*, Wilson & Lafleur, Montréal, at pages 635-636: "*le demandeur n'est jamais tenu d'établir le lien causal scientifique et qu'il suffit pour lui de décharger le simple fardeau de la preuve civile*".

329 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile, Op. cit*, Note 62, at page 105: "*la jurisprudence actuelle éprouve de sérieuses difficultés à distinguer causalité scientifique et causalité juridique, la première ayant un degré d'exigence beaucoup plus élevé quant à l'établissement d'un seuil de balance de probabilités*".

330 *Snell v. Farrell*, [1990] 2 S.C.C. 311, page 330 ("***Snell***"). See also: *Laferrière v. Lawson*, [1991] 1 SCR, 541, at paragraph 156.

331 Expert report of Dr. Marais, Exhibit 40549, at pages 12 and 18.

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[730] The Court found Dr. Siemiatycki to be a most credible and convincing witness, unafraid to admit weaknesses that might exist and forthright in stating reasonable convictions, tempered by a proper dose of inevitable incertitude. He fulfilled the expert's mission perfectly.

[731] As for the Companies' evidence in this area, they called three experts to counter Dr. Siemiatycki's opinions: Laurentius Marais and Bertram Price in statistics and Kenneth Mundt in epidemiology.

[732] Dr. Marais, called by JTM, was qualified by the Court as "an expert in applied statistics, including in the use of bio-statistical and epidemiological data and methods to draw conclusions as to the nature and extent of the relationship between an exposure and its health effects". In his report (Exhibit 40549) he describes his mandate as being "to conduct a thorough review of Dr. Siemiatycki's report".

[733] He strenuously disagrees with Dr. Siemiatycki's methods and conclusions. At pages 118 and following of his report, he summarizes the reasons for that as follows:

> (a) As I set forth in Section 3, Dr. Siemiatycki premises his analysis in part on an *ad hoc* measure of "dose" (pack-years) and ambiguous measures of "response" (relative risk of disease) in circumstances where these measures do not permit a dose-response relationship to be defined with sufficient precision to support a valid conclusion with a measurable degree of error.
>
> (b) As I also set forth in Section 3, Dr. Siemiatycki incorrectly supposes that the smoking conduct of individual Class members is measured with sufficient precision by a metric ("pack-years") that ignores important aspects of smoking behavior, including starting age, intensity of smoking (i.e., cigarettes per day), and time since quitting, each of which materially affects the risks faced by an individual ever smoker.
>
> (c) As I set forth in Sections 3 and 4, Dr. Siemiatycki focuses his analysis on the risk profile of a hypothetical "average" smoker, when in fact the risk profiles of individual smokers in the Class will vary widely depending on the factors which he ignores.
>
> (d) As I set forth in Section 4, Dr. Siemiatycki's analysis gives no weight to the fact that smokers face other Class disease risks, and that any individual case may be caused by risks other than smoking.
>
> (e) As I set forth in Sections 5 and 6 and Appendix "B", Dr. Siemiatycki's meta-analysis, by which he claims to compute his overall relative risks and Critical Amounts, fails to conform to accepted scholarly standards, and he fails to account coherently for error and uncertainty in his resulting estimates; properly conducted and interpreted, meta-analysis of the data on which he relied cannot estimate what Dr. Siemiatycki tries to use it to estimate, namely a Critical Amount of smoking for the four Class diseases, for the reasons. (sic)
>
> (f) As I set forth in Section 7, in order to reach the conclusions he does, Dr. Siemiatycki asserts without comment or reservation the equivalence between the legal "balance of probabilities" and the epidemiological proposition of a relative risk greater than 2.0; the validity of this equivalence is a matter of considerable controversy in epidemiology and statistics; and, more

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importantly, it mischaracterizes the nature and proper means of the determination of causation in individual cases of the Class diseases.

(g) As I set forth in Section 8. Dr. Siemiatycki erroneously equates the epidemiological concept of the probability of causation with the legal concept of the balance of probabilities.

[734] Dr. Marais's first point rests essentially on an insistence on the scientific level of proof, an argument that the Court rejects for reasons discussed above. For the same reasons, the Court rejects his point "e".

[735] His point "b" has already been rejected in our discussion around the "quitting factor", while his point "c" is disarmed as a result of the applicability of epidemiological studies via section 15 of the TRDA. His point "d" is basically a restatement of the two previous ones and is rejected for the same reasons.

[736] The parts of points "f" and "g" criticizing his equating juridical probability with a relative risk greater than 2 are rejected for the reasons expressed in our earlier discussion of Lax J.'s judgment in *Andersen v. St. Jude Medical*. Finally, his additional criticism in point "f", relating to the mischaracterization of "the nature and proper means of the determination of causation in individual cases of the Class diseases", falls to section 15 of the TRDA.

[737] As a general comment, the Court finds a "fatal flaw" in the expert's reports of all three experts in this area in that they completely ignored the effect of section 15 of the TRDA, which came into effect between 18 and 24 months prior to the filing of their respective reports. Dr. Marais and his colleagues preferred to blinder their opinions within the confines of individual cases, even though they should have known (or been informed) of the critical role that this provision plays with respect to the use of epidemiological evidence in cases such as these.

[738] Thus, the Court will never know how, or if, their opinions would have changed had they applied their expertise to the actual legal situation in place. That cannot but undermine our confidence in much of what they said.

[739] Finally on Dr. Marais, his bottom-line view of Dr. Siemiatycki's method, which is to apply meta-analysis to existing studies in order to estimate the numbers of persons in the Blais Class, was basically that "you can't get there from here". He stated that the only way to arrive at the number of persons in each Class or sub-Class would be to conduct a research project examining "only a handful of thousands of people".[332]

[740] To be sure, such a study would have made the Court's task immeasurably easier. That does not mean that it was absolutely necessary in order for the Plaintiffs to make the necessary level of proof at least to push an inference into play in their favour. In fact, it is our view that they succeeded in doing that through Dr. Siemiatycki's work. Thus, "an inference of causation", as Sopinka J. called it in *Snell*, is created in Plaintiffs' favour.

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[332] Transcript of March 12, 2014 at page 324 and 325.

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[741] In the same judgment, he noted that where such an inference is drawn, "(t)he defendant runs the risk of an adverse inference in the absence of evidence to the contrary".[333] Here, the Companies presented no convincing evidence to the contrary. Logically, once the inference is created, rebuttal evidence must go beyond mere criticism of the evidence leading to the inference. That tactic is exhausted in the preceding phase leading to the creation of the inference.

[742] Thus, to be effective, rebuttal evidence must consist of proof of a different reality. The Companies did not allow their experts even to try to make such evidence. Moreover, Dr. Marais said it was impossible to do so using proper scientific practices. That might be, but that does not make the inference go away once it is drawn.

[743] For all the above reasons, the Court finds no use for Dr. Marais's evidence.

[744] Dr. Price is a statistician called by ITL. In his report (Exhibit 21315, paragraph 2.2), he sets out the three questions that he was asked to address, which, as usual, focus on criticizing the opposing expert rather than attempting to provide useful answers to the questions facing the Court:

- Would Dr. Siemiatycki's cases likely include cases that the court could find were not caused by the alleged wrongful conduct of the defendants?
- Would Dr. Siemiatycki's cases likely include cases that the court could find were not caused by the alleged wrongful conduct of the defendants?
- (Does) the Siemiatycki Report contain sufficient information to determine which, if any, of the cases of, or deaths from, the four diseases diagnosed or occurring from 1995 to 2006 among smokers resident in Quebec were caused by the alleged wrongful conduct of the defendants?

[745] He answers the first two questions in the affirmative, which is not surprising. Epidemiological analysis, being based on the study of a population, will inevitably include a certain number of cases that would not qualify were individual analyses to be done. That, however, becomes irrelevant, since section 15 of the TRDA renders that type of evidence sufficient. He did not consider this.

[746] His negative response to the third question is based on Dr. Siemiatycki's failure to consider cases individually and to take account of cancer-causing elements other than smoking. He closes by criticizing the Plaintiffs for "implicitly assuming that all of Dr. Siemiatycki's cases were caused by the alleged wrongful conduct of the defendant".

[747] None of this sways the Court. We have previously rejected the first two points and the third is disarmed by the acceptability of epidemiological proof alone via the TRDA. His report thus offers no assistance to the Court[334], something that could have been

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[333] *Op. cit.*, *Snell*, Note 330, at page 330. Lax J. is of the same view in *Andersen, op. cit,* Note 325.

[334] In his testimony on March 18, 2014, he stated that he accepts that, based on the Surgeon General's conclusions, smoking causes the Diseases (Transcript at pages 212-213). The next day, he admitted that, with respect to the proportion of all lung cancers for which smoking is responsible, "the estimates that one sees are in the upper eighties (80s) to ninety percent (90%)", adding that, although he

remedied had he been allowed to perform the type of study that he said Dr. Siemiatycki should have done[335]. That page, however, was left blank.

[748] For all these reasons, the Court finds no use for Dr. Price's evidence.

[749] Dr. Mundt, called by RBH, was the sole epidemiologist who testified for the Companies. In his report (Exhibit 30217), he describes the two main aspects of his mandate as being:

- to evaluate Dr. Siemiatycki's report in which he attempts to estimate the number of people in Quebec who between 1995 and 2006 developed lung cancer, laryngeal cancer, throat cancer and emphysema 1 specifically caused by smoking cigarettes and
- to offer his opinion on Dr. Siemiatycki's approaches, methods and conclusions, based on his review of Dr. Siemiatycki's reports and testimony and his own review and synthesis of the relevant epidemiological literature.

[750] He feels that Dr. Siemiatycki's approach and methods are "substantially flawed" and that the probability of causation estimates that he claims to derive are "unreliable for their intended purpose, and cannot be scientifically or convincingly substantiated"[336]. Summarily, his specific conclusions are:

a. Dr. Siemiatycki's model and conclusions are wrong because they do not adequately take account of sources of bias;

b. Dr. Siemiatycki's conclusions are wrong because his model over-simplifies scientific understanding of the impact of risk factors other than smoking, such as smoking history, including the quitting factor, occupational exposures and lifestyle factors;

c. Dr. Siemiatycki's rationale for selection of the published epidemiological studies used in his meta-analysis is not clearly explained and, in any event, few of the ones he relied upon included Quebecers and he made no attempt to assure that the assumption of comparability was valid;

d. Dr. Siemiatycki's results cannot be tested in accordance with standard scientific methodology and good practices;

e. Dr. Siemiatycki uses COPD statistics rather than those specifically for emphysema and very few of those describe COPD in terms of relative risk and, as well, he fails to take account of other risk factors;

f. Dr. Siemiatycki's reliance on 4 pack-years as the critical value for balance of probabilities[337] is contrary to the scientific literature, which shows little to no

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accepts the numbers as calculated, he does not see that as determining causality (Transcript at pages 70-71).

335 See Transcript of March 19, 2014, at pages 41 and following.

336 See paragraph 112 of his report.

337 The Plaintiffs "round off" their critical dose at five pack years, but this does not counter the criticism made here.

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> excess risk of lung cancer among smokers with exposures of less than 10 or 15 pack-years.

[751] Of these comments, only the first and last raise elements that we have not dealt with, and dismissed, elsewhere.

[752] With respect to sources of bias, Dr. Siemiatycki did, in fact, consider that, albeit not in a scientifically precise way. He testified that he used his "best judgment" to account for problems of bias and error englobing "statistical and non-statistical sources of variability and error". His exact words are as follows:

> Now, these procedures and these estimates involved various types and degrees of potential error, or wiggle room, or variability; some of it what we call stochastic, sort of statistical variability, and some of it variability that is non-statistical, that's related to things like the definitions or diseases or problems of bias, potential biases in estimating parameters, and so on.
>
> Using my best judgment, I thought: for each disease, what is the plausible range of error that englobes statistical and non-statistical sources of variability and error? And I've indicated it in this table (Table D3), in a lower estimate and a higher estimate of a range of plausibility; now, this is not a technical term and I didn't pretend it to be so. And in the second footnote, it states clearly this is based on my professional opinion and it is what... that's what it is.[338]

[753] The footnotes to Table D3, entitled "Numbers of incident cases attributable to smoking* in Quebec of each disease in the entire period 1995 to 2006, with ranges of plausibility**", read:

> * This is the number of cases for which it is estimated that the probability of causation (PC) exceeds 50%.
>
> ** This is based on the author's professional opinion and uses as a guideline that the best estimates may be off by the following factors: for lung cancer, from -10% to +5%; for larynx cancer, from -15% to +7.5%; for throat cancer, from -20% to +10%; for emphysema, from -50% to +25%.

[754] In his report, he states that it is "most unlikely" that the true values of the number of cases would fall outside of the ranges he estimated for each Disease (Exhibit 1426.1, page 49).

[755] Dr. Mundt's criticism that this does not adequately take sources of bias into account is based on the scientific standard for such exercises. In that context, Dr. Siemiatycki's "best estimate" would surely fall short of acceptable. In the context of Quebec civil law, on the other hand, it meets the probability test and the Court accepts it in general, although with certain reservations concerning emphysema, as discussed below.

[756] Dr. Mundt's final point speaks of the number of pack years required to cause lung cancer. He indicates that the scientific literature that he has reviewed shows little or

338 Transcript of February 19, 2013, page 144.

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no risk of lung cancer below 10 to 15 pack years[339]. This is interesting from at least two angles.

[757] First, such a statement from the Companies' only expert in epidemiology confirms that "pack years" is, in fact, considered a valid unit of measure by the epidemiological community in relation to the onset of cancer. The other defence experts spent much time criticizing the appropriateness of that metric, but this removes any doubt from the Court's mind.

[758] As well, we finally see one of the Companies' experts providing a helpful response to one of the questions before us, i.e., what is a plausible minimum figure for the "critical dose". Dr. Barsky, while steering clear of actually providing useful guidance to the Court, also criticized "the low levels of smoking exposure" used by Dr. Siemiatycki[340]. Moreover, the Plaintiffs do not fundamentally contest Dr. Mundt's figures, having mentioned 12 pack years as a not unreasonable alternative on several occasions.

[759] Since Dr. Siemiatycki's method necessarily ignores several relevant, albeit minor, variables and, in any event, is not designed to calculate precise results, the Court will pay heed to Dr. Mundt's comments. Accordingly, we shall set the critical dose in the Blais File at 12 pack years, rather than five. The Class description shall be amended accordingly.

[760] It is important to note that nothing in Dr. Mundt's evidence in any way counters the inference of causation we have drawn in the Plaintiffs' favour here. That inference thus remains intact.

[761] On the other hand, we have a problem when it comes to Dr. Siemiatycki's figures for emphysema. The second footnote to Table D3.1 of Exhibit 1426.7 indicates a range of possible error from -50% to +25% for that Disease. This leaves the Court uncomfortable with respect to his best estimates of 24,524 for males and 21,648 for females, giving a total of 46,172. Because of the size of the possible-error range, and considering that his emphysema analysis includes cases of chronic bronchitis through use of COPD figures, we prefer to adopt his lower estimates for emphysema: Males – 12,262, Females – 10,824, for a total of 23,086[341].

[762] Overall, and stepping back a bit from the forest, we cannot but be impressed by the fact that Dr. Siemiatycki's results are compatible with the current position of essentially all the principal authorities in the field.

[763] At his recommended critical amount of 4 pack years for lung cancer, his probabilities of causation of 93% in men and 80% in women[342] reflect findings reported in a National Cancer Institute document that states that "Lung cancer is the leading cause of cancer death among both men and women in the United States, and 90 percent of lung cancer deaths among men and approximately 80 percent of lung cancer deaths among women are due to smoking." (Exhibit 1698 at pdf 2) As well, a 2004 monograph of the International Agency

339 Exhibit 30217, at page 23.
340 Exhibit 40504, at pdf 19.
341 Exhibit 1426.7, Table D3.1.
342 Exhibit 1426.7, Table A.1.

for Research on Cancer states that "the proportion of lung cancer cases attributable to smoking has reached 90%" (Exhibit 1700 at pdf 55).

[764] Moreover, those figures are not seriously contested by the Companies' experts. On February 18, 2014, Dr. Sanford Barsky, JTM's expert in pathology and cancer research, agreed that "roughly 90% of the lung cancer cases are attributable to smoking" (Transcript, at page 41). Several weeks later, Dr. Marais testified that Dr. Siemiatycki's calculation of the attributable fraction for each of the four Diseases, as shown at page 44 of his report, were within the range of estimates that he had seen in reviewing the literature, noting that a couple of them were even slightly lower[343].

[765] In the end, and after shaking the box in every direction, we opt to place our faith in the "novel" work of Dr. Siemiatycki in this file, with the adjustment for the number of pack years that we indicate above. It is not perfect, but it is sufficiently reliable for a court's purposes and it inspires our confidence, particularly in the absence of convincing proof to the contrary.

[766] In making this decision, we identify with the challenge faced by most judges forced to wade into controversial scientific waters, a challenge whose difficulty is multiplied when the experts disagree. The essence of that challenge was captured in the following remarks by Judge Ian Binnie of the Supreme Court of Canada, as he then was, in a 2006 speech at the University of New Brunswick Law Faculty:

> There is a further problem. The judge may not have the luxury of waiting until scientists in the relevant field have reached a consensus. The court is a dispute resolution forum, not a free-wheeling scientific inquiry, and the judge must reach a timely decision based on the information available. Even if science has not figured it out yet, the law cannot wait.[344]

[767] For obvious reasons, we cannot wait. The Court finds that each of the Diseases in the Blais Class was caused by smoking at least 12 pack years before November 20, 1998, and the Class definition is modified accordingly[345].

VI.D. WAS THE TOBACCO DEPENDENCE CAUSED BY SMOKING?

[768] On this point, the Létourneau case differs significantly from Blais. There, it was possible to argue that the Diseases could be caused by factors other than smoking, whereas no such an argument can be made in the case of tobacco dependence.

[769] As such, the Court finds that the tobacco dependence of the Létourneau Class was caused by smoking.

[770] That, however, does not put an end to this question. The Authorization Judgment does not provide a definition of dependence and the Class Amending

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343 Transcript of March 12, 2014 at pages 128-129.

344 Ian BINNIE, "*Science in the Courtroom: the mouse that roared*", University of New Brunswick Law Journal, Vol. 56, at page 312.

345 By moving from 5 pack years to 12, the number of eligible class members is reduced by about 25,000 persons: see Tables D1.1 through D1.4 in Exhibit 1426.7,

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Judgment's attempt to fill that void does not spare the Court from having to evaluate it in light of the proof adduced. ITL explains its view on the matter in its Notes as follows:

> **1086.** Despite its central importance to their case, Plaintiffs have not proffered a clear and objective, scientifically-accepted definition of addiction that would allow the Court to determine on a class-wide basis that smoking caused all Class Members to become addicted. ITL submits that no such definition is available.
>
> **1087.** Nor have Plaintiffs advanced any meaningful theory or methodology for determining who is "addicted" and what injury follows from any such determination. Instead, Plaintiffs have variously attempted to extrapolate statistics and averages from sources not intended for the purposes they now advance (as discussed below), with no guidance as to how these would be applied to determine liability even if they were reliable.

[771] It is essential to have a "workable definition" of tobacco dependence (or addiction) in order to decide several key questions, not the least of which being how to determine who is a Class Member. Individuals must be able to self-diagnose their tobacco dependence and, consequently, their possible membership in the Class. As the Supreme Court has noted: "It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria"[346].

[772] With this goal in mind, when amending the Class description the Plaintiffs adopted criteria mentioned in the testimony of their expert on dependence, Dr. Negrete[347]. The criteria they favour are:

1) To have smoked for at least four years;

2) To have smoked on a daily basis at the end of that four-year period.[348]

[773] The four-year gestation period is not mentioned in either of Dr. Negrete's reports[349] but, rather, came from his testimony in response to a question as to how long it takes for a person to become tobacco dependent. Commenting on an article on which Dr. Joseph Di Franza[350] was the lead author (Exhibit 1471), he opined that the first verifiable symptoms of dependence, according to clinical diagnostic criteria, appear within three-and-a-half to four years of starting to use nicotine.[351]

[774] The Companies objected to the filing of the DiFranza article, complaining that Dr. Negrete should have produced it with one of his reports. They argued that the Plaintiffs' attempts to file it in this manner, after having sent an email that very morning

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346 *Western Canadian Shopping Centres c. Dutton*, [2001] 2 R.C.S. 534, at paragraph 138.

347 We discuss his qualifications and our evaluation of his evidence in Chapter II.C.

348 The third condition found in the amended definition, that of smoking on February 21, 2005 or until death, is not technically part of the "medical" definition proffered by Dr. Negrete.

349 Dr. Negrete filed two reports in this file, one in 2006: Exhibit 1470.1, and one in 2009: Exhibit 1470.2. Unless otherwise indicated, where we speak of his "report", we will be referring to the first report.

350 Di Franza is a specialist in the area of tobacco dependence and the creator of the *"Hooked on Nicotine Checklist"*, commonly known as the HONC!

351 Transcript of March 20, 2013 at pages 115-118. See also Dr. Negrete's second report, which cites a study at page 3 where, after only two years of smoking, 38.2% of children who started smoking around 12 years old met the criteria for a clinical diagnosis of dependence.

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advising the Companies of their intention to use it, equated to producing a new (third) expert report by Dr. Negrete without prior notice, something that should not be allowed.

[775] The Court dismissed the Companies' objections and permitted the Plaintiffs to file and use the DiFranza report. In doing so, it noted that the Companies would have all the time necessary for their experts to review the report and counter it, since those experts would probably not be testifying for another year or so.[352] The Court's prediction turned out to be uncharacteristically accurate. The Companies' experts on dependence testified in January 2014, some ten months later.

[776] Returning to the four-year initiation period to nicotine dependence, the Court accepts Dr. Negrete's opinion on that. In fact, on all matters dealing with dependence, the Court prefers his opinions to those of the two experts in this area called by the Companies.

[777] As pointed out earlier, one of them, Dr. Bourget, had little relevant experience in the field and had, for the most part, simply reviewed the literature, much of which was provided to her by ITL's lawyers. The other, Professor Davies, was on a mission to change the way the world thinks of addiction. The torch he was carrying, despite its strong incendiary effect, cast little light on the questions to be decided by the Court.

[778] Getting back to Dr. Negrete, he did identify daily smoking as being one of two essential conditions for dependence, with lighting the first cigarette within 30 minutes of waking as the other.[353] That said, neither his report nor his testimony in court directly define what constitutes daily smoking, much less that it constitutes smoking the "at least one cigarette a day" required by the current class definition.

[779] It remains to be seen whether smoking one cigarette a day was sufficient to constitute daily smoking for dependence purposes in September 1998. If one-a-day cannot be the test, then we must see if there is adequate proof to determine what other level of consumption should be taken as the 1998 threshold of daily smoking.

[780] As for the one-a-day smoker, Dr. Negrete, himself, does not appear to consider such a low level of smoking as being enough to constitute dependence. At numerous places in his report, he refers to a level of smoking that obviously exceeds one a day: "smoking a higher number of cigarettes a day", at page 6 and "progressively increasing his consumption", at page 12 and "the need to increase the quantity consumed", at page 13 and "the daily total of cigarettes consumed is a direct measure of the intensity of the compulsion to smoke", at page 17.

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352 Transcript of March 20, 2013, at page 122.

353 At pages 19-20, in commenting on the Fagerstrom Test for Nicotine Dependence: "*Toutefois, ce sont les questions No 1 et 4 (of the Fagerstrom Test) celles qui semblent définir le mieux les fumeurs dépendants, car elles évoquent parmi eux le plus haut pourcentage de réponses à haut pointage. Pratiquement toute personne (95%) qui fume de façon quotidienne présente une dépendance tabagique à des différents degrés; mais le problème est le plus sévère chez les fumeurs qui ont l'habitude d'allumer la première cigarette du jour dans les premières 30 minutes après leur réveil. C'est le critère adopté par Santé Canada dans les enquêtes de prévalence de la dépendance tabagique dans la population générale.*"

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[781] Although he does not pinpoint what he considers to be the average number of daily cigarettes required to constitute dependence, a useful indication of that comes from his references, in particular, from a 2005 survey by Statistics Canada[354]. It shows that Canadian smokers self-reported consuming an average of 15.7 cigarettes a day between February and December 2005, up from 15.2 cigarettes a year earlier (at page 4 PDF). For Quebec, the figure was 16.5 cigarettes a day in 2005, with no information for 2004.

[782] Can such information be reasonably translated into a number of cigarettes that would constitute a threshold for persons dependent on nicotine on September 30, 1998? The Court believes it can, in spite of the fact that these figures do not deal with the exact time period in issue or with the specific topic of tobacco dependence.

[783] Almost never does a court of civil law have the luxury of a record that is a perfect match for every issue before it. Nevertheless, it must render justice. Thus, where there is credible, relevant proof relating to a question, it may, and must, use that in a logical and common-sense manner to arbitrate a reasonable decision.

[784] What is the average number of cigarettes a tobacco-dependent smoker in Quebec smoked on September 30, 1998? In that regard, we know that:

a. Tobacco dependence results from smoking;

b. It is a function of time and amount smoked;

c. 95% of daily smokers are nicotine dependent, albeit to differing degrees;

d. The average daily smoker in Quebec smoked around 16 cigarettes a day in 2005;

e. In general, smokers were cutting back on their consumption in the period we are examining[355].

[785] It is probable, therefore, that Quebecers who smoked an average of 16 cigarettes a day in 2005 were nicotine-dependent. That said, it appears likely that dependency sets in before a smoker reaches "average consumption".[356] Given the absence of direct proof on the point, the Court must estimate what that figure should be.

[786] Based on the above, the Court holds that the threshold of daily smoking required to conclude that a person was tobacco dependent on September 30, 1998 is an average of at least 15 cigarettes a day. The Companies steadfastly avoided making any evidence at all on the point, so there is nothing to contradict such a finding.

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354 Exhibit 1470.10. This is footnote 27 to Dr. Negrete's report. Note that there is a typographical error at page 20 that indicates that this is footnote 26. The error was corrected at trial.

355 Overall smoking prevalence dropped from about 25% to below 20% in that period (Exhibit 40495.33). See also: Exhibit 1550-1984, at PDF 45. In 1984 average cigarette consumption in the United States was estimated at between 18.9 and 24.2 cigarettes and declining annually. The evidence shows that, in general, smoking trends in Canada were similar to those in the United States.

356 At page 21 of his report, Dr. Negrete associates simple "smoking every day" ("*fument tous les jours*") with tobacco dependence. This indicates to the Court that he supports something less than average daily smoking as a minimum for dependence.

[787] There remains the third criterion set out in the Class description: "They were still smoking the defendants' cigarettes on February 21, 2005, or until their death, if it occurred before that date".[357] This raises the questions of how many cigarettes a day is meant by "smoking the defendants' cigarettes", a question that our previous reasoning makes relatively easy to answer. We have determined that tobacco dependence means daily consumption of 15 cigarettes and logic compels that this threshold should apply to this condition as well.

[788] Consequently, the Court finds that medical causation of tobacco dependence will be established where Members show that:

a. They started to smoke before September 30, 1994 and since that date they smoked principally cigarettes manufactured by the defendants; and

b. Between September 1 and September 30, 1998, they smoked on a daily basis an average of at least 15 cigarettes manufactured by the defendants; and

c. On February 21, 2005, or until their death if it occurred before that date, they were still smoking on a daily basis an average of at least 15 cigarettes manufactured by the defendants.[358]

[789] The Class description will be amended accordingly. We should also point out here that, in light of the manner in which the Plaintiffs cumulate the criteria in this description, most eligible Létourneau Members will have smoked for all or the greater part of 10 years and five months: September 30, 1994 to February 21, 2005. Although there will inevitably be some quitting periods for certain people, it would be hard even for the Companies to assert that smokers meeting these criteria are not dependent.

[790] As important as this is, it relates only to medical causation. The effect of legal causation and, should it be the case, prescription is not yet taken into account. That will occur in the following sections.

VI.E. WAS THE BLAIS MEMBERS' SMOKING CAUSED BY A FAULT OF THE COMPANIES?[359]

[791] The Companies embrace the "but-for-never" approach, arguing that the Plaintiffs should have to prove that, but for the Companies' faults, the Members would never have started or continued to smoke. As such, they would take issue with the title of this section. They would argue that the expression "a fault of the Companies" should be replaced by "the sole fault of the Companies".

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357 The Plaintiffs explain that this third condition is necessary in order to comply with the conditions of the original Class definition.

358 The qualification that the cigarettes must be those made by the Companies is meant to tie any damages to acts of the Companies and exclude those caused by other producers' cigarettes.

359 This is often called "conduct causation", although, in the annals of tobacco litigation, it apparently has become known as "wrongfully induced smoking causation" or, simply, "WIS causation". As well, there is a third type of causation that must be proved: "abstract" or "general" causation: See ITL's Notes at paragraphs 971 and following. This amounts to a type of preliminary test to prove that smoking cigarettes may cause cancer, emphysema and addiction (in the abstract). This is not disputed by the Companies – paragraph 1020 of ITL's Notes. Hence, the Court will not deal further with that element.

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[792] The Plaintiffs do not see it that way. Seeking to make their proof by way of presumptions, they prefer the "it-stands-to-reason" test. This would have the Court presume, in light of the gravity of the Companies' faults, that it stands to reason that such faults were the cause of people's starting or continuing to smoke, even if there is no direct proof of that.

[793] This opens the question of whether the Companies' fault must be shown to have been "the cause" of smoking or merely "a cause" and, if the latter, how important a cause must it be compared to all the others. In the first case, it comes down to determining whether it is probable that the Members would not have smoked had they been properly warned. The second requires more an appreciation of whether their smoking is a logical, direct and immediate consequence of the faults[360].

[794] Proving a negative, as the first case would require, is never an easy task and the Court does not believe that it is necessary to go that far in a claim for tobacco-related damages. If there is reason to conclude that the Companies' faults led in a logical, direct and immediate way to the Members' smoking, that is enough to establish causation, even if those faults coexist with other causes. Professor Lara Khoury provides a useful summary of the process in this regard:

> This theory (adequate causation) seeks to eliminate the mere circumstances of the damage and isolate its immediate cause(s), namely those event(s) of a nature to have caused the damage in a normal state of affairs (*dans le cours habituel des choses*). This theory necessarily involves objective probabilities and the notions of logic and normality. The alleged negligence does not need to be the sole cause of the damage to be legally effective however.[361]

[795] Where the proof shows that other causes existed, it might be necessary to apportion or reduce liability accordingly[362], but that does not automatically exonerate the Companies. We consider that possibility in a later section of the present judgment.

[796] JTM argues that the Plaintiffs' claim for collective recovery in Blais should be dismissed for a number of reasons.

- lack of proof that each Member's smoking was caused by its actions;
- lack of proof that the smoking that caused by JTM was actually the smoking that caused the Diseases;
- lack of proof of the number of disease cases caused;

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360 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 1-683.

361 Lara KHOURY, *Uncertain causation in medical liability*, Oxford, Hart Publishing, 2006, at page 29. See also Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 1-687: "*Dans l'esprit des tribunaux, cette demarche n'implique pas nécessairement la découverte d'une cause unique, mais peut les amener à retenir plusieurs faits comme causals*".

362 See article 1478 C.C.Q., which foresees the possibility of contributory negligence and an apportionment of liability.

- lack of proof in Professor Siemiatycki's work of the number of Members for whom all three elements of liability apply;
- lack of proof of the quantum of individual damages for each Class Member.[363]

[797] Of these, we shall deal with the first one in this section. The second is countered by the condition in the Class definition that the pack years of smoking must be of cigarettes "made by the defendants". The final three arguments are responded to in other sections of the present judgment.

[798] The Plaintiffs readily admit that they did not even try to prove the cause of smoking on an individual basis, recognizing that that would have been impossible in practical terms. Thus, they turn to presumptions of fact in order to make their proof.

[799] They point out that the Court has a large discretion in tobacco cases to apply factual presumptions arising from statistical and epidemiological data in deciding a number of points. Although the Court does not disagree, it does not see this as a matter of exercising judicial discretion. Presumptions are a valid means of making evidence in all cases, as article 2811 of the Civil Code makes clear. That said, certain conditions must be met before they can be accepted.

[800] Article 2846 of the Civil Code describes a presumption as being an inference established by law or the court from a known fact to an unknown fact. Here, the known facts is the Companies' faults in failing to warn adequately about the likelihood of contracting one of the Diseases through smoking - and going further by way of creating a scientific controversy over the dangers - and then enticing people to smoke through their advertising. The unknown fact is the reasons why Blais Members started or continued to smoke.

[801] The inference the Plaintiffs wish to be drawn is that the Companies' faults were one of the factors that caused the Members to start or continue to smoke.

[802] Article 2849 requires that, to be taken into consideration, a presumption must be "serious, precise and concordant[364]" (in French: *graves, précises et concordantes*). The exact gist of this is not immediately obvious and we are fortunate to have some enlightenment on the subject in the reasons in *Longpré v. Thériault*[365]. The Court takes the following guidance from that judgment:

- Serious presumptions are those where the connections between the known fact and the unknown fact are such that the existence of the former leads one strongly to conclude in the existence of the latter;
- Precise presumptions are those where the conclusion flowing from the known fact leads directly and specifically to the unknown one, so that it

363 JTM's Notes, paragraphs 2674 and 2675.
364 "Concordant" is defined in the Oxford English dictionary as: "in agreement; consistent".
365 [1979] CA 258, at page 262, citing L. LAROMBIÈRE, *Théorie et pratique des obligations*, t. 7, Paris, A. Durand et Pedone Laurier, 1885, page 216.

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is not reasonably possible to arrive at a different or contrary result or fact;

- Concordance[366] among presumptions is relevant where there is more than one presumption at play, in which case, taken together, they are all consistent with and tend to prove the unknown fact and it cannot be said that they contradict or neutralize each other.[367]

[803] With respect to the first, who could deny the seriousness of a presumption to the effect that the Companies' faults were a cause of the Members' smoking? The existence of faults of this nature leads strongly to the conclusion that they had an influence on the Members' decision to smoke. Mere common sense dictates that clear warnings about the toxicity of tobacco would have had some effect on any rational person. Of course, that would not have stopped all smoking, as evidenced by the fact that, even in the presence of such warnings today, people start and continue to smoke.

[804] Can the same be said about the "precision" of the presumption sought, i.e., is it reasonably possible to arrive at a different conclusion? In that regard, the text cited above can be misleading. To say that "it is not reasonably possible to arrive at a different or contrary result or fact" does not necessarily mean that the faults have to be the only cause of smoking, or even the dominant one. Nor is absolute certainty required.

[805] Ducharme is of the view that the test is one of simple probability and that it is not necessary for the presumption to be so strong as to exclude all other possibilities.[368]

[806] In the end, it comes down to what the party is attempting to prove by the presumption. The inference sought here is that the Companies' faults were one of the factors that caused the Members to smoke. The Court does not see how it would be reasonably possible to arrive at a different or contrary result, all the while recognizing that there could be other causes at play, e.g. environmental factors or "social forces", like peer pressure, parental example, the desire to appear "cool", the desire to rebel or to live dangerously, etc.

[807] In spite of those, this conclusion is enough to establish a presumption of fact to the effect that the Companies' faults were indeed one of the factors that caused the Blais

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366 The third condition does not apply here since there is not more than one presumption to be drawn.

367 Les présomptions sont **graves**, lorsque les rapports du fait connu au fait inconnu sont tels que l'existence de l'un établit, par une induction puissante, l'existence de l'autre [...]
*Les présomptions sont **précises**, lorsque les inductions qui résultent du fait connu tendent à établir directement et particulièrement le fait inconnu et contesté. S'il était également possible d'en tirer les conséquences différentes et mêmes contraires, d'en inférer l'existence de faits divers et contradictoires, les présomptions n'auraient aucun caractère de précision et ne feraient naître que le doute ou l'incertitude.*
*Elles sont enfin **concordantes**, lorsque, ayant toutes une origine commune ou différente, elles tendent, par leur ensemble et leur accord, à établir le fait qu'il s'agit de prouver […] Si elles se contredisent […] et se neutralisent, elles ne sont plus concordantes, et le doute seul peut entrer dans l'esprit du magistrat.* (The Court's emphasis)

368 Léo DUCHARME, *Précis de la preuve*, 6th édition, Montréal, Wilson & Lafleur, 2005, para. 636: *Il faut bien remarquer qu'une simple probabilité est suffisante et qu'il n'est pas nécessaire que la présomption soit tellement forte qu'elle exclue toute autre possibilité.*

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Members to smoke. This, however, does not automatically sink the Companies' ship. It merely causes, if not a total shift of the burden of proof, at least an unfavourable inference at the Companies' expense.[369]

[808] The Companies were entitled to rebut that inference, a task entrusted in large part to Professors Viscusi and Young. We have examined their evidence in detail in section II.D.5 of the present judgment and we see nothing there, or in any other part of the proof, that could be said to rebut the presumption sought.

[809] Consequently, the question posed is answered in the affirmative: the Blais Members' smoking was caused by a fault of the Companies.

VI.F. WAS THE LÉTOURNEAU MEMBERS' SMOKING CAUSED BY A FAULT OF THE COMPANIES?

[810] Much of what we said in the previous section will apply here. The only additional issue to look at is whether the presumption applies equally to the Létourneau Class Members.

[811] In its Notes, ITL pleads a total lack of proof on this aspect:

> **1128.** Plaintiffs have not even attempted to connect the addiction (however defined) of any Class Member, or any alleged injury, to any fault or wrongful conduct of ITL. In particular, Plaintiffs have made no attempt to establish a causal link between any acts or omissions of ITL and the smoking behaviour of any Class Members (or any alleged injuries). This alone is fatal to their entire addiction claim.

[812] RBH, with JTM adopting similar points[370], raises three arguments in opposition:

> **1099.** […] First, Plaintiffs failed to prove that a civil fault of the Defendants caused all – or indeed any – of the class members to start or continue smoking. Second, Plaintiffs failed to prove that each member of the *Létourneau* class has the claimed injury of addiction. Third, they failed to prove that this alleged addiction necessarily entails any injurious consequences given that addicted smokers may not want to quit smoking, may not have ever tried to quit, or may not have any difficulty in quitting if they do try. Certainly, there is no proof of anyone's humiliation or loss of self-esteem or of the gravity of either. Thus, the class will include people who are not smoking because of any wrong committed by the Defendants, who are not addicted to nicotine, and who, even if they are addicted, have not, and will not, necessarily suffer any cognizable injury as a result of their alleged "state of addiction."

[813] The first point is rebutted on the basis of the same presumption we accepted with respect to the Blais Class in the preceding section, i.e., that the Companies' faults were indeed one of the factors that caused the Members to smoke. Our conclusions in that regard apply equally here.

[814] As for the second, sufficient proof that each Class Member is tobacco dependent flows from the redefinition of the Létourneau Class in section VI.D above. Dr. Negrete

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369 Jean-Claude ROYER, *La preuve civile*, 3rd édition, Cowansville, Québec, Éditions Yvon Blais, 2003, pages 653-654, para. 847.

370 See paragraphs 2676 and following of JTM's Notes.

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opined that 95% of daily smokers are nicotine dependent and the new Class definition is constructed so as to encompass them. This makes it probable that each Member of the Létourneau Class is dependent.

[815] We recognize that there might be some individuals in the Class who are not tobacco dependent in light of this new definition. We consider that to be *de minimis* in a case such as this where, in light of the number of Class Members, a threshold of perfection is impossible to cross. Such a minor discrepancy can be adjusted for in the quantum of compensatory damages, thus permitting "the establishment with sufficient accuracy of the total amount of the claims of the members"[371], with no injustice to the Companies. In fact, the Plaintiffs reduce the size of the Létourneau Class accordingly in the calculation of the class size done in Exhibit 1733.5.

[816] As for "entailing injurious consequences", the arguments RBH raises are covered by Dr. Negrete's opinion concerning the damages suffered by dependent smokers. The Companies made no proof to contradict that and the Court finds Dr. Negrete's testimony to be credible and dependable. We reject the third point.

[817] Consequently, the question posed is answered in the affirmative: the Létourneau Members' smoking was caused by a fault of the Companies.

VI.G. THE POSSIBILITY OF SHARED LIABILITY

[818] The Civil Code foresees a possible sharing of liability among several faulty persons, including the victim of extracontractual fault:

> **Art. 1477.** The assumption of risk by the victim, although it may be considered imprudent having regard to the circumstances, does not entail renunciation of his remedy against the person who caused the injury.
>
> **Art. 1478.** Where an injury has been caused by several persons, liability is shared by them in proportion to the seriousness of the fault of each.
>
> The victim is included in the apportionment when the injury is partly the effect of his own fault.

[819] We must, therefore, consider whether the Companies' four faults were the sole cause of the Members' damages at all times during the Class Period.[372]

[820] In Blais, we found that the public knew or should have known of the risks and dangers of contracting a Disease from smoking as of the knowledge date: January 1, 1980. We have held that it takes approximately four years to become dependent, so persons who started smoking as of January 1, 1976 (the "**smoking date**" for the Blais File) were not yet dependent when knowledge was acquired in 1980. Hence, they would not have been unreasonably impeded by dependence from quitting smoking as of the knowledge date.

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371 Article 1031 CCP.

372 The general rules of the Civil Code apply to cases under the Quebec Charter and the Consumer Protection Act, unless overridden by the terms of those statutes.

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[821] Similar reasoning applies in Létourneau, albeit with different dates. The public knew or should have known of the risks and dangers of becoming tobacco dependent as of the knowledge date: March 1, 1996. Hence, Létourneau Class Members who started to smoke as of March 1, 1992 (the "**smoking date**" for the Létourneau File) were not yet dependent when knowledge was acquired in 1996. They, too, would not have been unreasonably impeded by dependence from quitting smoking as of the knowledge date.

[822] This points to a sharing of liability and an apportionment of the damages for some of the Members.

[823] In that perspective, the Plaintiffs seek total absolution for the Members in any apportionment of fault:

> **134.** In the case at bar, the Defendants, who create a pharmacological trap and invite children into it, have committed faults whose gravity exceeds by orders of magnitude that of any fault committed by a victim of that trap. It offends public order and common decency for a manufacturer to claim that using its product as intended is anywhere near as grave as its fault of designing, marketing and selling its useless, toxic product without adequate warnings or instructions and while constantly lying about its dangers. Even if the members committed a fault, its gravity is overwhelmed by the egregious faults committed by the Defendants and should attract no liability.[373]

[824] The Companies are correct in contesting this, but only with respect to the fault under article 1468. There, article 1473 creates a full defence where the victim has sufficient knowledge[374]. The case is different for the other faults here.

[825] Pushing full bore in the opposite direction from the Plaintiffs, JTM cites doctrine[375] to argue in favour of a plenary indulgence for the Companies on the basis that "a person who chooses to participate in an activity will be deemed to have accepted the risks that are inherent to it and which are known to him or are reasonably foreseeable"[376]. That article of doctrine, however, does not support this proposition unconditionally.

[826] There, the author's position is more nuanced, as seen in the following extract:

> *Dès qu'une personne est informée de l'existence d'un risque particulier et qu'elle ne prend pas les précautions d'usage pour s'en prémunir, elle devra, en l'absence de toute faute de la personne qui avait le contrôle d'une situation, assumer les conséquences de ses actes.*[377] (The Court's emphasis)

[827] As we have shown, the Companies fail to meet this test of "absence of all fault" and thus must share in the liability under three headings of fault. This seems only reasonable and just. It is also consistent with the principles set out in article 1478 and with the position supported by Professors Jobin and Cumyn:

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373 Plaintiffs' Notes, at paragraph 134.
374 See JTM's Notes, at paragraphs 135 ff.
375 P. DESCHAMPS, "*Cas d'exonération et partage de responsabilité en matière extracontractuelle*" in JurisClasseur Québec: *Obligations et responsabilité civile*, loose-leaf consulted on July 25, 2014 (Montréal : LexisNexis, 2008) ch. 22.
376 JTM's Notes, at paragraph 138.
377 JTM's Notes, at paragraph 39.

> **212.** […] *On notera uniquement que la responsabilité du fabricant, telle que définie par le législateur lors de la réforme du Code civil, s'écarte, sur ce point, du régime général de responsabilité civile, dans lequel la connaissance du danger d'accident par la victime constitue habituellement une faute contributive conduisant, non à l'exonération de l'auteur, mais à un partage de responsabilité*.[378]

[828] Based on the preceding, we find that any Blais Class Member who started to smoke after the smoking date in 1976 and continued smoking after the knowledge date assumed the risk of contracting the Diseases as of the knowledge date[379]. This constitutes a fault of a nature to call in the application of articles 1477 and 1478 of the Civil Code, resulting in a sharing of liability for those Members.[380]

[829] We should underline a basic assumption we make in arriving at this ruling. It is true that, as of the knowledge date, even smokers who were then dependent should have tried to quit smoking, and this in both files. While recognizing that, we do not attribute any fault to dependent smokers who did not quit for whatever reason.

[830] The evidence shows that for the majority of such smokers it is quite difficult to stop and that they need several tries over many months or years to do so – and even then. It also shows that some long-time smokers are able to quit fairly easily. Some of these might have chosen not even to try to stop and, for that reason, should be considered to have committed a fault leading to a sharing of liability. It is not possible to carve them out from the dependent Members who could not be blamed for continuing to smoke.

[831] In any event, it makes little difference in light of our calculating the amount of the Companies' initial deposit at 80% across the board, as explained further on. In addition, in Blais, many would have already accumulated 12 pack years of smoking by the knowledge dates and, in Létourneau, by being dependent they would have already suffered the moral damages claimed.

[832] For the Létourneau Class, we find that any Member who started to smoke after the smoking date in 1992 and continued smoking after the knowledge date assumed the

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[378] P-G JOBIN and Michelle CUMYN, *La Vente*, 3rd Edition, 2007, EYB2007VEN17, para. 212. The Court agrees that the present situation is not one where a *novus actus interveniens* can arise.

[379] This is based on what the authors qualify as "implicit consent". Professor Deslauriers notes that this is essentially a question of fact and presumption: "*Comme l'explique la doctrine, le consentement est 'implicite lorsque l'on peut présumer qu'un individu normal aurait eu conscience du danger avant l'exercice de l'activité'*" (reference omitted): Patrice DESLAURIERS et Christina PARENT-ROBERTS, *De l'impact de la création d'un risque sur la réparation d'un préjudice corporel*, Le préjudice corporel (2006), Service de la formation continue du Barreau du Québec, 2006, EYB2006DEV1216, at page 23. This notion of acceptance of the risk is raised by the Companies in their arguments regarding the autonomy of the will of Canadians who chose to smoke in spite of the dangers. It is true that Canadians have the right to smoke even if they choose to do so unwisely, but this does not excuse certain of the Companies' faults.

[380] Given the long gestation period for the Diseases, it is highly unlikely that a person who started after January 1976 could have contracted one of the Diseases before January 1, 1980. He would have had to have smoked 12 pack years within those four years. The Court therefore discards this possibility. Concerning the longer gestation period, see the report of Dr. Alain Desjardins (Exhibit 1382) at pages 26, 62 and 68.

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risk of becoming dependent as of the knowledge date. This fault leads to a sharing of liability for those Members.

[833] As for the relative liability of each party, this is a question of fact to be evaluated in light of all the evidence and considering the relative gravity of all the faults, as required by article 1478. In that regard, it is clear that the fault of the Members was essentially stupidity, too often fuelled by the delusion of invincibility that marks our teenage years. That of the Companies, on the other hand, was ruthless disregard for the health of their customers.

[834] Based on that, we shall attribute 80% of the liability to the Companies for the compensatory damages suffered by Members in each Class who started to smoke after the smoking dates and continued to smoke after the knowledge dates, with 20% of the liability resting on those Members.

[835] Other than for the Members of both Classes described above, there is no sharing of liability. Members who started to smoke prior to the respective smoking dates are not found to have committed a contributory fault even though they continued to smoke after the knowledge dates. There, the Companies must bear the full burden.

[836] Finally, concerning punitive damages, given the continuing faults of the Companies and the fact that awards of this type are not based on the victim's conduct, these elements do not reduce the Companies' liability. They will bear the full burden.

VII. PRESCRIPTION

[837] The usual prescription under the *Civil Code* for actions to enforce personal rights, as is the case here, is three years: article 2925. However, in June 2009, during the case management phase of these files, the Québec National Assembly passed the Tobacco-Related Damages and Health Care Costs Recovery Act. Section 27 thereof has a direct bearing on the issue of prescription in the present files. It reads:

> **27.** An action, including a class action, to recover tobacco-related health care costs or damages for tobacco-related injury may not be dismissed on the ground that the right of recovery is prescribed, if it is in progress on 19 June 2009 or brought within three years following that date.

[838] The Companies contested the constitutionality of the TRDA by way of a Motion for Declaratory Judgment shortly after its promulgation. Rather than suspending these files until final judgment on that motion, the Court chose to start this trial in March 2012 and, if necessary, allow the parties to make proof and argument with respect both to the possibility that the TRDA applied and to the possibility that it did not and that the general rules of the *Civil Code* applied.

[839] We say "if necessary" because the assumption was that a motion for declaratory judgment would surely proceed through the courts sufficiently quickly for a final judgment on it to be pronounced well before this Court was to render its judgment in these files. That seemingly cautious optimism proved to be ill founded. It took over four years to obtain judgment in first instance on the Motion for Declaratory Judgment. It came down on March 5, 2014, dismissing the Companies' motion.

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[840] That judgment has been appealed and it appears that the appeal process will not be completed prior to the signing of the present judgment. Accordingly, although the Court must and will assume that the TRDA does apply, it will analyze the other alternative. Not surprisingly, it is a fairly complicated analysis to perform in both cases.

[841] Before going there, however, the Court will examine four preliminary arguments, one by ITL and three by the Plaintiffs.

[842] ITL argues that the "Plaintiffs have effectively conceded that the claims of Blais Class Members who were diagnosed prior to November 20, 1995 are prescribed"[381], citing paragraphs 2168 and 2169 of the latters' Notes. Those paragraphs could indicate that the Plaintiffs concede prescription, but only if the TRDA does not apply. We have already held that it does.

[843] Consequently, as we conclude later in this chapter, pre-November 20, 1995 claims for moral damages in Blais are not prescribed. Independently, and presumably for reasons related to the availability of relevant statistics, Dr. Siemiatycki based his calculations of the number of eligible Blais Class Members on persons diagnosed with a Disease as of January 1, 1995[382].

[844] In any event, the Plaintiffs' calculation to reduce the 1995 figures to cover only the 41 days after November 20th of that year is not necessary[383]. None of the claims of persons diagnosed in 1995 are prescribed.

[845] Moreover, the current class definition includes anyone diagnosed before March 12, 2012, which, in this context, translates to all persons diagnosed between January 1, 1950 and that date. To restrict this class to coincide with Dr. Siemiatycki's calculations, it would be necessary to amend the class description, something that was neither specifically requested nor entirely the Plaintiffs' decision. In its role as defender of the class's interests, the Court has the final word there[384].

[846] And our hypothetical final word is that, were such an amendment requested, we would not be inclined to accept it.

[847] The 1995 cut-off date seems to be inspired more by a desire to facilitate the calculation of the number of class members, and thus the initial deposit, than by juridical concerns. We understand and accept that, but see no justification there to exclude otherwise eligible Disease victims from claiming compensation.

[848] We recognize that this theoretically could render the initial deposit ultimately insufficient to cover all claims made. That is an acceptable risk, as we explain later in the context of setting that deposit at 80% of the maximum amount of moral damages. As in that case, should more funds be required, the Plaintiffs will have the right to petition the court for additional deposits.

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381 ITL's Notes, at paragraph 1411.
382 See Exhibit 1426.7.
383 See Plaintiffs' Notes, at paragraph 2169 and footnote 2592.
384 See, for example, *Bouchard* c. *Abitibi-Consolidated Inc.,* REJB 2004-66455 (C.S.Q.)

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[849] We shall thus maintain this part of the class definition as it stands and allow any Blais Member who meets those criteria to make a claim.

[850] As for the Plaintiffs' preliminary arguments, they would have the effect that, even if the TRDA is ultimately declared invalid and the general rules of prescription apply, none of the claims in these files would be prescribed. Their points in this regard come under the following headings:

a. the effect of article 2908 C.C.Q. and the definition of the Blais Class;

b. the principle of *fin de non recevoir;*

c. the Companies' continuing and uninterrupted faults over the entire Class Period.

[851] Before examining those points, a quick word on terminology. In this judgment, we use the terms "moral damages" and "compensatory damages" interchangeably. That is because, at the Class level, the only compensatory damages claimed are in the form of moral damages. That would not be the case, however, at the individual level. There, Class Members would necessarily have to be claiming compensatory damages other than moral, since the latter are covered by this judgment.

[852] Therefore, where this judgment speaks of "moral damages", that will apply to all forms of compensatory damages.

VII.A. ARTICLE 2908 C.C.Q. AND THE DEFINITION OF THE BLAIS CLASS

[853] Occupying a privileged status on several points, a class action also benefits from special rules relating to prescription. Those are set out in article 2908 of the *Civil Code*:

Art. 2908. A motion for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the motion. (The Court's emphasis)	**Art. 2908.** La requête pour obtenir l'autorisation d'exercer un recours collectif suspend la prescription en faveur de tous les membres du groupe auquel elle profite ou, le cas échéant, en faveur du groupe que décrit le jugement qui fait droit à la requête. (Le Tribunal souligne)
The suspension lasts until the motion is dismissed or annulled or until the judgment granting the motion is set aside; however, a member requesting to be excluded from the action or who is excluded therefrom by the description of the group made by the judgment on the motion, an interlocutory judgment or the judgment on the action ceases to benefit from the suspension of prescription.	Cette suspension dure tant que la requête n'est pas rejetée, annulée ou que le jugement qui y fait droit n'est pas annulé; par contre, le membre qui demande à être exclu du recours, ou qui en est exclu par la description que fait du groupe le jugement qui autorise le recours, un jugement interlocutoire ou le jugement qui dispose du recours, cesse de profiter de la suspension de la prescription.
In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.	Toutefois, s'il s'agit d'un jugement, la prescription ne recommence à courir qu'au moment où le jugement n'est plus susceptible

d'appel.

[854] The class definition thus plays a critical role in determining prescription in a class action and it was amended for the Blais Class some eight years after the Authorization Judgment[385]. This opens the door to the Companies' argument that claims accruing in the gap between the authorization and three years prior to the Class Amending Judgment, a period that we shall call the "**C Period**"[386], are prescribed. If correct, this would result both under the normal rules and under the TRDA.

[855] ITL captures the essence of the issue in its supplemental Notes on prescription when it queries how an individual, who was diagnosed with lung cancer during the year 2008 and who was not a class member as per the Motion for Authorization filed in 1998, could benefit from the suspension of prescription provided by Article 2908.

[856] The only case submitted that was directly on point is the Superior Court judgment of Gascon, J. (now at the Supreme Court of Canada) in *Marcotte v. Fédération des caisses Desjardins du Québec*.[387] Although that case ultimately made it to the Supreme Court of Canada, its holdings with respect to the effect of article 2908 were challenged neither before the Court of Appeal nor before the country's highest court.

[857] In that file, an identical situation to ours arose when a period corresponding to the C Period occurred as a result of a modification of the class description. The Defendants there, like here, contended that the claims of the new members that accrued during their C Period were prescribed. Gascon J. rejected that argument based on article 2908 and on an analysis of "the group described in the judgment granting the motion", as mentioned in that provision.

[858] That class description in *Marcotte*, like the one for Blais, contained no closing date for class eligibility. The judge there reasoned that, since (a) such an omission should not prejudice the class members and (b) prescription is a ground of defence and, thus, up to the defendant to prove and (c) any doubt should be resolved in favour of the class members and (d) the original class had no closing date, then the "ambiguity" resulting from the absence of a closing date in the original description does not lead to a conclusion that the C Period claims are prescribed.[388]

[859] ITL argues that Gascon J. erred in this holding in that he "ignored the fundamental consideration of legal interest to sue contained in Art. 55 CCP, and failed to consider the Court's holding, undisturbed by the Court of Appeal, in *Billette* and *Riendeau*. This constituted an error."[389]

[860] The cases there cited can be distinguished from *Marcotte* and ours on two grounds. The class descriptions were never amended and both plaintiffs argued that the

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385 This discussion applies only to the Blais File.

386 This term comes from the diagrams that we later use to analyze the situation in the Blais File. As explained below, the Court prefers to calculate the upper date based on the date of service of the Motion to Amend the Class rather than the Class Amending Judgment that came several months later.

387 2009 QCCS 2743.

388 *Ibidem*, paragraphs 427-434.

389 At paragraph 28 of its supplemental Notes.

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closing date should be the date of final judgment, which would have had the effect of depriving potential members of their right to request exclusion from the class.

[861] In *Billette*[390], an amendment was, in fact, requested with the objective of closing the class as of the final judgment. It was refused because it sought to include persons who, at the time of the amendment, had not then financed their automobile through one of the defendants. This is far from the situation in the Blais File, where we allowed an amendment to add a closing date as of the start of the trial in first instance, which was over a year before the motion to amend.[391]

[862] In *Riendeau*[392], where the class definition omitted a closing date, the absence of an amendment seemed to be central to the judge's reasoning, as she stated:

> *[85] Il n'est pas dans l'intérêt de la justice d'exiger le dépôt de nouvelles procédures judiciaires concernant des situations similaires au seul motif que de nouveaux membres ont acquis l'intérêt nécessaire pour poursuivre entre la requête pour autorisation et le jugement d'autorisation ou le jugement du fond. Par ailleurs, il faut respecter les exigences du Code de procédure civile relatives à l'existence d'un intérêt et à la possibilité de s'exclure.*
>
> *[86] La procédure d'amendement s'avère le moyen approprié pour pallier à cette difficulté.*[393]

[863] In line with that, ITL admits that "it is always possible post-authorization to extend the class definition to include members who have gained a legal interest. However, the only way to do so is by amendment." It adds that the normal rules of prescription would apply to the members added by the amendment, with the result that three-year prescription could render some of the claims inadmissible.

[864] That argument overlooks the effect of article 2908. It also overlooks the policy considerations referred to in paragraph 85 of *Riendeau*: it is in the interest of justice that people who subsequently acquire the necessary interest to sue before the final judgment be added to an existing class action rather than being forced to institute separate proceedings. The same view is reflected in the Court of Appeal's judgment in the *Loto* Québec class action where the court emphasized the need to favour access to justice and to avoid the unnecessary multiplication of suits[394].

[865] This said, if prescription applies to disqualify some original class members' claims, why should it not apply to disqualify the otherwise prescribed claims of persons added subsequently?

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390 *Billette v. Toyota Canada Inc.*, 2007 QCCS 319.

391 This is a similar situation to that in a third case cited by ITL: *Desgagné v. Québec (Ministre de l'Éducation, du Loisir et du Sport)*, 2010 QCCS 4838. There, as in *Riendeau (*2007 QCCS 4603, affirmed 2010 QCCA 366), the plaintiffs in an open-ended class asked the judge to close the class as of the date of judgment on the merits. The judge refused, principally because to do so would be to deprive new members of their right of exclusion – see paragraphs 63 and 64.

392 *Riendeau c. Brault & Martineau inc., Ibidem*.

393 Faced with the plaintiff's inaction on the point, the judge amended the class of her own accord, to close it as of the date of the authorization judgment.

394 *La Société des loteries du Québec c. Brochu*, 2007 QCCA 1392, at paragraph 8. See also: *Marcotte v. Banque de Montréal* 2008 QCCS 6894, at paragraphs 49-53.

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[866] The answer is that it does - or does not - depending on the wording of the class definition.

[867] The suspension of prescription created by article 2908 depends on the definition of the group described in the authorizing judgment. If the authorizing judge sees fit not to stipulate a closing date, then the suspension should continue until one is imposed one way or another, presumably concurrently with an opportunity for new members to exclude themselves, as was done in the present files.

[868] We hasten to add that, in light of the policy considerations mentioned above, there will be cases where it will make good sense not to stipulate a closing date initially, recognizing that it will eventually be necessary. A good example of that is found in the Blais File.

[869] There, it must have been obvious in February 2005 that, in light of the long gestation period of the Diseases[395], people would continue to contract them as a result of smoking that occurred during the Class Period. Such persons should be given the opportunity to join the existing class action rather than being forced to institute a new one, or to forego their right to claim damages. Hence, by leaving the class open in Blais, the Authorization Judgment was favouring access to justice and avoiding the unnecessary multiplication of suits.

[870] Article 2908, as interpreted in *Marcotte*, facilitates that process by making it possible to add all such persons at once, without concern for prescription once the original class action is launched. This is the interpretation that we shall apply here.

[871] In this regard, we must consider the original description of the Blais Class as approved in the Authorization Judgment. It specifically includes people who "since the service of the motion" developed a Disease. This is dispositive. Membership in the Class is left open in time, as was the case in *Marcotte v. Desjardins*. In fact, one of the express purposes of the Class Amending Judgment was to create a closing date. Consequently, Blais Class claims arising in the C Period are not prescribed.

VII.B. *FIN DE NON RECEVOIR*

[872] Again relying on the principle of *fin de non recevoir*, the Plaintiffs argue that the defence of prescription should not be available to the Companies in light of the egregious nature of their behaviour over the Class Period. Referring to *Richter & Associés inc. v. Merrill Lynch Canada Inc.*[396], they reason at paragraph 2167 of their Notes that the Companies "are essentially claiming that the plaintiffs should have seen through their (the Companies') lies in time to realize they had a cause of action against them. The (Companies') illegal conduct is directly linked to the benefit they are seeking to invoke", i.e., the benefit of prescription.

[873] Although most of the case law on the question deals with a faulty plaintiff, the Plaintiffs here cite authority to the effect that a *fin de non-recevoir* can be raised against a

395 See the report of Dr. Alain Desjardins (Exhibit 1382) at pages 26, 62 and 68.
396 2007 QCCA 124.

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defence, including a defence of prescription[397]. While the Court agrees with that position, this does not resolve the issue in the Plaintiffs' favour.

[874] Where one is led by the opposing party to believe falsely that he need not act within a certain delay, a *fin de non recevoir* can protect him against a claim of prescription by the opposing party. That is the situation that Morissette J.A. dealt with in the *Loranger* decision[398] cited by the Plaintiffs. There, the government's behaviour could be seen as an indication that it had agreed not to apply the prescriptive delays otherwise governing the situation. That behaviour related directly to the issue of delays and there was no independent reason for Madam Loranger to believe otherwise.

[875] The Plaintiffs go well beyond that. Their theory would abolish prescription not only where the defendant's behaviour leads a plaintiff to believe that he need not act but, effectively, in every case where the defendant has lied to him, even about non-delay-related questions.

[876] That is a stretch that the Court is not willing to make. For a *fin de non recevoir* to be raised against prescription, a link between a party's improper conduct and the prescription invoked is necessary but, to be sufficient, that conduct must be shown to have been a cause for the failure to act within the required delays. Where there is nothing specific to induce a plaintiff to think that he need not exercise his right of action in a timely manner, there can be no *fin de non recevoir*.

[877] In these files there is nothing in the proof to indicate that the Companies' "disinformation" had any effect whatsoever on the Plaintiffs' decision not to sue earlier. Accordingly, the Court rejects the Plaintiffs' argument based on the principle of *fin de non recevoir*.

VII.C. CONTINUING AND UNINTERRUPTED FAULTS

[878] Where there is continuing (continuous) and uninterrupted damages and/or fault, an argument made only in the Létourneau File, the doctrine and the case law recognize that prescription "starts running each day"[399]. According to Baudouin and Deslauriers, as cited in English by the Supreme Court in the *Ciment St-Laurent* decision, "(continuing damage is) a single injury that persists rather than occurring just once, generally because the fault of the person who causes it is also spread over time. One example is a polluter whose conduct causes the victim an injury that is renewed every day".[400]

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397 See Jean-Louis BAUDOUIN, *Les obligations*, 7th edition, *op. cit.,* Note 328, at paragraph 730, page 854-855; Didier LLUELLES et Benoît MOORE, *Droit des obligations, op. cit.*, Note 303, at paragraph 2032, page 1160; *Fecteau c. Gareau*, [2003] R.R.A. 124 (rés.), AZ-50158441, J.E. 2003-233 (C.A.); *Loranger c. Québec* (Sous-ministre du Revenu), 2008 QCCA 613, paragraph 50.

398 *Ibidem, Loranger*.

399 *Ciment du Saint-Laurent inc.* v. *Barrette,* [2008] 3 S.C.C. 392, at paragraph 105.

400 *Ibidem*. *Ciment du Saint-Laurent inc.,* citing Jean-Louis BAUDOUIN and Patrice DESLAURIERS, *La Responsabilité Civile*, 7th edition, vol. 1, *op. cit.,* Note 328, paragraph 1-1422, *"Dommage continu – Il s'agit en l'occurrence d'un même préjudice qui, au lieu de se manifester en une seule et même fois, se*

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[879] The fact that a fault and a prejudice might be continuing does not automatically make the case subject to a daily restart of prescription, what we shall call "daily prescription". For that to occur, there must not only be a continuing fault, but, more to the point, that fault must cause additional or "new" damage that did not exist previously: in essence.

[880] Seen from a different perspective, daily prescription will occur in cases where the cessation of the fault would result in the cessation of new or additional damages. In such cases, the continuation of the fault on Day 2 causes separate and distinct damages from those caused on Day 1, damages that would not have resulted had the fault ceased on Day 1. It is as if a new cause of action were born on Day 2[401].

[881] On the other hand, where the damage has already been done, in the sense that it is not increased or created anew by the continuing fault, daily prescription is not appropriate. This is logical. Most damages are continuing, in that they are felt every day, but that does not call daily prescription into play. If that were the case, daily prescription would apply in almost all cases.

[882] In the Blais File, the Plaintiffs rightly do not allege that daily prescription applies, since those damages were crystallized at the moment of diagnosis of a Disease. The fact that the fault and the moral damages continued thereafter, literally until death, does not open the door to daily prescription.

[883] Is the situation any different in the Létourneau File? There, the crystallization of the Companies' faults might be harder to pinpoint in time but, in light of the Class definition, it is no less determinable.

[884] By that definition, a Member must be "addicted" to the nicotine in the Companies' cigarettes as of September 30, 1998, meaning that he started to smoke those cigarettes at least four years earlier and, during the 30 days preceding September 30, 1998, he smoked at least one cigarette a day[402]. This formula thus determines the date at which a Member's dependence was established.

[885] By meeting the criteria for dependence, the Létourneau Member is in the same situation as the Blais Member at the moment of diagnosis. Once a person is dependent on nicotine, the damage resulting from that would not cease were the Companies to correct their failure to inform. Accordingly, daily prescription does not apply and the Court rejects Plaintiffs' argument in this regard.

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perpétue, en général parce que la faute de celui qui le cause est également étalée dans le temps. Ainsi, le pollueur qui, par son comportement, cause un préjudice quotidiennement renouvelé à la victime".

401 In *Ciment St-Laurent*, *ibidem*, where the plaintiffs complained of air pollution caused by the operation of a cement factory near where they lived, there was no fault present, given that the cement plant was operating legally. Nevertheless, that case is still useful as an example of a situation where the damages complained of would have ceased had the defendant ceased its offending behaviour.

402 This is the definition in place before we amend it in the present judgment. The amendment does not affect the present analysis. The third wing of that test, that of still smoking those cigarettes as of February 21, 2005, is not relevant for the analysis of prescription.

[886] Before conducting a detailed review of the effect of prescription, first under and then outside of the TRDA for the Blais File, we shall look first at the Létourneau File in light of the knowledge date there.

VII.D. THE LÉTOURNEAU FILE

[887] Since this action was taken on September 30, 1998, under the normal rules a Member's cause of action must have arisen after September 30, 1995 in order not to be prescribed. This must be viewed in light of the knowledge date there, which is March 1, 1996.

[888] The knowledge date is the earliest date at which a Member is deemed to have known that smoking the Companies' products caused dependence. Such knowledge is an essential factor to instituting a claim. Consequently, no Létourneau cause of action could have arisen before the knowledge date. Since it is after September 30, 1995, it follows that none of the Létourneau claims are prescribed, and this, whether under the normal rules or under the special rules of the TRDA.

[889] We have not forgotten that during oral argument the Plaintiffs admitted that claims for punitive damages arising before September 30, 1995 were prescribed. That, however, does not affect this finding, which is predicated on the fact that the claims did not arise before March 1, 1996.

[890] As for the Blais Class, the knowledge date of January 1, 1980 falls well before the date the action was taken in 1998. As a result, there is a possibility of prescription, a question we examine in the following sections of the present judgment.

VII.E. THE BLAIS FILE UNDER THE TRDA

VII.E.1 MORAL/COMPENSATORY DAMAGES

[891] For this analysis, we have expanded on a diagrammatic format relating to the Blais File first developed by RBH in Appendix F to its Notes and later expanded at the Court's request to cover all cases. For Blais, those diagrams use the following dates, keeping in mind that the beginning of the Class Period is January 1, 1950:

a. November 20, 1995: three years prior to the institution of the action;

b. February 21, 2005: the date of the Authorization Judgment;

c. July 3, 2010: three years prior to the Class Amending Judgment;

d. March 12, 2012: the end date for membership in the Class (the first day of trial);

e. July 3, 2013: the date of the Class Amending Judgment.

[892] For points "c" and "e", the Court prefers the date that the Motion to Amend the Classes was served by the Plaintiffs over the date of the resulting Class Amending Judgment. Prescription is interrupted by the service of an action and the service of that type of motion can be likened to that[403]. It was first served on April 4, 2013, so three

[403] See *Marcotte v. Bank of Montreal* [2008] QCCS 6894, at paragraph 39.

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years prior to that is April 4, 2010. These are the dates the Court will use for this analysis, with the C Period becoming the time between February 21, 2005 and April 4, 2010.

[893] Diagram I depicts the prescription scenario for the claim for moral damages in the Blais File under the TRDA.

I - BLAIS FILE: COMPENSATORY DAMAGES - WITH THE TRDA

1950	1995/11/20	2005/02/21	2010/04/04	2012/03/12	2013/04/04
I-A	I-B	I-C	I-D	I-E	
not prescribed	not prescribed	**contested**	not prescribed	outside the Class	

[894] The only contestation relates to the I-C Period. The Companies argue that the TRDA has no application to any of the claims added by the Class Amending Judgment and that the normal rules of prescription apply to those. As such, claims accruing in period I-C would be prescribed because suit was not brought within three years.

[895] Although the TRDA might not cover this period, article 2908 of the Civil Code does. Accordingly, for the reasons set out in Section VII.A above, the Court rejects the contestation and reiterates that claims accruing in the C Period are not prescribed.

[896] As a result, under the TRDA none of the Blais Class claims for moral damages are prescribed.

VII.E.2 PUNITIVE DAMAGES WITH THE TRDA — AND WITHOUT IT

[897] The Companies argue that the TRDA has no impact on punitive damages. The Plaintiffs do not contest that position and neither does the Court. The use of the term "to recover damages" (In French: "*pour la réparation d'un préjudice*") in section 27 indicates that this provision does not encompass punitive damages, since they are not meant to compensate for injury suffered. Hence, claims for those fall outside the ambit of section 27 and will be governed by the normal rules of prescription.

[898] In that light, Diagram II depicts the situation with respect to claims for punitive damages in the Blais File in all cases, i.e., whether or not the TRDA applies.

II - BLAIS FILE: PUNITIVE DAMAGES – IN ALL CASES

1950	1995/11/20	2005/02/21	2010/04/04	2012/03/12	2013/04/04
II-A	II-B	II-C	II-D	II-E	
prescribed	not prescribed	**contested**	not prescribed	outside the claim	

[899] The only contestation relates to the C Period. The parties' arguments with respect to that period are the same now as under Diagram I for moral damages and the Court's ruling is also the same. Applying article 2908, we rule that the claims in period III-C are not prescribed, irrespective of the application of the TRDA.

[900] Consequently, whether or not the TRDA applies, Blais claims for punitive damages in period II-A are prescribed, whereas those arising in periods II-B, II-C and II-D are not.

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[901] To sum up, under the TRDA, the only claims that are prescribed for the Blais Class are those for punitive damages that accrued prior to November 20, 1995.

[902] Since the Court must assume that the TRDA does apply for the purposes of this judgment, to the extent that prescription is a factor, it will follow the holdings shown in the above diagrams and later clarified for the C Period. Nevertheless, we shall briefly examine the case where the TRDA would ultimately be ruled invalid.

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VII.F. IF THE TRDA DOES NOT APPLY

[903] Diagram III depicts the prescription scenario for the claim for moral damages in the Blais File under the normal rules, i.e., those set out in the Civil Code.

III - BLAIS FILE: COMPENSATORY DAMAGES - WITHOUT THE TRDA

1950	1995/11/20	2005/02/21	2010/04/04	2012/03/12	2013/04/04
III-A	III-B	III-C	III-D	III-E	
prescribed	not prescribed	**contested**	not prescribed	outside the claim	

[904] This is the same situation as in case II above for punitive damages. For the reasons described there, the Court would follow that ruling and declare the claims accruing in the III-C period not to be prescribed. Consequently, the only Blais claims for moral damages that would be prescribed are those accruing in period III-A.

[905] In summary, under the ordinary rules, the Blais claims that are prescribed are all those, i.e., for both compensatory and punitive damages, accruing prior to November 20, 1995.

VII.G. SUMMARY OF THE EFFECTS OF PRESCRIPTION ON SHARED LIABILITY

[906] To this point we have made a number of rulings, many of which influence each other. It will be useful to attempt to portray the result of all of these in practical and manageable terms. We base this recapitulation on the rules of prescription under the TRDA.

[907] There is no prescription of moral damages in either file. With respect to their safety-defect fault under article 1468, the Companies have a complete defence against the claims for moral damages of Members who started to smoke after the smoking date in each file. This has no practical effect, since the potential moral damages under that fault are duplicated under the others. Nonetheless, the Companies' liability is reduced to 80 percent with respect to Members who started to smoke after the smoking date in each file.

[908] For punitive damages in Blais, claims accruing prior to November 20, 1995 are prescribed. This affects only the Members diagnosed with a Disease before that date. The claims of those diagnosed after that are not affected by the date on which they started to smoke. The 80% attribution to the Companies for compensatory damages does not apply to punitive damages.

[909] No Létourneau claim is prescribed but there will be an apportionment of liability for moral damages only as of the date on which the Member started to smoke.

[910] Table 910 summarizes these results:

TABLE 910

MORAL DAMAGES	LIABILITY
Blais Member started smoking before January 1, 1976	Companies – 100%
Blais Member started smoking as of January 1, 1976	Companies – 80% // Member 20%
Létourneau Member started smoking before March 1, 1992	Companies – 100%
Létourneau Member started smoking as of March 1, 1992	Companies – 80% // Member 20%
PUNITIVE DAMAGES	LIABILITY
Blais claim accruing before November 20, 1995	Prescribed
Létourneau claim accruing before September 30, 1995	Companies – 100%
Blais claim accruing as of November 20, 1995	Companies – 100%
Létourneau claim as of September 30, 1995	Companies – 100%

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VIII. MORAL DAMAGES - QUANTUM

[911] In a class action, it is necessary, but not sufficient, to prove the three components of civil liability, fault, damages and causality. In addition, collective recovery must be possible, as stipulated in article 1031 of the Code of Civil Procedure:

> **1031.** The court orders collective recovery if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; it then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is not established.

[912] JTM explains it this way in its Notes:

> **2389.** In order to obtain collective recovery, Article 1031 requires that Plaintiffs satisfy the Court that the evidence establishes the total amount of the claims of the members of the class with "*sufficient accuracy*". In order to establish the total *amount* of the proven claims of members with sufficient accuracy, the court must of necessity know the total *number* of members of the class for whom fault, prejudice, and causation have been proven as well as the damages of each. Sufficient accuracy in both the number of members of the class for whom such proof has been given and the amount of their claims is the *sine qua non* of collective recovery. (Emphasis in the original)

[913] For its part, ITL argues at paragraph 1143 of its Notes that the Plaintiffs have failed to make acceptable proof of the elements required under article 1031, i.e.:

> a. Class size (particularly with respect to the Létourneau proceedings);

b. The nature and degree of the Class Members' "individual injuries" from which a total amount of recovery can be accurately determined;

c. The presence of Class-wide injuries which are causally linked to Defendants' faults and which are shared by each and every member of the Class (even if they vary as to degree); and

d. The existence of an average amount of recovery that is meaningful to a majority of Class Members, taking into account their individual circumstances and the defences that are particular to each individual claim.

[914] Some of these points have already been rejected, but others merit review now, especially in the Létourneau File.

[915] Earlier, we found fault, damages and causation in both files. What remains for purposes of collective recovery is to estimate the amount of the damages for the Létourneau Class and for each subclass in Blais, and to determine if this estimate can be done with "sufficient accuracy". For that estimate, we shall have to find the number of persons in each group and multiply that by the moral damages we are willing to grant to them.

[916] Moral damages were incurred to differing degrees in both files, as reflected in the different amounts claimed: $100,000 for Blais Class Members with lung or throat cancer and $30,000 for those with emphysema versus a universal amount of $5,000 in Létourneau.

[917] The Companies oppose these claims on several grounds, one of which applies to all categories of Class Members. Their experts uniformly opined that epidemiological evidence was not appropriate. They argue that, before any person can be diagnosed with one of the Diseases or with tobacco dependence, it is essential that an individual medical evaluation be done. The Companies argue that this step is necessary even on a class-wide level.

[918] In Blais, a medical evaluation will have been done for each Member. Since eligibility is conditional upon proving that he has been diagnosed medically with one of the Diseases, each Member will necessarily have undergone a medical evaluation and will have medical records supporting his eligibility. The Companies' argument in this regard is thus not relevant to the Blais Class.

[919] The situation is quite different for Létourneau, since a Member's tobacco dependence will generally not be documented. Nevertheless, earlier in this judgment we established measurable criteria for determining tobacco dependence in a person:

a. Having started to smoke before September 30, 1994 and since that date having smoked principally cigarettes made by the defendants; and

b. Between September 1 and September 30, 1998, having smoked on a daily basis an average of at least 15 cigarettes made by the defendants; and

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c. On February 21, 2005, or until death if it occurred before that date, continuing to smoke on a daily basis an average of at least 15 cigarettes made by the defendants.[404]

[920] To be accepted into the Létourneau Class, an individual will have the burden of proving all three elements. The Court considers the practical difficulties of making that proof later in the present judgment, while at the same time examining whether there is adequate proof of "the existence of an average amount of recovery that is meaningful to a majority of Class Members, taking into account their individual circumstances", as ITL insists.

[921] This said, a new issue arises around establishing the total amount of the claim as a result of our introduction of the smoking dates. A smoking date adjustment will not influence punitive damages in either file. As well, since we eventually refuse collective recovery of moral damages in Létourneau, the smoking-date question has no practical effect in that file. In Blais, however, it does play a role.

[922] Since the smoking date there is January 1, 1976, at least half, and likely more, of eligible Blais Members will have the right to claim only 80% of their moral damages from the Companies. At first glance, this impedes the Court from establishing with sufficient accuracy the total amount of the claims, since that cannot be determined until the number of Members in each smoking period is determined.

[923] It poses a problem as well for the assessment of punitive damages. Article 1621 of the Civil Code requires us, when doing that, to consider the amount of other damages for which the debtor is already liable. If we cannot ascertain the extent of compensatory damages, we will not be able to assess punitive damages in accordance with the law.

[924] Stepping back a bit, these problems seem to have fairly simple practical solutions.

[925] On the one hand, we could simply divide the Blais group in proportion to the number of years of the Class Period at 100% liability for the Companies versus 80% liability. That would be sufficiently accurate in our view.

[926] On the other, we could adopt an approach that is even simpler, and more favourable to the Companies.

[927] In nearly every class action, especially ones with a large number of class members, only a small portion of the eligible members actually make claims. Thus, the remaining balance, or "*reliquat*", could often be greater than the amount actually paid out. Hence, it is not unreasonable to proceed on the basis that the full amount of the initial deposits might not be claimed.

[928] We thus feel comfortable in ordering the Companies initially to deposit only 80% of the estimated total compensatory damages, i.e., before any reduction based on the smoking dates. If that proves insufficient to cover all claims eventually made, it will be possible to order additional deposits later, unless something unforeseen occurs and all

[404] See section VI.D of the present judgment.

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three Companies disappear. The Court is willing to assume that this will not happen. We shall thus reserve the Plaintiffs' rights with respect to such additional deposits.

[929] Admittedly, this will likely result in a smaller balance or *reliquat* at the end of the day, but our first duty is to provide compensation to wronged plaintiffs, not to maximize the *reliquat*. We would not be fulfilling that role were we to allow this type of technical obstacle to thwart proceeding to judgment now.

[930] Finally, let us deal with the Plaintiffs' argument that the condemnation for moral damages should be made on a solidary (joint and several) basis among the Companies.

[931] Article 1526 of the Civil Code states that reparation for injury caused through the fault of two or more persons is solidary where the obligation is extracontractual. Article 1480 explains some of the other sources of solidary liability. It reads as follows:

> **Art. 1480.** Where several persons have jointly taken part in a wrongful act which has resulted in injury or have committed separate faults each of which may have caused the injury, and where it is impossible to determine, in either case, which of them actually caused it, they are solidarily liable for reparation thereof.

[932] The Companies contest the claim for solidary liability. In its Notes, RBH argues as follows:

> **1325.** Indeed, in order to apply Article 1480 CCQ on a class-wide basis in these Actions, this Court would have to: (a) rule in favour of Plaintiffs' conspiracy claims (i.e. rule that Defendants jointly participated in the same wrongful act(s) which resulted in injury to all class members), OR (b) determine that some wrongful conduct by each Defendant caused each class member's injuries (i.e. every single class member smoked cigarettes manufactured by all three of these Defendants), AND (c) conclude that in either case, it is impossible to determine which of these Defendants caused the injury (which could only be the case if each Defendant engaged in conduct which, in and of itself, would have been sufficient to cause injury to each and every class member). (Emphasis in the original)

[933] They add that the Plaintiffs have failed to provide the necessary proof of these elements, i.e., that the Companies conspired together or that each and every Class Member smoked cigarettes made by all three Companies.

[934] We disagree.

[935] The conditions under article 1480 have been met in both Classes. As discussed in Section II.F hereof, the collusion among the Companies represents "a wrongful act which has resulted in injury". As well, given the number of Members and the fact that the relevant proof may be and was made by way of epidemiological analysis, it is a practical impossibility to determine which Company caused the injury to which Members of either Class or subclass.

[936] A second reason to rule in this manner is found in article 1526[405]. All parties agree that we are in the domain of extracontractual liability. Given that we hold that the

[405] **1526.** The obligation to make reparation for injury caused to another through the fault of two or more persons is solidary where the obligation is extra-contractual.

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Companies colluded to "disinform" the Members, this resulted in injury caused through the fault of two or more persons, as foreseen in that provision.

[937] There could also be a third reason in support of this position: section 22 of the TRDA. In essence, it edicts that, if it is not possible to determine which defendant caused the damage, "the court may find each of those defendants liable for health care costs incurred, in proportion to its share of liability for the risk". Section 23 of the TRDA provides guidelines for that apportionment.

[938] These provisions apply equally to class actions for damage claims (TRDA, section 25). As well, given the circumstances in these files, the damage award for each member cannot for practical reasons be tied to a specific co-defendant. The members must be allowed to collect from a common pool of funds resulting from the deposits. This type of class action could not function otherwise.

[939] Accordingly, to the extent that moral damages are awarded, solidary liability applies to them in both files.

VIII.A. THE LETOURNEAU FILE[406]

[940] This Class claims a universal amount of $5,000 for the following moral damages:

a. Increased risk of contracting smoking-related diseases;

b. Reduced life expectancy;

c. Loss of self esteem resulting from her inability to break her dependence;

d. Humiliation resulting from her failures in her attempts to quit smoking;

e. Social reprobation;

f. The need to purchase a costly but toxic product.

[941] The Companies do not attack so much the Plaintiffs' characterization of the moral damages suffered by a dependent smoker as they do the lack of evidence with respect to Létourneau Class Members' having suffered such damages. They also complain that, at the stage of final argument, the Plaintiffs attempted to change the types of moral damages claimed from those set out in the original action.

[942] Earlier, the Court held that it cannot rely on the expert reports of Professor Davies and Dr. Bourget[407]. Consequently, the only proof of the effect that tobacco dependence has on individuals is provided by Dr. Negrete.

[943] The Court disagrees with the Companies' assertions that the Plaintiffs have adduced no evidence describing any of the alleged injuries for which moral damages are claimed. We previously saw that, in his second report (Exhibit 1470.2), Dr. Negrete mentions the increased risk of "morbidité" and premature death[408] and a lower quality of

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406 In light of our decision on the Létourneau Class's claims for moral damages, we shall deal with this class first.

407 See section II.C.1 in the ITL chapter of this judgment.

408 *Face à cette évidence, on doit conclure que le risque accru de morbidité et mort prématurée constitue le plus grave dommage subi par les personnes avec dépendance au tabac*: at page 2

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life, both with respect to physical and social aspects.[409] He opined that the mere fact of being dependent on tobacco is, itself, the principal burden caused by smoking, since dependence implies a loss of freedom of action and an existence chained to the need to smoke – even when one would prefer not to[410].

[944] Thus, based on Dr. Negrete's second report, we hold that dependent smokers can suffer the following moral damages:

- The risk of a premature death is the most serious damage suffered by a person who is dependent on tobacco (Exhibit 1470.2, page 2);
- The average indicator of quality of life is lower for smokers than for ex-smokers, especially with respect to mental health, emotional balance, social functionality and general vitality (page 2);
- There is a direct correlation between the gravity of the tobacco dependence and a lower perception of personal well-being (page 2);
- Dependence on tobacco limits a person's freedom of action, making him a slave to a habit that permeates his daily activities and restricts his freedom of choice and of decision (pages 2-3);
- When deprived of nicotine, a dependent person suffers withdrawal symptoms, such as irritability, impatience, bad moods, anxiety, loss of concentration, interpersonal difficulties, insomnia, increased appetite and an overwhelming desire to smoke (page 3).

[945] What is more difficult to discern from the evidence, however, is the extent to which all dependent smokers suffer all these damages and to what degree.[411]

[946] Based on the first report of Dr. Negrete, the Plaintiffs estimate the number of Létourneau Class Members at 1,200,000 people in the first half of 2005 (Exhibit 1470.1, page 21). By the end of the trial, that number had been reduced to about 918,000[412]. In such a large group, the Companies see wide variation in the nature and degree of moral damages that will be incurred. The Court does, as well.

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409 *Une moindre qualité de vie - tant du point de vue des limitations physiques que des perturbations dans les fonctions psychique et sociale - doit donc être considérée comme un des inconvénients majeurs associes avec la dépendance tabagique*: at page 2.

410 *La personne qui développe une dépendance a la nicotine, même sans être atteinte d'aucune complication physique, subit l'énorme fardeau d'être devenue l'esclave d'une habitude psychotoxique qui régit son comportement quotidien et donne forme à son style de vie. L' état de dépendance est, en soi même, le trouble principal causé par le tabagisme.*
Cette dépendance implique une perte de liberté d'action, un vivre enchainé au besoin de consommer du tabac, même quand on préférerait ne pas fumer: at pages 2-3.

411 The Court of Appeal judgment in *Syndicat des Cols Bleus Regroupés de Montréal (SCFP, section locale 301) v. Boris Coll*, 2009 QCCA 708, points out the difficulty of analyzing moral damages across a large number of class members, in that case, caused by a time delay resulting from an illegal strike: see paragraphs 90 and following, especially paragraphs 99, 103 and 105.

412 Exhibit 1733.5. It is possible that the amendment to the Létourneau Class description ordered in the present judgment could affect this number, although the Court is not of that opinion. This, in any event, becomes moot in light of our decision to dismiss the claim for compensatory damages in Létourneau and to refuse to proceed with distribution of punitive damages to the individual Members.

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[947] As witness to that, the proof indicates that the level of difficulty experienced by smokers attempting to quit varies greatly, with some people succeeding with little or no difficulty and others repeatedly failing. Spread over more than a million people, that will affect the intensity, and even the existence, of several of the potential damages identified by Dr. Negrete.

[948] In its Notes, RBH pounds home the point that "Plaintiffs have not given the Court sufficient evidence from which it could conclude that all class members have suffered substantially similar injuries, such that it could award moral damages on a collective basis".[413] In other words, as they say later, there is no evidence that "all class members are similarly situated such that the court could select a common dollar amount to fairly compensate every class member"[414].

[949] The Court agrees to a large extent. It also agrees in principle with the Companies' point that a grant of moral damages on a collective level would require proof that all Class Members actually wanted to quit and suffered humiliation as a result of not being able to do so. The record is devoid of proof of that, as well. This is a critical element and neither can it be assumed nor can the Court see any basis on which to draw a presumption in that respect.[415]

[950] Despite the presence of fault, damages and causality, the Court must nevertheless conclude that the Létourneau Plaintiffs fail to meet the conditions of article 1031 for collective recovery of compensatory damages. Notwithstanding our railing in a later section against the overly rigid application of rules tending to frustrate the class action process, we see no alternative. The inevitable and significant differences among the hundreds of thousands of Létourneau Class Members with respect to the nature and degree of the moral damages claimed make it impossible to establish with sufficient accuracy the total amount of the claims of the Class. That part of the Létourneau action must be dismissed.

[951] There is an additional obstacle. Even if we were able to award compensatory damages to the Létourneau Class, it would be "impossible or too expensive" to administer the distribution of an amount to each of the members[416]. Proof of dependence would almost always be subjective, with little or no independent substantiation available, and, therefore, open to potentially rampant abuse. Moreover, the relatively modest amount that could be awarded to any individual Member[417] would rival the cost of administering the distribution process for that person. It would simply not make sense to undertake such an exercise.

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413 At paragraph 1207.

414 At paragraph 1211.

415 As discussed in the case of *Infineon Technologies AG v. Option consommateurs*, [2013] SCR 600, at paragraph 131, some types of damages are more easily assessed class wide, than others. Moral damages for tobacco dependence fall more in the latter category, as were those for defamation in the case of *Bou Malhab*, [2011] 1 SCR 214.

416 Article 1034 CCP.

417 Were we to grant moral damages in Létourneau, we would have opted for an amount in the vicinity of $2,000 per Member.

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[952] Article 1034 of the Code of Civil Procedure grants the Court the discretion to refuse to proceed with the distribution of an amount to each of the members in such circumstances and that is what we would have done in Létourneau had we been able to order collective recovery.

[953] For punitive damages, since they are not tied to the effect on the victim, the wide diversity among the Létourneau Members' situations does not pose a problem. This is a start, but it does not alleviate the concern raised under article 1034.

[954] For the same reasons mentioned with respect to compensatory damages, we must refuse to proceed with the distribution of punitive damages to the Létourneau Members. That does not mean, however, that we cannot condemn the Companies to such damages on a collective basis. We shall do so and, as foreseen in that article, shall provide for the distribution of that amount after collocating the law costs and the fees of the representative's attorney. We look into the distribution question in a later section.

[955] Dealing with what has now become a moot issue, at least with respect to moral damages, we would have declared Mme. Létourneau eligible to collect damages on the same basis as any other eligible Member of the Létourneau Class. The Code of Civil Procedure makes it clear that the judgment in Small Claims Court refusing her action for reimbursement of certain expenses related to her attempts to break her tobacco dependence has no relevance to the present case[418].

[956] Finally, where the Court rejects a claim for which fault and damages have been proven, it would normally proffer its best estimate of the amount it would have granted in the event of a different opinion in appeal. Here, we are unable to do that. To attempt to put a number to the moral damages actually suffered by the Létourneau Class would be pure conjecture on our part.

VIII.B THE BLAIS FILE

[957] We shall follow Dr. Siemiatycki's segregation of the Diseases in his work and, thus, analyze the case of each Disease subclass separately.

[958] Before going there, let us say a word about the Plaintiffs' argument in favour of using an "average amount" of moral damages within a class or subclass. In their Notes, they submit:

> **2039.** In a class action, the quantum of damages can be evaluated based upon a presumption of fact, itself based upon an average, as long as it does not increase the debtor's total liability.[419]

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418 See article 985 CCP.

419 The following is the Plaintiffs' footnote #2493, which appears at the end of their paragraph 2039: *St. Lawrence Cement Inc. v. Barrette*, 2008 C.S.C. 64, at paras 115-116, referring to *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; Denis FERLAND, Benoît EMERY et Kathleen DELANEY-BEAUSOLEIL, « *Le recours collectif – Le jugement* (art. 1027 à 1044 C.p.c.) » in *Précis de procédure civile du Québec,* Volume 2, 4e édition, (Cowansville : Éditions Yvon Blais, 2003) at para 133; *Conseil pour la protection des malades* c. *Fédération des médecins spécialistes du Québec*, EYB 2010-183460 (C.S), EYB 2010-183460, at para 115 reversed in part, but not on the question of evaluating moral injury by EYB 2014-234271 (C.A.), at paras 114-115.

> **2062.** As established by case-law, injuries of this nature are impossible to quantify in dollar amounts. Calculating moral damages thus remains an arbitrary exercise. The damages claimed, though insufficient in certain cases, represent an average amount accounting for the variations in symptoms and consequences of the disease on each class member.

[959] We agree with much of what is said there, but not all.

[960] Below, we opt to apply a "uniform amount" of moral damages across the Blais subclasses. This is not the same as an average, which evokes a mathematical calculation. We perform no such calculation in arriving at our uniform amount. It simply represents our best estimate of the typical moral damages that a Blais subclass Member suffered as a result of contracting the Disease in question.

[961] Let us now examine the personal claim of Mr. Blais.

[962] In Dr. Desjardins' examination of him, it is indicated that he smoked only JTM products[420]. Accordingly, the other Companies argue that his claim against them should be rejected. Since moral damages are awarded on a solidary basis, that argument fails. For punitive damages, however *de minimis* the amount, it has merit, but no effect. The amounts deposited as punitive damages for each subclass must be pooled for practical reasons, so it is not possible to isolate payments on a Company-by-Company basis.

[963] There is also the fact that Dr. Barsky identifies a number of mitigating factors with respect to the causes of Mr. Blais's lung cancer and emphysema. He notes that the type of emphysema could have been caused by other things than smoking and that there were several occupational factors besides smoking that could have led to his lung cancer[421].

[964] Nevertheless, although stating that "it cannot be said that Mr. Blais would not have developed lung cancer in the absence of cigarette smoking", he opines that "considering the magnitude of Mr. Blais' exposure to cigarette smoking, I cannot exclude it as having played a role in his lung cancer".[422] This does not contradict the opinions of Dr. Desjardins that the most probable cause of the Diseases in Mr. Blais was smoking[423]. We accept that opinion.

[965] Mr. Blais's estate will be eligible to collect damages on the same basis as any other eligible Member of the Blais subclasses.

VIII.B.1 LUNG CANCER

[966] Dr. Barsky contested Dr. Siemiatycki's methods and results. He opined that there were four different histological types of lung cancer tumours having varying degrees of association, and therefore relative risk, with smoking: small cell carcinoma, squamous cell carcinoma, large cell undifferentiated carcinoma and adenocarcinoma, which can be further subdivided into bronchioloalveolar lung cancer (BAC), and traditional adenocarcinoma (Exhibit 40504, page 5).

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420 Export A and Peter Jackson cigarettes: Exhibit 1382, at page 89.
421 Exhibit 40504, at page 32.
422 Exhibit 40504, at page 32.
423 Exhibit 1382, at pages 94 and 95.

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[967] He cites studies to the effect that:

- small cell carcinoma bears a strong relationship with smoking;
- of the non small cell types, squamous cell carcinoma bears a strong association; large cell undifferentiated bears an inconsistent association, and adenocarcinoma, a less well defined and more complicated association;
- lymphoma, sarcoma, mucoepidermoid carcinoma, carcinoid, atypical carcinoid, bronchioloalveolar lung cancers have an uncertain association with smoking, while other types such as adenocarcinoma, large cell undifferentiated carcinoma, and adenosquamous carcinoma have weak to modest associations. Still other cell types, including squamous cell carcinomas and small cell carcinoma have strong to very strong associations;
- some other types of lung cancer appear not to be associated with smoking at all or do not have a consistent association with smoking. (Exhibit 40504, pages 6-7 and 19-20; references omitted)

[968] Dr. Barsky's evidence on these points, although not contradicted, does not take the Court very far. It is fine to say that certain cancers have "an uncertain association" or "weak to modest associations", but he does not specify what that means. Nor does he specify the percent of all lung cancers that each type of cancer represents. Nor, of course, does he do the calculations that logically are required so as to correct the figures advanced by Dr. Siemiatycki.

[969] The red flags he wishes to raise are of no use to the Court in the absence of presenting a way around those obstacles, something the Companies' experts, alas, never do. His testimony does not shake our confidence as to the accuracy of Dr. Siemiatycki's results.

[970] He also points out that there is "some evidence for the involvement of human papillomavirus in lung cancers"[424], estimating it to be a factor in about two to five percent of lung cancers but higher in oropharyngeal cancers[425]. The Court does not reject that opinion, but does not see that it has much effect on the acceptability of Dr. Siemiatycki's work. Smoking need not be the only cause of a Disease in order for it to be considered as a cause.

VIII.B.1.a THE SIZE OF THE SUBCLASS

[971] As for the size of the lung-cancer subclass, we have earlier indicated our confidence in Dr. Siemiatycki's work, and this includes his calculations with respect to these figures. As noted in section VI.C.6, Dr. Siemiatycki's original probability of causation figures for lung cancer were in accord with those published by the US National Cancer Institute, and several of the Companies' experts agreed that they were within a reasonable range. This supports our confidence in the quality of his work.

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424 Exhibit 40504, at pdf 22.
425 Transcript of February 18, 2014, at pages 47 and 108.

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[972] In Table A.1 of Exhibit 1426.7[426], he sets out the probability of causation (PC) by smoking of each of the Diseases for both males and females at four different critical amounts (CA). At the CA that we have chosen, 12 pack years, the PC averaged for both sexes is remarkably similar among the Diseases, about 71%. We note, however, that Dr. Siemiatycki does not use the average for each Disease but does his calculation using the CA for each gender within each Disease.

[973] Anecdotally, his figure of 81% for male lung cancer victims goes well with the "85 Percent Formula" cited by Mr. Mercier, ITL's former president: 85% of lung cancers occur in smokers, but 85% of smokers do not have lung cancer[427].

[974] In his updated Tables D1.1, D1.2 and D1.3[428], Dr. Siemiatycki applies the CA to the total number of cases for the period claimed (1995-2011[429]) to establish the number of victims by gender of each of the Diseases. This is part of the equation for computing the number of Members in the Blais subclasses for the purpose of determining the size of the deposit to cover damages. In the absence of alternative estimates by the Companies, the Court accepts Dr. Siemiatycki's figures.

[975] We do, however, recognize that it is possible that under Dr. Siemiatycki's method some people might be included in the classes, and thus compensated, incorrectly. But should that be a concern with classes of the size here?

[976] The courts should not allow the spirit and the mission of the class action to be thwarted by an impossible pursuit of perfection. While respecting the general rules of the law, the courts must find reasonable ways to avoid allowing culpable defendants to frustrate the class action's purpose by insisting on an overly rigid application of traditional rules. This is particularly so where the fault, the damages and the causal link are proven, as they are here.

[977] In the instant case, the Companies will not be penalized by an adjustment of the size of the classes in the manner proposed. By assessing "uniform amounts" within the subclasses of Members in Blais, the total amount of damages will be "sufficiently accurate" after such an adjustment. The primary objective of civil liability is to compensate reasonably for damages incurred. This process satisfies that and also ensures that the Companies are paying no more than a fair amount.

[978] The lung-cancer subclass in Blais has 82,271 Members.

VIII.B.1.b THE AMOUNT OF DAMAGES FOR THE SUBCLASS

[979] The evidence of moral damages for the lung-cancer subclass is found in the report of Dr. Alain Desjardins (Exhibit 1382), recognized by the Court as an expert chest and lung clinician. He outlines the treatment options for the three types of cancer covered by the Class description in the Blais File, those options being surgery, radiation therapy, chemotherapy and long-term pharmacological treatment. The treatments are relevant

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426 This is an update to Table A in his original report using 12 pack years as the Critical Amount.

427 Transcript of April 18, 2012, at pages 303 and following.

428 Exhibit 1426.7. For lung cancer with a Critical Amount of 12 pack years, incident cases are: males 54,375, females 27,896, TOTAL = 82,271.

429 The period actually goes until March 12, 2012.

because, in addition to the damages caused by the cancer itself, the secondary effects of the treatments cause additional significant hardship that can last for years.

[980] Given that the same treatments are prescribed for each of the three cancers, the Court will assume that the same secondary effects from the treatments apply to each Disease. In addition, there will be other effects related to the location of the tumours in the body.

[981] In his report at pages 75 through 78, Dr. Desjardins describes the temporary secondary effects of radiation therapy and chemotherapy in the context of lung cancer as follows:

- headaches, nausea, vomiting, fatigue, sores in the mouth, diarrhoea, deafness;
- inflammation of the esophagus;
- skin burns;
- stiffness and joint pain;
- radical pneumonitis causing fever, coughing and los of breath;
- loss of body hair;
- swelling of the lower members;
- increased susceptibility to infection.

[982] As for lung cancer itself, at page 80 of his report he notes that a person living with cancer is affected both physically and psychologically, as well as spiritually, with certain patients experiencing significant stress as a result of being diagnosed with lung cancer. He goes on to cite the following specific affects:

- rapid fluctuations in the state of physical health;
- fatigue, lack of energy and weakness;
- loss of appetite;
- pain;
- loss of breath;
- paralysis in one or more members;
- depression.

[983] The Companies did not challenge the Plaintiffs' characterization of the moral damages, nor the amount claimed for each Member in the most serious cases of any of the Diseases. The contestation in this area was directed more at the Plaintiffs' use of one single amount for such damages across the subclasses for each Disease.

[984] The evidence of Drs. Desjardins and Guertin convinces us that few cases of lung and throat cancer fall below very serious. As well, the amount proposed is not excessive in the context of life-threatening, and life-ruining, illnesses. Accordingly, we accept a

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uniform figure of $100,000 for individual moral damages in the lung cancer and throat cancer subclasses[430].

[985] For emphysema, the Plaintiffs did admit that the degree to which a patient's life is affected depends on the degree of severity of the case. We deal with this issue below, in the section on emphysema.

[986] After reducing the number of incidents identified by Dr. Siemiatycki between 1995 and 2011[431] by 12% to account for immigration, and applying a uniform figure of $100,000 for individual moral damages in the lung cancer subclass, the total moral damages for it are calculated as follows:

Members[432]	-12% for immigration	Total moral damages	80% of total
82,271	72,398 x $100,000 =	$7,239,800,000	$5,791,840,000

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VIII.B.2 CANCER OF THE LARYNX, THE OROPHARYNX OR THE HYPOPHARYNX

VIII.B.2.a THE SIZE OF THE SUBCLASS

[987] Dr. Siemiatycki analyzes this subgroup in two parts: cancer of the larynx and "throat cancer"[433]. He specifies at page 24 of his report that "For our purpose we have taken as the definition of throat cancer, those that fall into ICD categories 146 and 148, cancers of the oropharynx and hypopharynx." The combination of the two corresponds to the subclass definition.

[988] Tables D1.2 and D1.3 show that for the period 1995 through 2011 there were 5,369 smokers in Québec with cancer of the larynx and 2,862 with cancer of the oropharynx and hypopharynx caused by tobacco smoke. The throat-cancer subclass in Blais thus has 8,231 Members.

VIII.B.2.b THE AMOUNT OF DAMAGES FOR THE SUBCLASS

[989] For Blais Class Members with cancer of the larynx or the pharynx, the evidence of moral damages is found in the report of Dr. Louis Guertin, an expert on chemistry and tobacco toxicology[434]. It is not the Court's practice to reproduce lengthy extracts of documents in a judgment, however, it is appropriate to make an exception for the following paragraphs of Dr. Guertin's report[435]:

> *… En effet, le site d'origine de ces cancers, à la jonction des tractus respiratoire et digestif, fait en sorte que les patients présentent rapidement, dès les premiers*

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430 The theoretical maximum allowed for moral damages was set at $100,000 in 1981 by the Supreme Court. The actualized value of that is $356,499 as of January 1, 2012: Plaintiffs' Notes, at paragraph 2042.

431 Dr. Siemiatycki updated his figures to the end of 2011 for 12 pack years in Exhibit 1426.7.

432 Siemiatycki Table D1.1 in Exhibit 1426.7.

433 Tables D1.2 and D1.3 of Exhibit 1426.7.

434 Dr. Guertin analyzes cancers he calls "CE des VADS", which can be loosely translated as: "epidermoidal carcinoma of the upper aero-digestive paths", and includes cancers of the larynx, oropharynx, hypopharynx and the oral cavity. In our decision on the amendment of the class descriptions, we excluded cancer of the oral cavity from consideration in this file.

435 Exhibit 1387.

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> *symptômes de leur cancer, une atteinte de leur qualité de vie : atteinte de la parole, troubles d'alimentation et difficultés respiratoires. Les premiers symptômes peuvent aller d'un changement de la voix, d'une douleur à l'oreille ou à la gorge ou d'une masse cervicale jusqu'à une obstruction des voix respiratoires ou une incapacité à avaler toute nourriture si le diagnostic n'est pas précoce.*
>
> *Lorsque le patient consulte, il devra subir une biopsie et anesthésie générale pour confirmer la présence de la tumeur et son extension. Il devra aussi se présenter à de nombreux rendez-vous pour des consultations médicales ou des tests diagnostiques. Comme pour tous les autres cancers, cette période d'investigation vient ajouter le stress du diagnostic de cancer et l'incertitude de l'étendue de la maladie aux symptômes que le patient présente.*
>
> *Une fois le bilan terminé si la tumeur est trop avancée pour être traitée ou si la patient est incapable, secondairement à son état de santé général, de supporter un traitement à visée curative, le patient sera orienté en soins palliatifs pour des soins de confort. Il décédera habituellement en dedans de six mois mais aura auparavant présenté une détérioration sévère de sa qualité de vie. Graduellement il deviendra incapable d'avaler toute nourriture et parfois même sa salive. On devra lui installer un tube pour l'alimenter soit par son nez ou directement dans l'estomac à travers sa paroi abdominal. Sa respiration sera progressivement plus laborieuse, ce qui entraînera fréquemment la nécessité d'une trachéostomie (trou dans le cou pour respirer). Le patient ne pourra alors plus parler ce qui rendra la communication difficile avec les gens qui l'entourent. La trachéostomie nécessite des soins fréquents et s'accompagne de sécrétions colorées abondantes qui auront souvent pour effet d'éloigner l'entourage du patient qui se retrouvera alors isolé. Le patient présente alors une atteinte importante de la perception de son image corporelle et devient déprimé. À tout ceci vient s'ajouter les douleurs importantes que ressentira le patient secondairement à l'envahissement de nombreuses structures nerveuses qui se retrouvent au niveau cervical. Ces douleurs sont classiquement difficiles à contrôler et demandent des ajustements fréquents de l'analgésie. Il ne fait aucun doute que mourir d'un CE des VADS qui progresse localement est l'une des morts les plus atroces qui existe. (Pages 5 et 6).*

[990] In the pages that follow, Dr. Guertin chronicles the various treatments that are usually attempted when there is indication that the cancer might be curable: surgery, chemotherapy and radiation therapy. He describes the possible secondary effects of each one of those treatments, a veritable litany of horrors, including:

- open sores on the mucous membranes,[436]
- swelling in the legs (oedema),
- nasal intubation or tracheotomy for weeks, months or even permanently,
- cutaneous changes, cervical fibrosis, loss of the ability to taste,
- chronic dry-mouth leading to elocution problems and difficulty in swallowing,

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[436] It is clear that each patient will not necessarily suffer all of the listed problems, but it is to be expected that each patient treated will suffer a number of them.

- removal of all teeth,
- surgery-induced mutilation of the face and neck, elocution problems and difficulty in swallowing and the inability to eat certain foods,
- loss of the vocal chords,
- chronic pain and diminution of shoulder strength.

[991] Death ultimately ends the torture, but at what price? At page 8 of his report, Dr. Guertin writes that "the patients who die from a relapse of their original cancer will experience a death that is atrociously painful, unable even to swallow their saliva or to breathe" (the Court's translation).

[992] This makes it clear that the uniform figure of $100,000 for individual moral damages in the throat cancer subclass is well justified. Thus, the total moral damages for the subclass are calculated as follows:

Members[437]	-12% for immigration	Total moral damages	80% of total
8,231	7,243 x $100,000 =	$724,300,000	$579,440,000

VIII.B.3 EMPHYSEMA

[993] Dr. Alain Desjardins' report (Exhibit 1382) opines on the moral damages suffered as a result of emphysema as well as lung cancer. He deals with emphysema through an analysis of COPD, which includes both emphysema and chronic bronchitis. He notes that a high percentage of individuals with COPD have both diseases (page 12), but not all.

[994] There is no serious contestation by the Companies that Dr. Desjardins' description of the impact of COPD on the quality of life accurately portrays the impact that emphysema alone would have. As such, his is a useful analysis for the purpose of evaluating moral damages caused to emphysema sufferers by smoking and the Court accepts it as sufficient proof of that..

[995] Dr. Siemiatycki follows Dr. Desjardins in basing his analysis of emphysema on information available for COPD. He explains his reasons for this as follows:

> Many epidemiologic and statistical studies are now focused on COPD as the clinical end-point. Fewer focus explicitly on emphysema. Indeed, much of the evidence we now have on the epidemiology of emphysema comes from studies on COPD. Consequently, in this report I will use the term COPD/emphysema to signify that the conditions we are describing and analysing include a mixture of COPD and emphysema, in some unknown ratio. Where possible I have focused on evidence and studies that have been able to address emphysema specifically, but usually it has been some combination of emphysema and chronic bronchitis.[438]

[996] The Companies attack the accuracy of Dr. Siemiatycki's report on this ground, arguing that, by doing so, he greatly overstates the number of individuals with emphysema only. On that point, Dr. Marais states that "I understand that the prevalence of

[437] Siemiatycki Tables D1.2 and D1.3 in Exhibit 1426.7.
[438] Exhibit 1426.1, at page 6.

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chronic bronchitis in the population is likely twice that of emphysema"[439]. Although this criticism has merit, it is not fatal to this portion of Dr. Siemiatycki's report.

[997] Given that we have proof of fault, damages and causation for this subclass, we feel that we must arbitrate certain figures to fill out the portrait. We have already reduced Dr. Siemiatycki's figure for the size of the subclass by about half[440]. We also accept a lower individual damage figure than originally claimed. We are satisfied that these adjustments bring us to an acceptable approximation of the values in question.

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VIII.B.3.a THE SIZE OF THE SUBCLASS

[998] As mentioned, we reject Dr. Siemiatycki's best estimate for the number of new cases of emphysema in Quebec attributable to smoking between 1995 and 2011 in favour of his lower estimate, for a total of 23,086.[441].

VIII.B.3.b THE AMOUNT OF DAMAGES FOR THE SUBCLASS

[999] On the impact of COPD, and thus emphysema, on the quality of life a person afflicted with it, Dr. Desjardins' report (Exhibit 1382) indicates that:

- Over 60% of individuals with COPD report significant limitations in their daily activities caused by shortness of breath and fatigue (page 48);
- Specific activities affected include sports and leisure, social life, sleep, domestic duties, sexuality and family life (Figure J on page 48; see also page 34);
- These limitations, when experienced daily, eventually result in social isolation, loss of self esteem, marital problems, frustration, anxiety, depression and an important reduction in the overall quality of life (pages 48-49);
- A person with emphysema can expect to suffer from a persistent cough, spitting up of blood, loss of breath and swelling in the lower members (pages 26-28).

[1000] Added to the above, of course, is the likelihood, or rather the near certainty, of a premature death (pages 18 and 19). The anticipation of that cannot but contribute to a loss of enjoyment of life.

[1001] As mentioned, the Plaintiffs admit that the degree to which a patient's life is affected by emphysema depends on the degree of severity of the case. Taking that into consideration, Dr. Desjardins used the "GOLD Guidelines", which divide the degree of severity of COPD into five levels, from Level 0, indicating cases "at risk," through Level 4, indicating cases with very severe emphysema (Exhibit 1382, page 41). Dr. Desjardins estimated the percentage of impairment or diminution of the quality of life for each level as 0%, 10%, 30% 60% and 100%. This is in line with the figures used by the U.S. Veteran's Administration (Exh. 1382, pages 51-53).

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439 Exhibit 40549, at page 23.
440 See section VI.C.6 of the present judgment.
441 Exhibit 1426.7, Table D3.1.

[1002] In an attempt to simplify the file, the Plaintiffs amended the amount claimed for the emphysema subclass to a universal amount of $30,000, arguing that such a compromise was most conservative and ensured that the award would not unfairly penalize the Companies. This seems reasonable. In fact, if the Court had to arbitrate an amount for this subclass, it would likely have landed a bit higher.

[1003] Another advantage to adopting such a low figure is that it serves to correct the distortion in this analysis caused by using COPD statistics, which include chronic bronchitis and emphysema, in lieu of figures for emphysema alone.

[1004] Consequently, we accept a uniform figure of $30,000 for individual moral damages for the emphysema subclass. The total moral damages for the subclass are calculated as follows:

Members[442]	-12% for immigration	Total moral damages	80% of total
23,086	20,316 x $30,000 =	$609,480,000	$487,584,000

VIII.B.4 APPORTIONMENT AMONG THE COMPANIES

[1005] Table 1005 shows the amount of moral damages in the Blais File for all subclasses, based on 80%. It comes to $6,858,864,000[443].

TABLE 1005

Disease	Moral Damages for subclass at 80%
Lung Cancer	$5,791,840,000
Throat Cancer	$579,440,000
Emphysema	$487,584,000
TOTAL	$6,858,864,000

[1006] Since the Companies are solidarily liable for moral damages, it is necessary to determine the share of each therein for possible recursory purposes[444]. This will also indicate the amount to be deposited initially by each Company.

[1007] The Plaintiffs propose dividing this total among the Companies according to their respective average market shares over the Class Period. That would result in the following percentage share for each Company:

- ITL: 50.38%
- RBH: 30.03%
- JTM: 19.59%

442 Siemiatycki Table D3.1 in Exhibit 1426.7.
443 The total amount of moral damages for the Class will actually be higher, since some Members will have the right to claim 100% of those damages.
444 Article 469 of the Code of Civil Procedure.

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[1008] On this question, section 23 of the TRDA states that, in apportioning liability among a number of defendants, "the court may consider any factor it considers relevant". It then suggests nine possible factors, one of which is market share (ss. 23(2)). Many of the others apply equally to all the Companies, for example, the duration of the conduct (ss. 23(1)) and the degree of toxicity of the product (ss. 23(3)). Others, however, seem to point more in the direction of one of the Companies: ITL. For example:

> (6) the extent to which a defendant conducted tests and studies to determine the health risk resulting from exposure to the type of tobacco product involved;
>
> (7) the extent to which a defendant assumed a leadership role in the manufacture of the type of tobacco product involved;
>
> (8) the efforts a defendant made to warn the public about the health risks resulting from exposure to the type of tobacco product involved, and the concrete measures the defendant took to reduce those risks[445].

[1009] Our analysis of the Companies' activities over the Class Period underlines the degree to which ITL's culpable conduct surpassed that of the other Companies on factors similar to these. It was the industry leader on many fronts, including that of hiding the truth from – and misleading - the public. There is, for example:

- Mr. Wood's 1962 initiatives with respect to the Policy Statement;
- the company's refusal to heed the warnings and indictments of Messrs. Green and Gibb, as described in section II.B.1.a of the present judgment;
- Mr. Paré's vigorous public defence over many years of the cigarette in the name of both ITL and the CTMC;
- the company's leading role in publicizing the scientific controversy and the need for more research;
- the extensive knowledge and insight ITL gained from its regular Internal Surveys such as the CMA and the Monthly Monitor; and
- more specifically with respect to the Internal Surveys, its awareness of the smoking public's ignorance of the risks and dangers of the cigarette, and its absolute lack of effort to warn its customers accordingly.

[1010] We have not forgotten ITL's bad-faith efforts to block court discovery of research reports by storing them with outside counsel, and eventually having those lawyers destroy the documents. This seems to the Court to be something that would more influence the quantum of punitive damages, but it is not entirely irrelevant to the analysis we are now performing.

[1011] All this separates ITL out from the other Companies and requires that it assume a portion of the damages in excess of its market share. We shall exercise our discretion in this regard and assign to it 67% of the total liability.

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[445] We take this item to include the efforts made not to warn the public of the health risks.

[1012] As for the other Companies, we see nothing that justifies varying from the logical basis of market share for this apportionment. Since RBH's share was slightly more than one and one-half times that of JTM's, we shall round their respective shares to 20% and 13%.[446]

[1013] Table 1013 summarizes the condemnation of each Company for moral damages in the Blais file, at 80%[447].

TABLE 1013

COMPANY	TOTAL DAMAGES x %	PRE-INTEREST AWARD
ITL	$6,858,864,000 x 67%	$4,595,438,800
RBH	$6,858,864,000 x 20%	$1,371,772,800
JTM	$6,858,864,000 x 13%	$891,652,400

[1014] To calculate the actual value of the condemnation, however, it is necessary to increase the figures in the third column by interest and the additional indemnity. Given the lifespan of these files to date, that total surpasses the 15 billion dollar mark[448]. This brings us to consider the amount of the initial deposit for moral damages in Blais.

[1015] Normally, we would simply order the Companies to deposit the full amount into some sort of trust account and that would be that. In the instant case, however, this would be counter-productive to the principal objective of compensating victims. We do not see how the Companies could come up with such amounts and stay in business. Moreover, to risk the Companies' demise to that degree would be something of a pointless exercise. As mentioned earlier, it is unlikely that actual claims will come to anything more than a fraction of the total amount and our goal is not to maximize the *reliquat*.

[1016] The Code of Civil Procedure provides for a high degree of flexibility when it comes to issues relating to the execution of the judgment in a class action[449]. On that basis, we shall set the total initial deposit for all the Companies at what appears to be the "manageable amount" of one billion dollars ($1,000,000,000), i.e., approximately one year's average aggregate before-tax profit, a calculation we make in the following chapter

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446 The Plaintiffs seek solidary condemnations for the compensatory damages. We deal with that issue in Chapter VIII of the present judgment.

447 Although specified by Company, the moral damages in Blais will be awarded on a solidary basis among the Companies for reasons we have explained above. We also remind the reader that the total moral damages for the Class will actually be higher, since some Members will have the right to claim them at 100%.

448 Since 1998, combined interest and additional indemnity averaged approximately 7.5% a year. Since these amounts are not compounded, i.e., there is no interest on the interest, the base figure is increased by about 127% over the seventeen-year period.

449 See articles 1029 and 1032, in part, which read;

1029. The court may, *ex officio* or upon application of the parties, provide measures designed to simplify the execution of the final judgment.

1032. […] The judgment may also, for the reasons indicated therein, fix terms and conditions of payment.

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of this judgment. That total will be divided among them along the same lines applying to their respective liability for moral damages: 67% to ITL for a deposit of $670,000,000, 20% to RBH for a deposit of $200,000,000 and 13% to JTM for deposit of $130,000,000. Should these amounts not suffice, the Plaintiffs will have the right to return to court to request additional deposits.

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IX. PUNITIVE DAMAGES - QUANTUM

[1017] Earlier in the present judgment, we ruled that an award for punitive damages against each of the Companies was warranted here. That ruling is based on the following analysis.

[1018] The Supreme Court of Canada favours granting punitive damages only "in exceptional cases for 'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency'": *Hill v Church of Scientology of Toronto*[450]. Seven years later in *Whiten*, that court further defined the type of misconduct that needed to be present, being one "that represents a marked departure from ordinary standards of decent behaviour"[451].

[1019] In its decision in *Cinar*, the Quebec Court of Appeal notes that the Supreme Court's judgment in *Whiten* has only limited application in Quebec in light of the codification of the criteria in article 1621. Nevertheless, it appears to be in full agreement both with *Whiten* and *Hill* when it states:

> *… il (Whiten) aide à en préciser les balises d'évaluation. Les dommages punitifs sont l'exception. Ils sont justifiés dans le cas d'une conduite malveillante et répréhensible, qui déroge aux normes usuelles de la bonne conduite. Ils sont accordés dans le cas où les actes répréhensibles resteraient impunis ou lorsque les autres sanctions ne permettraient pas de réaliser les objectifs de châtiment, de dissuasion et de dénonciation.*[452]

[1020] Specifically under the CPA, the Supreme Court in *Time* examines the criteria to be applied, including the type of conduct that such damages are designed to sanction:

> [180] In the context of a claim for punitive damages under s. 272 C.P.A., this analytical approach applies as follows:
>
> - The punitive damages provided for in s. 272 C.P.A. must be awarded in accordance with art. 1621 C.C.Q. and must have a preventive objective, that is, to discourage the repetition of undesirable conduct;
> - Having regard to this objective and the objectives of the C.P.A., violations by merchants or manufacturers that are intentional, malicious or vexatious, and conduct on their part in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumers' rights under the C.P.A. may result in awards of punitive damages. However, before awarding such damages, the court must consider the whole of the merchant's conduct at the time of and after the violation.[453]

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450 [1995] 2 S.C.R. 1130, at para. 196.
451 *Whiten v. Pilot Insurance Co.*, [2002] S.C.R. 595, at para. 36.
452 2011 QCCA 1361, at paragraph 236 ("***Cinar***").
453 *Op. cit., Time*, Note 20, at paragraph 180.

[1021] The faults committed by each Company conform to those criteria. The question that remains is to determine the amount to be awarded in each file for each Company and the structure to administer them, should that be the case.

[1022] We should point out that the considerations leading to the 67/20/13 apportionment for moral damages also have relevance for the amount of punitive damages for each Company. Other factors could also affect those amounts, as mentioned in article 1621 of the Civil Code. We shall analyze that aspect on a Company-by-Company basis below.

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IX.A THE CRITERIA FOR ASSESSING PUNITIVE DAMAGES

[1023] Article 1621 sets out guidelines for an award of punitive damages in Quebec. It reads:

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.	**1621.** Lorsque la loi prévoit l'attribution de dommages-intérêts punitifs, ceux-ci ne peuvent excéder, en valeur, ce qui est suffisant pour assurer leur fonction préventive.
Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.	Ils s'apprécient en tenant compte de toutes les circonstances appropriées, notamment de la gravité de la faute du débiteur, de sa situation patrimoniale ou de l'étendue de la réparation à laquelle il est déjà tenu envers le créancier, ainsi que, le cas échéant, du fait que la prise en charge du paiement réparateur est, en tout ou en partie, assumée par un tiers.

[1024] Quebec law provides for punitive damages under the Quebec Charter and the CPA and we have ruled that in these files such damages are warranted under both. We recognize that neither one was in force during the entire Class Period, the Quebec Charter having been enacted on June 28, 1976 and the relevant provisions of the CPA on April 30, 1980. Consequently, the punitive damages here must be evaluated with reference to the Companies' conduct only after those dates.

[1025] Admittedly, this excludes from 50 to 60 percent of the Class period but, barring issues of prescription, it makes little difference to the overall amount to be awarded. The criteria of article 1621 are such that the portion of the Class Period during which the offensive conduct occurred is sufficiently long so as to render the time aspect inconsequential.

[1026] On another point, the amount of punitive damages to be awarded would not necessarily be the same under both statutes. The very different nature of the conduct targeted in one versus the other could theoretically give different results, in particular, with respect to the gravity and scope of the Companies' faults and the seriousness of the

infringement of the Members' rights[454]. In this instance, though, that distinction is not relevant.

[1027] The Companies' liability under both statutes stems from the same reprehensible conduct. True, it deserves harsh sanctioning, but it cannot be sanctioned twice with respect to the same plaintiffs. Given the gravity of the faults, the assessment process for punitive damages arrives at the same result under either law. Accordingly, it is neither necessary nor appropriate to analyze quantum separately by statute.

[1028] The same applies to a possible assessment between the two Classes. It is proper to assess one global amount of punitive damages covering both files, rather than separate assessments for each. Like for the statutes, the liability in both files results from the same conduct and faults. In fact, the connection between the two is such that the Létourneau class could have actually been a subclass of Blais.

[1029] As for the factors to consider in assessing quantum, the Supreme Court has made it clear that the gravity of the debtor's fault is "*undoubtedly the most important factor*"[455]. This is the element that the Plaintiffs emphasize, along with ability to pay.

[1030] That said, other criteria must also be factored into the calculation, including without limitation those mentioned in article 1621. We must also keep in view that the purposes for which punitive damages are awarded are "prevention, deterrence (both specific and general) and denunciation".[456] Hovering over all of these is 1621's guiding principle that "such damages may not exceed what is sufficient to fulfil their preventive purpose".

[1031] This guiding principle, as we shall see, is not unidimensional.

[1032] The Companies make much of the fact that, even if they had wanted to mislead the public about the dangers of smoking, which they assure that they did not, current governmental regulation of the industry creates an impermeable obstacle to any such activity. All communication between them and the public, in their submission, is prohibited, thus assuring that absolute prevention has been attained. It follows, in their logic, that there can be no justification for awarding any punitive damages.

[1033] They overlook the objectives of general deterrence and denunciation.

[1034] In paragraph 1460 of ITL's Notes, its attorneys reproduce part of a sentence from paragraph 155 in *Time*: "An award of punitive damages is based primarily on the principle of deterrence and is intended to discourage the repetition of similar conduct …". They stopped reading too soon. The full citation is as follows:

> An award of punitive damages is based primarily on the principle of deterrence and is intended to discourage the repetition of similar conduct both by the wrongdoer and in society. The award thus serves the purpose of specific and general deterrence.[457] (The Court's emphasis)

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454 *Op. cit., Time*, Note 20, at paragraph 200.
455 *Op. cit.*, *Time*, Note 20, at paragraph 200.
456 *Cinar*, *op. cit.*, Note 451, at paragraph 126 and 134.
457 *Op. cit.*, *Time*, Note 20, at paragraph 155.

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[1035] The full text of this passage confirms that the deterrence effect of punitive damages is not aimed solely at the wrongdoer, but is equally concerned with discouraging other members of society from engaging in similar unacceptable behaviour. Similar reasoning is found in the Supreme Court's decision in *DeMontigny*[458].

[1036] A need for denunciation is clearly present in our files. The two final sentences of the same paragraph in *Time* make that clear:

> In addition, the principle of denunciation may justify an award where the trier of fact wants to emphasize that the act is particularly reprehensible in the opinion of the justice system. This denunciatory function also helps ensure that the preventive purpose of punitive damages is fulfilled effectively.[459]

[1037] Over the nearly fifty years of the Class Period, and in the seventeen years since, the Companies earned billions of dollars at the expense of the lungs, the throats and the general well-being of their customers[460]. 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?

[1038] The Companies' actions and attitudes over the Class Period were, in fact, "particularly reprehensible" and must be denounced and punished in the sternest of fashions. To do so will be to favour prevention and deterrence both on a specific and on a general societal level. We reject the Companies arguments that there is no justification to award punitive damages against them.

[1039] On another point, it seems evident that the nature of the damages inflicted in Blais versus Létourneau is not the same. The harm suffered by dependent persons is serious, but it is not on a level of that experienced by lung and throat cancer patients, nor by persons suffering from emphysema. Hence, the gravity of the fault is not the same in both files.

[1040] It is also relevant to note that we refuse moral damages in the Létourneau File, whereas in Blais we grant nearly seven billion dollars of them, plus interest. Thus, the reparation for which the Companies are already liable is quite different in each and a separate assessment of punitive damages must be done for each file, as discussed further below.

[1041] As for which periods of time the Court should consider the Companies' conduct, the Plaintiffs argue at paragraph 2158 of their Notes that "even if claims for punitive damages in respect of conduct prior to 1995 were prescribed, the Court's award of punitive damages would still have to reflect the Defendants' egregious misconduct throughout the entire class period". They cite the *Time* decision in support:

> 174. […] it is our opinion that the decision to award punitive damages should also not be based solely on the seriousness of the carelessness displayed at the time of

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458 *Op. cit.*, Note 20, at paragraph 49.

459 *Op. cit.*, *Time*, Note 20, at paragraph 155.

460 As stated below, ITL and RBH have each earned close to half a billion dollars a year before tax in the past five years, while JTM's figure is around $100,000,000. We discuss the issue of "disgorgement" of profits further on.

> the violation. That would encourage merchants and manufacturers to be imaginative in not fulfilling their obligations under the *C.P.A.* rather than to be diligent in fulfilling them. As we will explain below, our position is that the seriousness of the carelessness must be considered in the context of the merchant's conduct both before and after the violation[461].

[1042] The Plaintiffs would thus have us consider the Companies' conduct not only before the violation of the CPA, but also before the CPA came into force - and in spite of the prescription of some of the claims. Their position is similar with respect to the Quebec Charter.

[1043] Strictly speaking, we cannot condemn a party to damages for the breach of a statute that did not exist at the time of the party's actions. That said, this is not an absolute bar to taking earlier conduct into account in evaluating, for example, the defendant's general attitude, state of awareness or possible remorse[462].

[1044] In any event, it is not necessary to go there now. The period of time during which the two statutes were in force during the Class Period and the gravity of the faults over that time obviate the need to look for further incriminating factors.

[1045] The final argument we shall deal with in this section is ITL's submission that deceased Class Members' claims for punitive damages cannot be transmitted to their heirs under the rules of either Civil Code in force during the Class Period.

[1046] Concerning the "old" code, the CCLC, which was in force until January 1, 1994, at paragraph 184 of its Notes, ITL cites the author Claude Masse to assert that the CCLC "did not provide for a claim for punitive damages for a breach of a personality right to be transmitted to the heirs of a deceased plaintiff. As a result, the heirs of the Class Members who died before January 1, 1994 of both Classes cannot assert such a claim in this proceeding." Although the first sentence is technically not incorrect, ITL's use of it is misleading.

[1047] Professor Masse merely states that the transmissibility of that right was not "clearly established" prior to the "new" CCQ[463]. This is not particularly surprising. Punitive damages were a relatively recent addition to Quebec law at the time the Civil Codes changed and it is possible that the question had not yet been answered in our courts.

[1048] Whatever the case, given that the doctrine cited does not stand for the principle advanced, ITL offers no relevant authority to support its position. We reject its argument with respect to the CCLC both for that reason and for the policy consideration mentioned in the following paragraphs. The claims for punitive damages of Members who passed away before January 1, 1994 are transmissible to their heirs.

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461 *Op. cit*, *Time*, Note 20, paragraph 174.

462 See Claude DALLAIRE and Lisa CHARMANDY, *Réparation à la suite d'une atteinte aux droits à l'honneur, à la dignité, à la réputation et à la vie privée*, JurisClasseur Québec, coll. "Droit Civil", Obligations et responsabilité civile, fasc. 27, Montréal, LexisNexis Canada, at paragraphs 74 and 75.

463 "*clairement établie*": Claude MASSE, « *La responsabilité civile* », dans La réforme du Code civil - Obligations, contrats nommés, vol. 2, Les Presses de l'Université Laval, 1993, at page 323.

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[1049] As for the CCQ, ITL expends much ink attempting to explain away the Supreme Court's decision in *DeMontigny*[464] accepting the transmission of a deceased claim for punitive damages to her heirs. The court expressed itself as follows:

> [46] For these reasons, the fact that no compensatory damages were awarded in the instant case does not in itself bar the claim for exemplary damages made by the appellants in their capacity as heirs of the successions of Liliane, Claudia and Béatrice. In my opinion, that claim was admissible.[465]

[1050] This could not be clearer in favour of the heirs, a result that makes fundamental good sense in the context of punitive damages. Why should the victim's death permit a wrongdoer to avoid the punishment that he otherwise deserves? What logic would there be to such a policy – especially when the death is a direct result of the defendant's faulty conduct, as is often the case in these files?

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IX.B QUANTIFICATION ISSUES

[1051] The Plaintiffs initially sought a solidary (joint and several) condemnation for punitive damages among the Companies, but later recognized that solidarity for punitive damages among co-defendants is not normally possible. They thus amended their claims to request that each Company be assessed solely in accordance with its market share over the relevant period. That approach does not work either.

[1052] There is little connection between factors such as those suggested in article 1621 and market share. Where there is more than one defendant, the Court must examine the particular situation of each co-defendant. That is the only way to examine "all appropriate circumstances":

> Both the objectives of punitive damages and the factors relevant to assessing them suggest that awards of punitive damages must be individually tailored to each defendant against whom they are ordered.[466]

[1053] This will be a delicate exercise, to be sure. For example, a defendant with a third of the market might, on the one hand, be guilty of behaviour far more reprehensible than that of the others, thus meriting more than one third of the overall amount of punitive damages. At the same time, its shaky patrimonial situation or a heavy award of compensatory damages against it might require that the punitive damages be reduced.

[1054] We should add that the assessment of punitive damages in cases like these is not completely divorced from considering the plaintiff's side. The gravity of the debtor's fault is to be "assessed from two perspectives: 'the wrongful conduct of the wrongdoer and the

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464 *Op. cit.,* Note 20, at paragraph 46.

465 *DeMontigny* is often cited as authority for the position that punitive damages can be granted even where there are no compensatory damages. This situation does not arise in Létourneau, although no compensatory damages are granted, because we hold that the Members did, in fact, suffer moral damages on the basis of fault and causality. We refuse to award any for reasons related strictly to the requirements for collective recovery.

466 *Op. cit., Cinar*, Note 451, at paragraph 127.

seriousness of the infringement of the victim's rights'"[467]. The presence of a multitude of co-plaintiffs is something that can affect both of those.

[1055] There is also the fact that there are about nine times as many persons affected in Létourneau than in Blais: 918,218[468] compared to 99,957[469]. Since we calculate a total amount of punitive damages covering both files, this arithmetic could have an influence on the division of that total between the files.

[1056] The combined effect of the above factors requires the Court not only to judge each Company separately, but also to assess the punitive damages in each file separately. The same logic could be seen to apply to the three subclasses in Blais, but we do not believe that to be the case.

[1057] The Companies' wrongful conduct for all the Blais subclasses was similar. They were knowingly harming smokers' quality and length of life. The fact that one victim might survive longer than the other, or be less visibly mutilated by surgery, makes little difference as to the gravity of the fault and the infringement of the Members' rights. In all cases, the Companies' conduct is inexcusable to the highest degree and to try to draw distinctions among such situations would be to overly fine-tune the process.

[1058] As for the total amount of punitive damages to be granted, during oral argument, the Plaintiffs adjusted their aim to claim a level of $3,000,000,000 globally, described as being between $2,000 and $3,000 a Member. Following on what we discussed above, it is not appropriate to approach this question on a "per class member basis".[470] The analysis must be individually tailored to each Company. We must establish the appropriate Company amounts and add them up to arrive at the total, as opposed to starting from the total and dividing that among the Companies.

[1059] As well, the Companies correctly insist that, since article 1621 requires the Court to take into consideration "the extent of the reparation for which (the debtor) is already liable to the creditor", we cannot order collective recovery of punitive damages until the amount of compensatory damages is known, including those resulting from the adjudication of all the individual claims.

[1060] That may be true, but the Members of both Classes have renounced their individual claims and are content to be compensated solely under a collective order. As a result, having determined the amount of collective recovery of moral damages in both Files, we are thus in a position to order collective recovery of punitive damages.

[1061] Finally, we take note of the Supreme Court's message in *Time* with respect to the limits of our discretion in this matter:

> [190] It should be borne in mind that a trial court has latitude in determining the quantum of punitive damages, provided that the amount it awards remains within rational limits in light of the specific circumstances of the case before it. […] An

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467 *Op. cit., Time*, Note 20, at paragraph 200.
468 Exhibit 1733.5.
469 After reduction of 12% for immigration: 72,398 + 7,243 + 20,316 = 99,957.
470 See: *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333, at paragraph 127.

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> assessment will be wholly erroneous if it is established that the trial court clearly erred in exercising its discretion, that is, if the amount awarded was not rationally connected to the purposes being pursued in awarding punitive damages in the case before the court (…).[471]

IX.C THE COMPANIES' "PATRIMONIAL SITUATION"

[1062] For the purpose of evaluating the Companies' "patrimonial situation" as mentioned in article 1621, the Plaintiffs agreed to limit their proof to summaries of each Company's before-tax earnings taken from the financial statements filed and later withdrawn from the record. Five or seven-year summaries of both before and after-tax earnings were filed for each Company, which we shall refer to as the "**Summaries**".[472]

[1063] All the Summaries were preliminarily declared to be confidential. In Sections XI.C.2 and XI.D.2 of the present judgment, we rule that the Summaries corresponding to the earnings category on which we choose to base our analysis of the Companies' patrimonial situation will become public.

[1064] The Companies' position is that, should there be an award of punitive damages against them, their patrimonial situation should be based on their after-tax earnings. They also feel that those amounts for fiscal year 2008 should be reduced by the hundreds of millions of dollars of fines they paid to the federal government for what RBH euphemistically characterized as the "mislabelling" of their products.

[1065] The Plaintiffs insist on before-tax earnings and refuse to accept granting any consideration for the fines. Like them, the Court is not inclined to allow the Companies to benefit from the fines they were obliged to pay in 2008 for breaking the law. That, however, is not a factor here, as explained below.

[1066] As for the choice of earnings, we shall use before-tax figures, since they more accurately reflect the reality of a party's patrimonial situation[473]. GAAP-compliant accounting allows access to perfectly legal tax operations that can skew a company's financial portrait. A good case in point is the deductibility of the 2008 fines by the Companies. Such "adjustments" should not be allowed to reduce a defendant's patrimonial situation.

[1067] There is also the possible deductibility of amounts paid pursuant to this judgment, whether for moral or punitive damages or for costs. Article 1621 already takes account of those expenses in its mention of the reparation due under other heads.

[1068] On a related point, it makes good sense to base the assessment of punitive damages on average earnings over a reasonable period, because they reflect on a defendant's capacity to pay. We keep in mind that the objective is not to bankrupt the wrongdoer, in spite of the Plaintiffs' cry for the Companies' heads. Nevertheless, within that limit, the award should hurt in a manner as much as possible commensurate with the

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471 *Op. cit*, *Time,* Note 20, paragraph 190.

472 Exhibits 1730-CONF 1730A-CONF and 1730B-CONF for ITL and Exhibits 1732-CONF, 1732A-CONF and 1730B-CONF for RBH and Exhibit 1747.1, Annexes A, C and D for JTM.

473 The corresponding exhibits are Exhibits 1730A, 1732A and Annex A to Exhibit 1747.1.

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gravity of the ill deed and the need for specific and general deterrence, as well as the other applicable criteria.

[1069] Concerning the period of averaging, we have ITL's earnings for seven years: 2007 through 2013, so we are able to do either a seven-year or a five-year average. ITL's five-year average of $483,000,000 is some $22 million a year less than the seven-year one of $505,000,000. This might sound like a lot, but it is not. It represents a little over 4% of ITL's half-billion dollars in annual before-tax earnings.

[1070] As a general rule, we are inclined to use five-year averages. In addition, the figures filed for JTM cover only the five years of 2009 through 2013, inclusively, and the Plaintiffs do not contest that filing. We shall therefore base the average on those five fiscal years. Hence, the "fine-reduced" year of 2008 does not come into play.

[1071] For ITL, the five-year average of before-tax earnings between 2009 and 2013 is $483,000,000. For RBH, it is $460,000,000. JTM's "Earnings from operations" for the period average $103,000,000.

[1072] Another factor to consider is the extent to which a defendant benefited from his actions. A violator of either the CPA or the Quebec Charter who deserves to be condemned to punitive damages should not be allowed to profit from his wrongdoing. This principle is embraced by the Supreme Court in a number of decisions, including *Cinar* (at paragraph 136) and *Whiten* (at paragraph 72). Here, we quote from *Time*:

> [206] Also, in our opinion, it is perfectly acceptable to use punitive damages, as is done at common law, to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than an expense paid to earn greater profits while flouting the law (*Whiten*, at para. 72).[474]

[1073] Average earnings are relevant in the context of disgorging ill-gained profits. Here, those profits were immense to the point of being inconceivable to the average person. ITL and RBH earned nearly a half billion dollars a year over the past five years, with ITL earning over $600 million in 2008. The $200 million dollar fine it paid that year looks almost like pocket change.

[1074] Over the averaging period alone, the Companies' combined before-tax earnings totalled more than five billion dollars ($5,000,000,000). Recognizing that a dollar today is not worth what it was in 1950 or 1960, or even 1998, we still must assume that the profits earned by them over the 48 years of the Class Period were massive[475].

[1075] That said, and although one view of justice might require it, it is not possible to disgorge all that profit by way of punitive damages here. Nonetheless, the objective of disgorgement is compelling. It inspires us to adopt as a base guideline that, other things being equal, each Company should be deprived of one year's average before-tax profits. Working from that base, we shall adjust the individual amounts depending on the particular circumstances of each Company.

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474 *Op. cit*, *Time*, Note 20, paragraph 206.

475 The fact that Quebec sales likely represented from 20 to 25 percent of those earnings is not relevant to the Companies' overall patrimonial situation.

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IX.D ITL'S LIABILITY FOR PUNITIVE DAMAGES

[1076] In our preceding analysis, we have found that all three Companies were guilty of reprehensible conduct that warranted an award of punitive damages against them under both the Quebec Charter and the CPA. We also pointed out a number of elements that distinguish the case of ITL from that of the others.

[1077] In that analysis we referred to the guidelines set out in the section 23 of the TRDA for apportioning liability for compensatory damages among several defendants. There, we considered the following elements:

- Mr. Wood's 1962 initiatives with respect to the Policy Statement;
- the company's refusal to heed the warnings and indictments of Messrs. Green and Gibb, as described in section II.B.1.a of the present judgment;
- Mr. Paré's vigorous public defence over many years of the cigarette in the name of both ITL and the CTMC;
- the company's leading role in publicizing the scientific controversy and the need for more research;
- the extensive knowledge and insight ITL gained from its regular Internal Surveys such as the CMA and the Monthly Monitor;
- more specifically with respect to the Internal Surveys, its awareness of the smoking public's ignorance of the risks and dangers of the cigarette, and its absolute lack of effort to warn its customers accordingly; and
- ITL's bad-faith efforts to block court discovery of research reports by storing them with outside counsel, and eventually having those lawyers destroy the documents.

[1078] As well, there is ITL's "outlier" status throughout the Class Period. In spite of overwhelming scientific acceptance of the causal link between smoking and disease, ITL continued to preach the sermon of the scientific controversy well into the 1990's, as we saw earlier[476]. All these points are relevant to the assessment of punitive damages. They weigh heavily on the gravity of ITL's faults and require a condemnation higher than the base amount.

[1079] Exercising our discretion in the matter, we would have held ITL liable for overall punitive damages equal to approximately one and one-half times its average annual before-tax earnings, an amount of seven hundred twenty-five million dollars ($725,000,000).[477] As noted earlier, this covers both classes.

[1080] Let us immediately underscore that, not only is this amount within the rational limits that the Supreme Court rightly imposes on this process, but also, viewed in the perspective of these files, it is actually rather paltry.

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476 See Exhibit 20063.10, at pdf 154.

477 We should point out that our use of the conditional tense of the verb in this analysis is intentional, for reasons that we explain below.

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[1081] Since there are about 1,000,000 total Members in both Classes, the average amount from ITL on a "per member" basis would be about $725. Adding in the awards from the other two Companies, as established below, the total punitive damages averaged among all Members would come to a mere $1,310, hardly an irrational amount. True, we do not assess punitive damages on the basis of an amount "per member", but viewing them from this perspective does provide a sobering sense of proportionality.

[1082] This global total must be divided between the two Classes and possibly among the Blais subclasses, a process that applies to the three Companies.

[1083] As between the Classes, the circumstances in Blais justify a much larger portion for its Members. In spite of the fact that there are about nine times more Members in Létourneau than in Blais[478], the seriousness of the infringement of the Members' rights is immeasurably greater in the latter. Reflecting that, the $100,000 of moral damages for lung and throat cancer in Blais is 50 times greater than what we would have awarded in Létourneau.

[1084] Consequent with the preceding, we shall attribute 90% of the total punitive damages to the Blais Class and 10% to Létourneau. Ten percent of ITL's share of $725,000,000 is $72,500,000.

[1085] Turning now to the Blais subclasses, the Court would have followed the pattern proposed for compensatory damages and award the Members of the emphysema subclass 30% of the amount of punitive damages granted to the lung and throat cancer subclasses. Given that punitive damages are not based on a per-member or per-class metric, this does not affect the amount of the deposit the Companies must make.

[1086] All this said, we must now ask to what degree the size of the award for compensatory damages in Blais should affect the amount to be granted for punitive damages[479]. The response is that it should affect it very much indeed.

[1087] We have condemned the Companies to almost seven billion dollars of moral damages, which comes to more than 15 billion dollars once interest and the additional indemnity are accounted for. That is a sizable bite to swallow, even for corporations as profitable as these. However much it might be deserved, we cannot see our way fit to condemn them to significant additional amounts by way of punitive damages.

[1088] What we feel we can and should do is to make a symbolic award in this respect. That is why we shall condemn each Company to $30,000 of punitive damages in the Blais File. This represents one dollar for each Canadian death this industry causes in Canada every year.[480]

[1089] The total of $90,000 represents less than one dollar for each Blais Member. Rather than foreseeing a payment of that amount to claiming Members, we shall order

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478 Parenthetically, it is probable that all the Blais Members would also belong to the Létourneau Class.

479 A reminder: since we have dismissed the claim for compensatory damages in Létourneau, this question is not relevant there.

480 See the reasons of Laforest, J. in *RJR-Macdonald Inc. v. A.G. Canada*, [1995] 3 S.C.R. 199, at pages 65-66.

that it be dealt with in the same manner as the punitive damages payable in the Létourneau File.

IX.E RBH'S LIABILITY FOR PUNITIVE DAMAGES

[1090] Concerning RBH, the only element that appears to stand out is Rothmans' efforts to stifle the initiative of Mr. O'Neill-Dunne in 1958, as discussed in section IV.B.1.a. That type of behaviour is not exclusive to RBH. It typifies what all the Companies and their predecessors were doing and is part of the fundamental reason for awarding punitive damages in the first place. As such, we do not see that it warrants a condemnation beyond the base amount.

[1091] We shall condemn RBH to punitive damages equal to its average annual before-tax earnings, an amount of $460,000,000. The division of this amount between the two files shall be the same as for ITL: The 10% for Létourneau represents $46,000,000.

IX.F JTM'S LIABILITY FOR PUNITIVE DAMAGES

[1092] As further discussed in section XI.D, JTM's situation takes a different turn as a result of the Interco Contracts. The Plaintiffs' position is the same with respect to using before-tax earnings as a base, but JTM's case differs from that of the other Companies.

[1093] It argues that the payments due under the Interco Contracts, totalling some $110 million a year in capital, interest and royalties (the "**Interco Obligations**"), should be accepted at face value. The result would be to reduce JTM's annual earnings to a deficit, since its average before-tax earnings are "only" $103 million. This would also have the advantage of rendering the choice between before and after-tax figures moot, although JTM favours the latter.

[1094] As a result of our approving the Entente in Chapter XI below, paragraphs 2138-2145 of the Plaintiffs' Notes become public[481]. There we find many of the relevant facts around how the Interco Contracts work to impose, artificially in the Plaintiffs' view, the Interco Obligations on JTM.

[1095] For example, the Japan Tobacco group caused JTM to transfer its trade marks valued at $1.2 billion to a new, previously-empty subsidiary, JTI-TM, in return for the latter's shares. This "Newco" charges JTM an annual royalty of some $10 million for the use of those trade marks. It is hard to conceive of a more artificial expense.

[1096] There is also a loan of $1.2 billion from JTI-TM to JTM for which JTM is charged $92 million a year in interest. One of the curious aspects of this loan is that JTM appears never to have received any funds as a result of it[482], although we must admit that Mr. Poirier's clear answer in this regard at page 115 of the transcript[483] became less clear later in his testimony.

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481 Paragraphs 2138-2145 of the Plaintiffs' Notes are reproduced in Schedule J to the present judgment.

482 Testimony of Michel Poirier, May 23, 2014, at page 115.

483 189Q-Is it not a fact, sir, that JTIM never received one dollar ($1) of a loan in respect of that one point two (1.2) billion dollars of debentures?
A- Yes, I think that's correct.

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[1097] Our analysis of this matter leads us to agree with Mr. Poirier who, when reviewing some of the planning behind the Interco Contracts, was asked if "that sounds like creditor proofing to you". He candidly replied: "Yes".[484]

[1098] Shortly thereafter, the following exchange ensued in Mr. Poirier's cross examination:

> [172]Q." […]The modifications suggested will enhance our ability to protect our most valuable assets." Most valuable assets in this context are the trademarks valued at one point two (1.2) billion dollars?
>
> A- Yes. Yes.
>
> [173]Q-And it's to protect your most valuable assets from creditors, creditors like perhaps the plaintiffs in this lawsuit?
>
> A- Perhaps the plaintiffs. It's a tobacco company.
>
> [174]Q-It's a what?
>
> A- It's a tobacco company.[485]

[1099] To be clear, no one has attacked the validity or the legality of the tax planning behind the Interco Contracts, or the contracts themselves, for that matter. That is not necessary for the point the Plaintiffs wish to score. Because something might be technically legal for tax purposes, something on which we give no opinion, does not automatically mean that it cannot be one of "the appropriate circumstances" that article 1621 obliges us to consider.

[1100] The Interco Contracts affair is clearly an appropriate circumstance to consider when assessing punitive damages against JTM and we shall consider it, not once, but twice: quantitatively and qualitatively.

[1101] In the first, we cannot but conclude that this whole tangled web of interconnecting contracts is principally a creditor-proofing exercise undertaken after the institution of the present actions by a sophisticated parent company, Japan Tobacco Inc., operating in an industry that was deeply embroiled in product liability litigation. Even Mr. Poirier could not deny that. And on paper, the sham may well succeed.

[1102] Unless the Interco Contracts are overturned, something that is not the subject of the present files, JTM appears to be nothing more than a break-even operation. So be it, but that is an artificial state of affairs that does not reflect the company's true patrimonial situation. Absent these artifices, JTM is earning an average of $103,000,000 a year before taxes and that is the patrimonial situation that we will adopt for the purpose of assessing punitive damages.

[1103] Then there is the qualitative side. The Interco Contracts represent a cynical, bad-faith effort by JTM to avoid paying proper compensation to its customers whose health and well-being were ruined, and the word is not too strong, by its wilful conduct.

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484 Testimony of Michel Poirier, May 23, 2014, at page 108.
485 *Ibidem*, at pages 108-109.

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This deserves to be sanctioned and we shall do so by setting the condemnation for punitive damages above the base amount[486].

[1104] We shall thus condemn JTM to punitive damages equal to approximately 125% of its average annual before-tax earnings, an amount of $125,000,000.[487] The division of this amount between the two files shall be the same as for ITL: The 10% for Létourneau represents $12,500,000.

[1105] Before closing on JTM, the Court will deal with its argument that it never succeeded to the obligations of MTI, as set out in paragraphs 2863 and following of its Notes.

[1106] Summarily, it argues that, in light of the contracts signed when the RJRUS group acquired it in 1978 and of the dissolution of MTI in 1983, the provisions of the Quebec Companies Act and the applicable case law dictate that "Plaintiffs' right of action, assuming they have any, can only be directed at MTI's directors and not its successor".[488] This applies in its view to "any alleged wrongdoing that could have been committed on or before (October 27, 1978) by MTI".[489]

[1107] The Court does not see how this can assist JTM in avoiding liability under the present judgment, and this, for two reasons.

[1108] First, under a General Conveyancing Agreement of October 26, 1978 (Exhibit 40596), MTI "transfers, conveys, assigns and sets over" the essential parts of its business to an RJRUS-controlled company, RJR-MI. At page 4 of that agreement, RJR-MI "covenants and agrees to assume and discharge all liabilities and obligations now owing by MTI", which included specifically:

> (e) all claims, rights of action and causes of action, pending or available to anyone against MTI.

[1109] In connection with the phrase "now owing" in that contract, in 1983, both MTI and RJRUS had long known that MTI's customers were being poisoned by its products, as discussed at length above. As such, any reasonable executive of those companies had to realize that the other shoe would soon be dropping and lawsuits would start appearing in Canada, as had already happened in other countries. The future Canadian lawsuits can thus be seen to be part of the "claims, rights of action and causes of action … available to anyone against MTI" in 1978. These were assumed by RJR-MI.

[1110] Moreover, the General Conveyancing Agreement foresees the dissolution of MTI in its opening clause. The potential liability of the directors of a dissolved company would have been well known to MTI and its legal advisors. It could not have been the intention

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[486] See Claude DALLAIRE and Lisa CHARMANDY, *Réparation à la suite d'une atteinte aux droits à l'honneur, à la dignité, à la réputation et à la vie privée*, op. cit., Note 462, at paragraph 97, referring to *Gillette v. Arthur* and G.C. v. L.H. (references omitted).

[487] The fact that the sum of the condemnations for the three Companies comes to a round number of $1.3 billion is pure coincidence.

[488] Paragraph 2889 of JTM's Notes.

[489] Paragraph 2890 of JTM's Notes.

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of the very people who were approving the deal to transfer the risk of inevitable and onerous product liability litigation to themselves.

[1111] In any event, even if JTM could escape liability for MTI's obligations, it makes no similar assertion with respect to RJRM's liability as of 1978. All of the faults attributed to the Companies in the present judgment continued throughout most of the Class Period, including the years where JTM was operating as RJRM.

[1112] We reject JTM's submissions on this point.

X. DEPOSITS AND DISTRIBUTION PROCESS

[1113] Table 1113 incorporates the deposits for moral damages in Blais with the condemnations for punitive damages in both files[490] to show the amounts to be deposited by each Company by file and by head of damage.

TABLE 1113

1 COMPANY	2 MORAL DAMAGES BLAIS	3 PUNITIVE DAMAGES BLAIS	4 PUNITIVE DAMAGES LÉTOURNEAU
ITL	$670,000,000	$30,000	$72,500,000
RBH	$200,000,000	$30,000	$46,000,000
JTM	$130,000,000	$30,000	$12,500,000

[1114] On the issue of interest and the additional indemnity, for punitive damages they run only from the date of the present judgment. They must be added to the deposits indicated in columns 3 and 4 of the table when the deposits are made. For the Blais moral damages, although they run from the date of service of the Motion for Authorization to Institute the Class Action, they do not affect the amount of the deposits indicated in column 2 for reasons already explained.

[1115] A question remains as to the possible effect of prescription on these amounts. Since we assume that the TRDA applies, there is no prescription of claims for moral damages. We have also held that the Létourneau claims for punitive damages are not prescribed. We shall therefore analyze this issue only with respect to punitive damages in Blais.

[1116] From Table 910 we see that Blais claims for punitive damages that accrued before November 20, 1995 are prescribed. This effectively "wipes out" 45 years of

[490] A reminder: punitive damages do not vary by subclass in Blais and no moral damages are awarded in Létourneau.

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possible punitive damages, leaving 17 years of those claims in that file[491]. Should this affect the amount of global punitive damages to be assessed?

[1117] From a purely mathematical viewpoint, it should. From a common sense and legal viewpoint, it does not.

[1118] As pointed out by Laforest J. in his dissent in the first Supreme Court decision on the constitutionality of Canadian tobacco legislation, the educated view is that in 1995 tobacco was responsible for nearly 100 deaths a day in Canada, over 30,000 premature deaths annually[492]. This means that, during the 17 years while non-prescribed punitive damages were amassing in Blais, the Companies products and conduct ruined the lives of Blais Class Members and their families and, in the process, caused the death of more than half a million Canadians, of which we estimate that there were some 125,000 Quebecers.

[1119] If every life is priceless, what price 500,000 lives … or even "only" 125,000?

[1120] Our reply to that question is shown in columns 3 and 4 of Table 1113. We see no justification for reducing those amounts beyond the level to which they have already been reduced in light of the purposes and objectives of punitive damages and the remarkable profits made by the Companies every year.

[1121] In Table 1113, columns 2, 3 and 4 show the initial deposits to be made by each Company in each file in accordance with article 1032 CCP. Should these amounts not suffice to cover all claims made by eligible Members, the Plaintiffs may petition the Court to issue an order for the deposit of a further sum.

[1122] Finally in this area, in light of our rulings above, it will be necessary to foresee a method for distributing the amounts due to the Blais Members and to establish a practical and equitable plan of distribution of the punitive damages awarded but not distributed. We shall reconvene the parties at a later date to hear them on that.

[1123] In preparation, we shall order the Plaintiffs to submit a detailed proposal on all issues related to distribution of damages within sixty (60) days of the date of the present judgment, with copy to the Companies. Should they so desire, the Companies may reply in writing within thirty (30) days of their receipt of the Plaintiffs' proposal

XI. DECISIONS ON OBJECTIONS UNDER RESERVE AND CONFIDENTIALITY

[1124] During the course of the trial, the Court attempted to avoid taking objections under reserve, although certain exceptions were necessary. Even there, the Court advised counsel that, in order to obtain a ruling on an objection taken under reserve, they would have to argue it specifically in their closing pleadings, failing which the Court would assume that the objection was withdrawn.

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491 The amended class description in Blais "expanded" the class to include anyone who had been diagnosed with a Disease before March 12, 2012.

492 *RJR-Macdonald Inc. v. A.G. Canada*, [1995] 3 S.C.R. 199, at pages 65-66.

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[1125] The parties renew a small number of objections or similar questions at this stage, mostly claims by the Companies that certain documents be declared confidential and kept under seal. The questions to be decided are[493]:

a. The admissibility of Exhibit 1702R in the face of JTM's objection on the basis of professional secrecy;[494]

b. The general admissibility of reserve or "R" documents that were allowed to be filed subject to subsequent authorizations as a result of testimony, a motion or otherwise;

c. The confidentiality of certain of the Companies' internal documents: coding information, cigarette design/recipes, insurance policies and financial statements;

d. The confidentiality of exhibits relating to JTM's Interco Contracts in light of its agreement with the Plaintiffs on this subject.

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XI.A. THE ADMISSIBILITY OF EXHIBIT 1702R

[1126] On July 30, 1986, Anthony Colucci wrote a letter to James E. Young that the Plaintiffs wish to file into the court record and which received the provisional exhibit number of 1702R: "R" for "under reserve of an objection" (the "**Colucci Letter**"). Mr. Colucci, described as "an RJR scientist working on behalf of the legal department"[495], was the director of the Scientific Litigation Support Division of the Law Department of RJRUS. Mr. Young was an attorney in a Cleveland law firm.

[1127] On that basis, JTM objected to the admissibility of the document on the ground of what is known in Quebec as "professional secrecy", as codified in section 9 of the Quebec Charter.

[1128] At trial, the Court dismissed the objection (the "**1702R Judgment**") for reasons set out in a judgment it had rendered on March 25, 2013 dealing with other documents. In that 2013 judgment, which was not appealed, the Court held that professional secrecy did not apply to an otherwise "privileged" document that had been published on the Internet in compliance with valid American court orders, as is the case with Exhibit 1702R. The Court specifically refrained from expressing any opinion on the effect of "an

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493 In its Notes, at paragraphs 1465 and following, ITL identifies a number of additional objections for which it requests a decision. Since nothing in those affects the present judgment and, in fact, several were decided during the trial, e.g., the relevance of diseases not covered by the class descriptions, the Court will not deal further with those.

494 In addition, the Companies objected to the production of a number of documents based on Parliamentary Privilege. Since their contents are not confidential, the Court allowed them to be produced under reserve with a "PP" annotation and stipulated that we would limit their use to that which is not prohibited by that privilege. Although the Plaintiffs refer to several of them in their Notes, the Court relies on none of them in the present judgment. Consequently, the question of whether the Plaintiffs' proposed use of such documents contravenes Parliamentary Privilege or not is moot and we shall say nothing further on the subject.

495 Exhibit 1702.1.

improper publication", i.e., one that was done without colour of right, and we shall maintain our silence on that now.

[1129] JTM chose to appeal the 1702R Judgment, a process that might have caused some delay in the present proceedings. To avoid that, the lawyers for JTM and the Plaintiffs applied their ingenuity to conceive an alternative process. The Plaintiffs desisted from the 1702R Judgment and JTM desisted from its appeal. They agreed to re-plead the point in their final arguments and asked that the Court reconsider the issue in the judgment on the merits. Since confidentiality of the document is not an issue, they agreed that, should the Court dismiss the objection, it could refer to the exhibit in the final judgment. The Court agreed to proceed in that manner.

[1130] We should add that, in light of our not referring to this exhibit in our judgment, the question borders on being moot. Nevertheless, we do not wish to impede any of the parties' strategies in appeal, should there be one, and we feel we must rule on the objection now.

[1131] On this subject, the parties signed a series of admissions relating to this exhibit, which were filed as Exhibit 1702.1. These admissions essentially confirm that, although the Colucci Letter is available on Legacy plus at least two RJRUS-related web sites "as compelled by court order", it was never disclosed voluntarily and the company never waived its claim of privilege with respect to it and continues to assert that claim at all times.

[1132] In its Notes, JTM argues as follows:

> **2953.** Accordingly it is respectfully submitted that the determinative factor to decide whether a document covered by professional secrecy of the attorney can be used in litigation should be whether its use has been authorized by the beneficiary (including through a waiver) or by an express provision of law. Whether the document has been seen by 1, 10, 1,000 or even 100,000 individuals is irrelevant, so long as no such authorization exists.

[1133] For their part, the Plaintiffs raise the following arguments against JTM's claim of professional secrecy:

a. The document was never covered by professional secrecy because of the nature of its contents and the status of its author, who appears not to have been a lawyer;

b. Even if it had been covered by professional secrecy originally, it lost that protection as a result of its being publicly available on the Internet for more than ten years.

[1134] Further to its argument that the involuntary or unauthorized disclosure of a privileged document to a third party does not result in the loss of privilege, JTM argues that "the fact that Exhibit 1702-R has been made accessible to the public as a result of U.S. Court orders does not affect its privileged nature under Quebec law, nor does it render it admissible into evidence in Quebec proceedings".

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[1135] Concerning the US proceedings, it is not every day that one sees orders of this sort[496]. It is quite simply extraordinary for a court to require the worldwide publication of documents potentially covered by solicitor-client privilege. Yet, we understand that more than one US court has done so in the context of "tobacco litigation" in that country.

[1136] This Court need neither analyze nor comment on those orders. Our interest is to examine how they might affect the admissibility of a single document in this trial. We emphasize their exceptional nature solely to underline our conviction that, to our knowledge, this facet of solicitor-client privilege has no parallel in Canadian legal history. The only precedent in Canadian jurisprudence of which we are aware comes from our own previous judgments in relation to this and other documents published on the Legacy Tobacco Documents Library website.

[1137] We dealt with that question in a March 25, 2013 judgment[497], as well as in a May 17, 2012 judgment dealing with litigation privilege[498]. Analyzing the effect of the divulgation being made against the party's will, but licitly, as is the case with Exhibit 1702R, on both occasions we ruled that the document lost any right to professional secrecy. In doing so, we relied on simple common sense, as well as on an *obiter dictum* from the Court of Appeal. Here are the relevant passages of the more recent judgment wherein we explain our reasoning.

> [7] Though there might be other motives for refusing professional secrecy protection to the Documents, the Court sees no need to look beyond the fact that they are available on Legacy in compliance with valid American court orders. From a practical and common-sense point of view, such a widespread and licit publication empties the issue of professional secrecy of all its relevance.
>
> [8] In our judgment of May 17, 2012, we provided our view on the effect of a widespread publication of a document that would otherwise be subject to professional secrecy. There, albeit dealing with a document subject to litigation privilege and not, strictly speaking, professional secrecy, we wrote:
>
> > [11] In its decision in *Biomérieux*[499], the Court of Appeal clearly limited the future application of *Chevrier*[500]. Before doing that, however, it noted that in its 1994 decision in the case of *Poulin v. Prat*[501] it had clarified the role of article 9 of the *Quebec Charter of Human Rights and Freedoms*[502] in such questions. The *Poulin* judgment provides guidance here not so much for its recognition of the professional secret as a fundamental right but, rather, for the door that it opened, or perhaps left open, in cases "according to the circumstances, when the document or information is already in the hands of the adverse party"[503].

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496 Exhibit 1702.1 refers to the order of Madam Justice Kessler in the District of Columbia, file 99-CV-2496.
497 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2013 QCCS 4903.
498 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCCS 2181
499 *Biomérieux Inc. v. GeneOhm Sciences Canada Inc.,* 2007 QCCA 77.
500 *Chevrier v.Guimond*, [1984] R.D.J. 240, at page 242.
501 AZ-94011268; [1994] R.D.J. 301.
502 R.S.Q., ch. C-12.
503 Reference omitted.

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> [12] Thirteen years later, the Court of Appeal in Biomérieux clarified what is meant by "the circumstances" in *Poulin v. Prat*. It said: "For example, if information subject to the professional secret has been divulged to the general public, I have difficulty in seeing how it could be protected by the court or otherwise. On the other hand, if its divulgation was of limited scope and the circumstances do not lead to the conclusion that the divulgation was done as the result of a waiver of privilege, it seems to me that the court must impose the measures necessary to ensure the protection of a fundamental right arising from article 9 of the Charter"[504].
>
> [13] It is paramount to note that the court made it clear that the qualification that the divulgation not be done as the result of a waiver of privilege applies only to the case of a limited divulgation. By isolating that mention in a sentence separate from the one dealing with a general divulgation, the Court of Appeal sets aside any consideration of waiver where there has been a broad divulgation of the document.
>
> …
>
> [15] Consequently, in circumstances such as these, particularly where the widespread divulgation was made legally (as the result of a court order), as opposed to by way of an illicit act, the common sense approach of the Court of Appeal is the only logical alternative available - even in the face of a rule of such importance as the one governing privilege. (The Court's emphasis)
>
> [9] We still favour the common sense approach of *Biomérieux*, and this, whether the document be subject to litigation privilege or to professional secrecy, provided that the divulgation has not been done improperly, i.e., illegally, unlawfully or illicitly. We need not and do not express any opinion on the effect of an improper publication of a document subject to professional secrecy, since the divulgations which concern us here were the result of court orders and, arguably, settlement agreements.
>
> [10] Consequently, professional secrecy does not apply to the Documents.[505]

[1138] We still adhere to this reasoning. Thus, we hold that Exhibit 1702R is not subject to professional secrecy and dismiss JTM's objection. It follows that the "R" should be removed from the exhibit number, which now becomes Exhibit 1702.

[1139] As a result, it is not necessary to deal with the Plaintiffs' first argument referring to the nature of the contents and the status of the document's author.

XI.B. THE ADMISSIBILITY OF "R" DOCUMENTS

[1140] At paragraphs 1481-1488 of its Notes, ITL requests the withdrawal from the record of all "R" exhibits that were allowed to be filed under reserve, subject to subsequent authorization as a result of testimony, a motion, an admission or otherwise[506].

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504 Reference omitted.

505 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, *op. cit.,* Note 491.

506 There is a second category of "R" documents, being ones filed subject to an objection based on relevance. The only documents in that category are those discussed in Section XI.D below. The Court

At the time of filing, and on subsequent occasions, the Court made it clear that, in the absence of such subsequent authorization, the document would be removed from the record. We have not changed our position on that.

[1141] Consequently, all "R" exhibits for which no authorization was obtained shall be struck from the evidentiary record. The struck exhibits include the five such documents mentioned in the Plaintiffs' Notes: Exhibits 454-R, 454A-R, 613A-R, 623A-R and 1571-R.[507]

[1142] In furtherance of that, we shall reserve the parties' rights to obtain a further judgment specifying the struck exhibits, should that be required.

XI.C. THE CONFIDENTIALITY OF CERTAIN INTERNAL DOCUMENTS:

[1143] The documents in question are marketing documents, such as consumer surveys, cigarette designs and recipes, insurance policies and financial statements.

[1144] Preliminary to analyzing the cases of the documents for which confidentiality is claimed by the Companies, it is useful to examine the state of the law on the subject of confidentiality orders with respect to documents.

[1145] In order to justify an infringement of the public's right to freedom of expression and grant a confidentiality order, the Supreme Court in its decision in *Sierra Club* expressed the view that the applicant has the burden of showing necessity and proportionality:

> a) Such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> b) The salutary effects of the confidentiality order, including the effects on the right or civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[508] (The Court's emphasis)

[1146] In the following paragraphs, the court underlined "three important elements" affecting the first branch of the test, i.e., necessity:

- The risk must be real, substantial and well grounded in the evidence and pose a serious threat to the commercial interest in question;
- The important commercial interest cannot merely be specific to the party but the confidentiality must be of public interest in the sense of representing a general principle;

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will not comment on ITL's paragraphs 1479 and 1480, since the issues there were resolved among the parties.

[507] ITL also makes submissions with respect to Exhibit 1740R. The Court has this exhibit as having been withdrawn. In any event, our general ruling on this matter would apply to it, if it is still in the record.

[508] *Sierra Club v. Canada (Minister of Finance),* [2002] 2 SCR 522, at paragraph 53.

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- Reasonably alternative measures include the possibility of restricting the order as much as is reasonably possible while preserving the commercial interest in question.[509]

[1147] These are the principles that will guide our evaluation of the requests for confidentiality orders in this matter.

[1148] As well, we see no sense in analyzing the potential confidentiality of documents that are not referred to by any of the parties in their arguments[510]. Hence, we instructed counsel to limit their submissions to such documents, which ITL identified. We shall deal only with those documents now.

[1149] Finally, we analyzed this question in depth in our June 5, 2012 judgment in these files[511], where we refused to grant confidential status to a number of documents, *inter alia*, because they contained outdated information. We have not lost sight of what we ruled there, nor have we changed our view on that specific topic since then.

[1150] That said, we must point out that our 2012 judgment came after "only" three months of hearing, what for these files can be qualified as "very early on". More than two years of trial have followed and, at this juncture, the judgment is essentially written. Our current perspective thus provides us a complete view of the contents and the nuances of the evidence, something that we did not have in June 2012.

XI.C.1 GENERAL DOCUMENTS, INCLUDING CODING INFORMATION

[1151] In paragraphs 1506 and following of its Notes, ITL advises that eleven confidential documents of this type were referred to in Plaintiffs' argument, four of which are no longer confidential: Exhibits 1149-2M, 1196, 1258 and 1540.

[1152] Of the remaining seven "CONF" exhibits in issue, all appear to have been filed both in complete and in "redacted" form, i.e., where the confidential text is hidden. The first bears a "CONF" suffix, with the second having no "CONF". ITL also refers to one "CONF" document in its Notes.

[1153] Let us make it clear at the outset not only that we did not see the need to refer to a single one of these documents in the present judgment but also that the Plaintiffs did not see the need to refer to any of the redacted portions of these exhibits in their pleadings. The mere fact that a company is involved in litigation is no justification for rendering its entire corporate archives public. The public hearing rule should apply only to information that is relevant to the case.

[1154] On the other hand, as a general rule it is best not to carve up a document by nipping out bits and leaving in others[512]. That is a dangerous exercise, since one almost never knows what portions will eventually prove to be relevant. That becomes less dangerous, however, where the parties agree in advance to the portions to be exorcised, as is the case here.

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509 *Ibidem*, paragraphs 55-57.
510 It is not irrelevant to note in this context that over 20,000 exhibits were filed in these cases.
511 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCCS 2581.
512 The French term "*charcuter*" captures the essence of this process.

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[1155] The remaining exhibits are the following, as described in ITL's Notes at paragraphs 1510 and following:

- 529-CONF - a 1988 memo entitled "Cigarette Component Rationalization". Plaintiffs quote from this memorandum in their Notes and Submissions, and the quote they rely on is contained in the redacted copy: Exhibit 529.
- 530C-CONF – a 1981 document entitled "List of additives no longer used on Cigarettes and Fine Cuts", identifying the additives by their "K" Numbers, a confidential code, as described below.
- 530E-CONF – a listing of codes, called "K" Numbers, used by ITL to identify potential additives to cigarettes. ITL advises that Plaintiffs made an undertaking to file only the redacted version of this exhibit.
- 532-CONF – an attachment to a 1981 letter from ITL to Health Canada entitled "Type of Product in Which Additive Used". ITL indicates that the only redactions relate to fine-cut or roll-your-own tobacco, a subject that is outside the scope of the present actions. As well, the information that the Plaintiffs refer to is the use of coumarin in some of ITL's American style cigarettes. That information is also contained in the redacted copy: Exhibit 532.
- 992-CONF - a 1974 document entitled "List of active K-numbers by location", identifying a number of additives by their "K" Numbers.
- 999-CONF – a 1981 document entitled "K-Numbers Active List". ITL advises that Plaintiffs made an undertaking to file only the redacted version of this exhibit.
- 1000-CONF - a document entitled "K-No Identification". ITL advises that Plaintiffs made an undertaking to file only the redacted version of this exhibit.
- 20186-CONF – a Scientific Research and Experimental Development Information Return for fiscal 1990, as filed with Revenue Canada". It was referred to by ITL as an example of the disclosure that was made to the Canadian government on a regular basis.

[1156] Two other exhibits, 361-CONF and 1225-CONF, were the subject of an agreement with the Plaintiffs whereby only the redacted versions would be public. Failing disavowal of such agreement by the Plaintiffs, these exhibits will remain under seal.

[1157] ITL advises that Plaintiffs undertook to file only the redacted versions of exhibits 530E-CONF, 999-CONF and 1000-CONF and ask us to enforce that undertaking. We note that the proof indicates that the coding in these documents might still be in use by ITL. Hence, failing disavowal of such agreement by the Plaintiffs, these exhibits will remain under seal. In any event, the Court is satisfied that they meet the *Sierra Club* test.

[1158] Following in the path of the previous three, Exhibits 530C-CONF and 992-CONF contain confidential coding information that is of no use either to the Plaintiffs or to the

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Court in these files. We are satisfied that they meet the *Sierra Club* test. Accordingly, they shall remain under seal.

[1159] The excluded portions of Exhibit 529-CONF refer either to American cigarettes, which are not the subject of these cases or to design features. Neither of these aspects is of direct relevance to these cases. The exhibits will remain under seal.

[1160] The excluded portions of Exhibit 532-CONF refer to products that are not the subject of these cases and for which the Court consistently refused to hear evidence. It will remain under seal.

[1161] The excluded portions of Exhibit 20186 are of no relevance to these cases and the exhibit will remain under seal.

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XI.C.2 FINANCIAL STATEMENTS

[1162] For the purposes of assessing punitive damages, article 1621 C.C.Q. states that the debtor's "patrimonial situation" is relevant. Accordingly, the Court ordered the Companies to file their financial statements as of 2007 under a temporary sealing order.

[1163] After having reviewed those, the Plaintiffs agreed to allow ITL and RBH to withdraw their financial statements from the court record and replace them with the Summaries of earnings before and after tax: Exhibits 1730A-CONF and 1730B-CONF, respectively, for ITL and Exhibits 1732A-CONF and 1732B-CONF for RBH.

[1164] The Plaintiffs are content to limit the proof on this point to the Summaries, to which they add their own slightly different interpretation of the figures in the financial statements: Exhibits 1730-CONF for ITL and 1732-CONF for RBH.

[1165] RBH and the Plaintiffs agreed that the RBH Summaries would remain confidential unless and until a judgment awarding punitive damages is rendered against RBH. Depending on whether the Court bases its decision on earnings before or after tax, the corresponding exhibit would become public, with the other remaining under seal. Given that such a judgment is rendered herein, and that we have opted for earnings before tax, Exhibit 1732A-CONF is no longer confidential and is re-numbered as Exhibit 1732A, while Exhibit 1732B-CONF stays under seal.

[1166] ITL did not agree to a similar arrangement for its Summaries, although it was allowed to withdraw its financial statements from the record. Its position is that all these exhibits should remain under seal under all circumstances.

[1167] On this question, as well as with respect to the confidentiality of its insurance policies, ITL advises in paragraph 1496 of its Notes that it repeats and relies upon its Plan of Argument of November 21, 2014 in support of its Motion for a Sealing Order. We note that this motion refers to the actual financial statements and not to the Summaries.

[1168] In that Plan of Argument, ITL cites a number of decisions refusing production of financial information at a "*less advanced stage of the trial*", in ITL's words, on the ground that it is premature to file that evidence until it is essential to establish certain elements of the case. As such, it argues that this evidence should not be adduced unless and until a

judgment ordering punitive damages has been rendered. Given our judgment herein awarding punitive damages, this argument loses any relevance and is dismissed.

[1169] ITL also argues that the three "important elements" of the necessity test of *Sierra Club* apply so as to warrant a confidentiality order. The Court need not analyze in detail the arguments made in this regard, because they are all based on the possible filing of full financial statements. The substitution of the Summaries for the financial statements assuages any concerns that might have existed under either the first two "important elements" or the proportionality test.

[1170] As well, this "reasonably alternative measure" removes any possible serious risk to an important commercial interest of ITL, though we hasten to add that we are not convinced that any such risk existed. RBH's acceptance of the publication of its Summaries would seem to confirm that.

[1171] Accordingly, given that we have opted for earnings before taxes, Exhibit 1730A-CONF is no longer confidential and is re-numbered as Exhibit 1730A. Exhibit 1730B-CONF now becomes irrelevant and we shall make permanent the temporary confidentiality order in place with respect to it and order that it remain under seal unless and until a further order changes its status.

[1172] Plaintiffs' Exhibits 1730-CONF and 1732-CONF contain the same information shown in the two opened exhibits as well as other information that is not necessary for these cases. We shall thus make permanent the temporary confidentiality order in place with respect to them and order that they remain under seal unless and until a further order changes their status.

XI.C.3 INSURANCE POLICIES

[1173] The next series of documents to consider are insurance policies that could result in the payment of the damages being "wholly or partly assumed by a third person", as foreseen in article 1621. The Plaintiffs argue that the Companies made no proof to support a claim of confidentiality for the nearly 150 insurance policies filed for ITL and RBH[513]. For its part, JTM "stated that it had none to cover the two claims".[514]

[1174] The analysis done of these rather dense policies is quite sparse and the Court is not the one who should be filling in the blanks. The Plaintiffs assert that they need not refer to any confidential part of the policies in their arguments on punitive damages, but do not go on to indicate what policies or parts thereof are relevant to those arguments.

[1175] They merely point out that numerous policies "could theoretically cover, to some extent, these two claims but that no insurance company has confirmed that so far. They either reserved their decision or, in some cases, already denied coverage"[515]. They add that the

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513 Exhibits 1753.1-CONF through 1753.81-CONF for RBH and 1754.1-CONF through 1754.60-CONF for ITL.

514 Plaintiffs' Notes, at paragraph 2134.

515 Plaintiffs' Notes, at paragraph 2135. Since article 1621 requires us to consider the extent of the reparation for which the Companies are already liable to the creditor, the fact that insurance covers compensatory damages is relevant to the assessment of punitive damages.

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possibility that some compensatory damages might be covered by insurance should not weigh against granting punitive damages. That is fine, but it does not take us very far.

[1176] The Plaintiffs point to no specific insurance policy of ITL or RBH that would cover a condemnation for punitive or even compensatory damages. ITL, on the other hand, provided proof by affidavit that, in response to the claims it has submitted, their insurers have either denied coverage or not yet taken a position. [516] Hence, no insurer has to this date accepted that its policy covers the damages claimed in these files.

[1177] There is thus no proof that the Companies are insured against any condemnation made in this judgment, whether for compensatory or for punitive damages. It follows that there is no need to refer to any of these policies beyond what we have said above; the policies themselves are unnecessary and irrelevant.

[1178] As such, the Companies have satisfied the burden of proof on them in order to maintain the confidentiality of their insurance policies. We shall make permanent the temporary confidentiality order in place with respect to them and order that they remain under seal unless and until a further order changes their status.

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XI.D. THE RELEVANCE AND CONFIDENTIALITY OF THE INTERCO CONTRACTS

[1179] Citing a number of inter-company transactions within the Japan Tobacco Inc. group shortly after it acquired JTM in 1999 (the "**Interco Contracts**"), the Plaintiffs allege that JTM's financial statements do not reflect the reality of its patrimonial situation. For that reason, they contest those financials and insist that the effect of the Interco Contracts be purged.

[1180] The facts behind this issue are presented in paragraphs 2138 to 2144 of Plaintiffs' Notes, which are reproduced in Schedule J. JTM's president, Michel Poirier, was questioned at length on this and numerous documents were filed, all under reserve of an objection as to relevance. JTM continues that objection as to all aspects of this evidence and seeks a sealing order for the exhibits relating to it. It was, nonetheless, willing to be practical and cooperative in order to avoid unnecessary debate, as we explain below.

[1181] We should note at the outset that the Interco Contracts question was studied in a recent judgment by one of our colleagues and by a judge of the Court of Appeal. They both refused Plaintiffs' Motion for a Safeguard Order to prohibit JTM from paying annual amounts of some $110 million to related companies as capital, interest and royalties under the Interco Contracts. JTM argues that these judgments decide the issue once and for all and that the Plaintiffs should not be allowed to reopen it now. JTM thus objects as to the general relevance of this information, plus as to its relevance in light of the two above-mentioned judgments.

[1182] Since we are on the subject, let us rule on that objection now.

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[516] Exhibit 1754-CONF for ITL, at paragraph 6; Exhibit 1753-CONF for RBH. The RBH affidavit is referred to in Plaintiffs' Notes, but it does not seem to deal with insurance coverage.

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XI.D.1 OBJECTION AS TO RELEVANCE

[1183] The judgments mentioned above certainly do decide in final fashion the Motion for a Safeguard Order, but only for the questions raised therein and for the remedy sought by it. They do not purport to examine the amount of punitive damages to be awarded under a future judgment on the merits and cannot automatically have the effect of rendering all aspects of the Interco Contracts affair irrelevant for that purpose.

[1184] Article 1621 edicts that "Punitive damages are assessed in the light of all the appropriate circumstances, in particular …". The items that follow that phrase are not limitative. It thus stands to reason that the Interco Contracts affair will be relevant if we feel that it is an appropriate circumstance to consider in our adjudication on punitive damages, in which case we must consider it.

[1185] We do and we already have. The objection as to relevance is dismissed.

XI.D.2 CONFIDENTIALITY OF RELATED EVIDENCE

[1186] Earlier, we referred to JTM's practical and cooperative approach on this issue. In laudable, albeit labyrinthine fashion, it and the Plaintiffs arrived at an agreement settling many of the evidentiary aspects raised: the "*Entente sur la confidentialité de certaines informations entre les demandeurs et JTIM*" (the "**Entente**": Exhibit 1747.1). It deals mainly with the designation of a number of pieces of evidence relating to the Interco Contracts as being either confidential or not.

[1187] Subject to the Court's ratification of it, the Entente has JTM withdrawing its request for confidentiality for the redacted parts of paragraphs 2138 through 2144 of the Plaintiffs' Notes, previously under seal by consent. Notwithstanding the opening of those paragraphs to the public, JTM and the Plaintiffs request that the exhibits and the testimony referred to therein remain under seal. We note that, since those paragraphs reproduce and paraphrase parts of those exhibits and testimony, those portions could no longer be treated as confidential.[517]

[1188] In the end, the decision on the ratification of the Entente comes down to deciding whether or not the confidential status should be maintained as requested. This request, although technically made by JTM, is indirectly made jointly with the Plaintiffs, since they both request the Court to ratify the Entente. The effect of ratification would be to declare the testimony and the Annexe B documents confidential.

[1189] Annexe B is comprised of a series of some 40 exhibits filed under reserve of JTM's objection as to relevance and as "CONF", this being by consent of the Plaintiffs. In it, we find numerous financial statements dating back to 1998, along with documents related to them. There are also a number of documents explaining the tax planning that was done within the Japan Tobacco group at the time of the formation of the Interco

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[517] Annexe A, the summary of JTM's "Earnings from operations" for the years 2009 through 20013, would also become public, provided that the Court chooses that measure for evaluating punitive damages. That is, in fact, the measure that we prefer. JTM undertook to file two other summaries covering after-tax earnings and results after payments under the Interco Contracts. They came in the form of Annexes C and D to Exhibit 1747.1.

Contracts. They are for the most part quite technical and go into much greater detail than is necessary for the Plaintiffs to tell the story that they feel needs to be told.

[1190] They are the masters of their evidence, subject to any proper intervention the Court feels is required. Here, they confirm that all that they wish to say about the Interco Contracts is found in paragraphs 2138 through 2145 of their Notes, and that there is no need to refer to the underlying exhibits or to render them public[518]. That is confirmed by the fact that the only reference to them in the pleadings that the Court could find is in those eight paragraphs.

[1191] We see no justification for forcing the Plaintiffs to adduce any further proof than that which they choose to make. It is their decision and they will live or die by it. For our part, we see no need to state any other facts than those set out there, or to examine in detail any other documents. These exhibits are unnecessary for the adjudication of this matter.

[1192] We shall therefore ratify the Entente and render a confidentiality order with respect to the documents listed in Annexe B and the testimony of Mr. Poirier of May 23, 2014 and order that they remain under seal unless and until a further order changes their status. Exhibit 1747.1, on the other hand, becomes public, including Annexe A, JTM's earning from operations.

XII. INDIVIDUAL CLAIMS

[1193] The Plaintiffs displayed an impressive sense of clairvoyance in their Notes when they opted to renounce to making individual claims, declaring that "Outside of collective recovery, recourses of the members against the defendants are just impossible".[519] The Court agrees.

[1194] The Companies are of two minds about this. While no doubt rejoicing in the knowledge that there will be no need to adjudicate individual claims in the present files, they wish to avoid the possibility of any new actions being taken by current Class Members, a highly unlikely event, to be sure. That is why they insisted that the Plaintiffs not be allowed to remove the request for an order permitting individual claims and that the Court rule on it. The Plaintiffs do not object.

[1195] Consequently, we shall dismiss the request for an order permitting individual claims of the Members against the Companies in both files.

XIII. PROVISIONAL EXECUTION NOTWITHSTANDING APPEAL

[1196] The Plaintiffs seek a judgment declaring that the Companies were guilty of "improper use of procedure", one result of which would be the possibility of an order for provisional execution notwithstanding appeal under article 547(j) of the Code of Civil Procedure. The Court put over the question of procedural abuse until after judgment on the merits, but this did not stop the Plaintiffs in their quite understandable quest for some immediate payment of damages.

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518 Transcript of November 21, 2014, at page 104.
519 Plaintiffs' Notes, at paragraph 2329.

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[1197] They changed strategy and requested provisional execution on the basis of the penultimate paragraph of article 547, which reads:

> In addition, the court may, upon application, order provisional execution in case of exceptional urgency or for any other reason deemed sufficient in particular where the fact of bringing the case to appeal is likely to cause serious or irreparable injury, for the whole or for part only of a judgment. (The Court's emphasis)

[1198] In light of the delays in these cases, it takes no great effort to sympathize with the plight of the Members, particularly in the Blais file. Initiated some 17 years ago, these cases are far from being over. The Plaintiffs estimate that the appeals process will likely take another six years. The Court finds that optimistic, but possible.

[1199] In the meantime, Class Members are dying, in many cases as a direct result of the faults of the Companies. In our opinion, this represents serious and irreparable injury in light of the time required for the appeals. And there are other reasons sufficient to require an order of provisional execution.

[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.

[1201] There is also the appeal phase, a process that will be far from economical both in terms of time and of money. It is critical in the interest of justice that the Plaintiffs have the financial wherewithal to see this case to the end. Finally, the Fonds d'aide aux recours collectifs, which has been carrying part of that financial burden over these many years, also deserves consideration at this point.

[1202] Thus, it is fair and proper to approve provisional execution for at least part of the damages awarded, and we shall so order, limiting the immediate-term execution to the initial deposits and punitive damages. We do this in full knowledge of the Court of Appeal's statement to the effect that provisional execution for moral and punitive damages is very exceptional[520]. There is very little in these files that is not very exceptional, and this is no exception.

[1203] In this regard, there is precedent for a type of *sui generis* provisional execution in a class action. In the case of *Comartin v. Bodet*[521], the defendants were required to deposit a portion of damages on a provisional basis. The money was held by the prothonotary pending appeal and not distributed to the members until the judgment was final. We are inclined to follow similar lines here, although not identical. We are open to the possibility of distributing certain amounts immediately.

[1204] We shall, therefore, order each Company to deposit into its respective attorney's trust account, within sixty (60) days of the date of the present judgment, an amount equal to its initial deposit of moral damages plus both condemnations for punitive damages. In their proposal concerning the distribution process, the Plaintiffs should

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520 *Hollinger v. Hollinger* [2007] CA 1051, at paragraph 3.

521 [1984] Q.J. No. 644 (Superior Court), at paragraphs 154 and following.

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include suggestions for dealing with that amount pending final judgment, a question that will be decided after hearing the parties at a later date. The Companies may also provide written representations on this question within thirty (30) days of receiving the Plaintiffs' proposal.

XIV. CONCLUDING REMARKS

[1205] It is customary for our court to draft its judgments in the language of what is colloquially called "the losing party". Although the Companies succeeded on several of their principal arguments in these files, it seemed reasonable to draft in English, being the language that they clearly prefer. The Court will request a French translation of this judgment in the days following its publication.

[1206] Finally, the Court wishes to thank those lawyers whose professionalism, coupled with their sense of practicality and cooperation, made it possible ultimately to complete this journey in spite of the many obstacles cluttering its path.

IN COURT FILE #06-000076-980 (THE BLAIS FILE) THE COURT:

[1207] **GRANTS** the Plaintiffs' action in part;

[1208] **AMENDS** the class description as follows:

All persons residing in Quebec who satisfy the following criteria:	*Toutes les personnes résidant au Québec qui satisfont aux critères suivants:*
1) To have smoked, before November 20, 1998, a minimum of 12 pack/years of cigarettes manufactured by the defendants (that is, the equivalent of a minimum of 87,600 cigarettes, namely any combination of the number of cigarettes smoked in a day multiplied by the number of days of consumption insofar as the total is equal to or greater than 87,600 cigarettes).	*1) Avoir fumé, avant le 20 novembre 1998, au minimum 12 paquets/année de cigarettes fabriquées par les défenderesses (soit l'équivalent d'un minimum de 87 600 cigarettes, c'est-à-dire toute combinaison du nombre de cigarettes fumées dans une journée multiplié par le nombre de jours de consommation dans la mesure où le total est égal ou supérieur à 87 600 cigarettes).*
For example, 12 pack/years equals:	*Par exemple, 12 paquets/année égale:*
20 cigarettes a day for 12 years (20 X 365 X 12 = 87,600) or	*20 cigarettes par jour pendant 12 ans (20 X 365 X 12 = 87 600) ou*
30 cigarettes a day for 8 years (30 X 365 X 8 = 87,600) or	*30 cigarettes par jour pendant 8 ans (30 X 365 X 8 = 87 600) ou*
10 cigarettes a day for 24 years (10 X 365 X 24 = 87,600);	*10 cigarettes par jour pendant 24 ans (10 X 365 X 24 = 36 500);*
2) To have been diagnosed before March 12, 2012 with:	*2) Avoir été diagnostiquées avant le 12 mars 2012 avec:*
a) Lung cancer or	*a) Un cancer du poumon ou*
b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx or	*b) Un cancer (carcinome épidermoïde) de la gorge, à savoir du larynx, de l'oropharynx ou de l'hypopharynx ou*
c) Emphysema.	*c) de l'emphysème.*

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The group also includes the heirs of the persons deceased after November 20, 1998 who satisfied the criteria mentioned herein.

Le groupe comprend également les héritiers des personnes décédées après le 20 novembre 1998 qui satisfont aux critères décrits ci-haut.

[1209] **CONDEMNS** the Defendants solidarily to pay as moral damages an amount of $6,858,864,000 plus interest and the additional indemnity from the date of service of the Motion for Authorization to Institute the Class Action;

[1210] **CONDEMNS** the Defendants solidarily to pay the amount of $100,000 as moral damages to each class member diagnosed with cancer of the lung, the larynx, the oropharynx or the hypopharynx who started to smoke before January 1, 1976, plus interest and the additional indemnity from the date of service of the Motion for Authorization to Institute the Class Action;

[1211] **CONDEMNS** the Defendants solidarily to pay the amount of $80,000 as moral damages to each class member diagnosed with cancer of the lung, the larynx, the oropharynx or the hypopharynx who started to smoke as of January 1, 1976, plus interest and the additional indemnity from the date of service of the Motion for Authorization to Institute the Class Action;

[1212] **CONDEMNS** the Defendants solidarily to pay the amount of $30,000 as moral damages to each member diagnosed with emphysema who started to smoke before January 1, 1976, plus interest and the additional indemnity from the date of service of the Motion for Authorization to Institute the Class Action;

[1213] **CONDEMNS** the Defendants solidarily to pay the amount of $24,000 as moral damages to each member diagnosed with emphysema who started to smoke as of January 1, 1976, plus interest and the additional indemnity from the date of service of the Motion for Authorization to Institute the Class Action;

[1214] **DECLARES** that, as among the Defendants, ITL shall be responsible for 67% of the solidary condemnations for moral damages pronounced in the present judgment, including all costs; RBH shall be responsible for 20% thereof and JTM shall be responsible for 13% thereof;

[1215] **ORDERS** Defendant Imperial Tobacco Canada Ltd. to make an initial deposit for compensatory damages of $670,000,000 into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1216] **ORDERS** Defendant Rothmans, Benson & Hedges Inc. to make an initial deposit for compensatory damages of $200,000,000 into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1217] **ORDERS** Defendant JTI Macdonald Corp. to make an initial deposit for compensatory damages of $130,000,000 into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1218] **RESERVES** the Plaintiffs' right to request orders for additional deposits should the above initial deposits prove insufficient to cover all claims made by eligible Members of the Class;

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[1219] **CONDEMNS** Defendant Imperial Tobacco Canada Ltd. to pay a total of $30,000 as punitive damages for the entire class, plus interest and the additional indemnity from the date of the present judgment;

[1220] **ORDERS** Defendant Imperial Tobacco Canada Ltd. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1221] **CONDEMNS** Defendant Rothmans, Benson & Hedges Inc. to pay a total of $30,000 as punitive damages for the entire class, plus interest and the additional indemnity from the date of the present judgment;

[1222] **ORDERS** Defendant Rothmans, Benson & Hedges Inc. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1223] **CONDEMNS** Defendant JTI Macdonald Corp. to pay a total of $30,000 as punitive damages for the entire class, plus interest and the additional indemnity from the date of the present judgment;

[1224] **ORDERS** Defendant JTI Macdonald Corp. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1225] **WITH COSTS**, including, with respect to the Plaintiffs' experts, the costs related to the drafting of all reports, to the preparation of testimony, both on discovery and in trial, and to the remuneration for the time spent testifying and attending trial;

[1226] **ORDERS** that the fees of the representative's attorneys be paid in full out of the amounts deposited, subject to the rights of Le Fonds d'aide aux recours collectifs;

[1227] **DISMISSES** the Plaintiffs' request for an order permitting individual claims against the Defendants;

[1228] **GRANTS** the Plaintiffs' request for provisional execution notwithstanding appeal with respect to the initial deposits of each Defendant for moral damages plus the full amount of punitive damages;

[1229] **DECLARES** that, with respect to any balance of the amounts recovered collectively after the distribution process is completed, the Court will invite the parties to make representations as to its disposition;

IN COURT FILE #06-000070-983 (THE LÉTOURNEAU FILE) THE COURT:

[1230] **GRANTS** the Plaintiff's action in part;

[1231] **GRANTS** the portion of the Plaintiff's action seeking punitive damages;

[1232] **DISMISSES** the portion of the Plaintiffs' action seeking moral damages;

[1233] **AMENDS** the Class description to read as follows:

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All persons residing in Quebec who, as of September 30, 1998, were addicted to the nicotine contained in the cigarettes made by the defendants and who otherwise satisfy the following criteria:	*Toutes les personnes résidant au Québec qui, en date du 30 septembre 1998, étaient dépendantes à la nicotine contenue dans les cigarettes fabriquées par les défenderesses et qui satisfont par ailleurs aux trois critères suivants:*
1) They started to smoke before September 30, 1994 and since that date have smoked principally cigarettes manufactured by the defendants;	*1) Elles ont commencé à fumer avant le 30 septembre 1994 et depuis cette date fumaient principalement les cigarettes fabriquées par les défenderesses;*
2) Between September 1 and September 30, 1998, they smoked on a daily basis an average of at least 15 cigarettes manufactured by the defendants; and	*2) Entre le 1er et le 30 septembre 1998, elles fumaient en moyenne au moins qunize cigarettes fabriquées par les défenderesses par jour; et*
3) On February 21, 2005, or until their death if it occurred before that date, they were still smoking on a daily basis an average of at least 15 cigarettes manufactured by the defendants.	*3) En date du 21 février 2005, ou jusqu'à leur décès si celui-ci est survenu avant cette date, elles fumaient toujours en moyenne au moins qunize cigarettes fabriquées par les défenderesses par jour.*
The group also includes the heirs of the members who satisfy the criteria described herein.	*Le groupe comprend également les héritiers des membres qui satisfont aux critères décrits ci-haut.*

[1234] **CONDEMNS** Defendant Imperial Tobacco Canada Ltd. to pay the amount of $72,500,000 as punitive damages, with interest and the additional indemnity from the date of the present judgment, in accordance with the following orders;

[1235] **ORDERS** Defendant Imperial Tobacco Canada Ltd. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1236] **CONDEMNS** Defendant Rothmans, Benson & Hedges Inc. to pay the amount of $46,000,000 as punitive damages, with interest and the additional indemnity from the date of the present judgment, in accordance with the following orders;

[1237] **ORDERS** Defendant Rothmans, Benson & Hedges Inc. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1238] **CONDEMNS** Defendant JTI Macdonald Corp. to pay the amount of $12,500,000 as punitive damages, with interest and the additional indemnity from the date of the present judgment, in accordance with the following orders;

[1239] **ORDERS** Defendant JTI Macdonald Corp. to deposit the amount of the condemnation for punitive damages into its attorney's trust account within sixty (60) days of the date of the present judgment;

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[1240] **WITH COSTS**, including, with respect to the Plaintiffs' experts, the costs related to the drafting of all reports, to the preparation of testimony, both on discovery and in trial, and to the remuneration for the time spent testifying and attending trial;

[1241] **REFUSES** to proceed with the distribution of punitive damages to each of the Class Members;

[1242] **ORDERS** that the fees of the representative's attorneys be paid in full out of the amounts deposited as punitive damages, subject to the rights of Le Fonds d'aide aux recours collectifs;

[1243] **ORDERS** that the balance of punitive damages awarded hereunder in both files be distributed according to the procedure to be established at a later hearing;

[1244] **DISMISSES** the Plaintiff's request for an order permitting individual claims against the Defendants;

[1245] **GRANTS** the Plaintiffs' request for provisional execution notwithstanding appeal with respect to the full amount of punitive damages;

[1246] **DECLARES** that, with respect to any balance of the amounts recovered collectively after the distribution process is completed, the Court will invite the parties to make representations as to its disposition;

WITH RESPECT TO BOTH FILES, THE COURT:

[1247] **ORDERS** the Plaintiffs to submit to the Court within sixty (60) days of the date of the present judgment, with copy to the Companies, a detailed proposal for the distribution of all amounts awarded herein, both with respect to punitive damages and to moral damages for Blais Class Members, including provisions for the publication of notices, for time limits to file claims, for adjudication mechanisms and any other relevant issues, as well as with respect to the treatment of any amounts resulting from provisional execution;

[1248] **STRIKES** the following exhibits from the court record:

- 454-R;
- 454A-R;
- 613A-R;
- 623A-R;
- 1571-R; plus
- All other "R" exhibits for which no subsequent authorization for filing was obtained, subject to the others provisions of the present judgment confirming the confidential status of an "R" exhibit, and **RESERVES** the parties rights to obtain a further judgment from this Court specifying the struck exhibits, should that be required;

[1249] **DISMISSES** the requests for confidentiality orders with respect to Exhibits 1730A-CONF and 1732A-CONF and **DECLARES** that those exhibits are no longer under seal and **RENUMBERS** them as Exhibits 1730A and 1732A;

[1250] **DISMISSES** JTM's objection based on professional secrecy with respect to Exhibit 1702R and **RENUMBERS** it as Exhibit 1702;

[1251] **DISMISSES** JTM's objection based on relevance for the evidence relating to the Interco Contracts;

[1252] **RATIFIES** the "*Entente sur la confidentialité de certaines informations entre les demandeurs et JTIM*" filed as Exhibit 1747.1;

[1253] **DECLARES** that the following exhibits and transcripts are confidential and shall remain under seal unless and until a further order changes their status:

- 361-CONF;
- 529-CONF;
- 530C-CONF;
- 530E-CONF;
- 532-CONF;
- 992-CONF;
- 999-CONF;
- 1000-CONF;
- 1225-CONF;
- 1730-CONF;
- 1730B-CONF;
- 1732-CONF;
- 1732B-CONF;
- 20186-CONF;
- 1731-1998-R-CONF through 1731-2012-R-CONF;
- 1748.1-R-CONF;
- 1748.1.1-R-CONF;
- 1748.1.3-R-CONF through 1748.1.6-R-CONF;
- 1748.2-R-CONF;
- 1748.4-R-CONF;
- 1750.1-R-CONF;
- 1751.1-R-CONF;
- 1751.1.1-R-CONF through; 1751.1.10-R-CONF;
- 1751.2-R-CONF;
- 1755.2-R-CONF;
- 1753.1-CONF through 1753.81-CONF;
- 1754.1-CONF through 1754.60-CONF;

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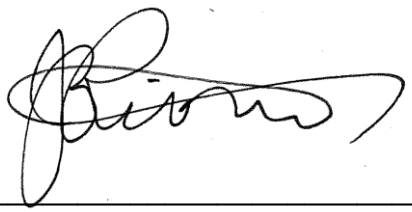
- The documents listed in Annex B of Exhibit 1747.1, including any mentioned above.
- Annex D of Exhibit 1747.1
- Transcript of the testimony of Michel Poirier on May, 23, 2014;



BRIAN RIORDAN, J.S.C.

Hearing Dates: 251 days of hearing between March 12, 2012 and December 11, 2014

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SCHEDULE A - GLOSSARY OF DEFINED TERMS

In cases such as these, it is a necessary evil from several perspectives to use abbreviated names for certain persons and things. Although the Court identifies most of those definitions in the text, it might prove helpful to the reader to have a complete glossary of defined terms readily available for easy reference.

- 1702R Judgment – The judgment rendered by the Court dismissing the objection to the production of Exhibit 1702R based on professional secrecy
- Ad Hoc Committee – A committee formed in 1963 by the four companies comprising the Canadian tobacco industry at the time, which became the CTMC in 1971
- AgCanada – Canadian Ministry of Agriculture; sometimes referred to as "CDAg" in exhibits
- Authorization Judgment - The judgment of February 21, 2005 authorizing the present class actions
- BAT – British American Tobacco Inc.; head office in the United Kingdom; the most important single shareholder of ITL over the Class Period (at least 40% of the voting shares) and sole shareholder since 2000
- B&H – Benson & Hedges Canada Inc.; the company that was merged with RPMC in 1986 to form RBH
- Blais Class – the members of the class in the Blais File
- Blais File – Court file #06-000076-980
- Bourque Report – the expert's report of Christian Bourque: Exhibit 1380
- Brown & Williamson – BAT's US subsidiary located in Louisville, Kentucky
- Canada – the Government of Canada and its ministries and agencies
- CDAg - AgCanada
- Civil Code – either of the *Civil Code of Lower Canada* or the *Civil Code of Quebec*, unless otherwise specified.
- Class Amending Judgment – Judgment of July 3, 2013 amending the definition of each Class
- Class Member - a member of the defined class in either file
- Class Period - 1950 - 1998
- CLP Act - the *Crown Liability and Proceedings Act*, R.S.C. 1985 c. C-50
- CMA – ITL's monthly Continuous Market Assessment survey of smokers only, measuring especially brand market share

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- Codes - Cigarette Advertising and Promotion Codes adopted by the Companies as of 1972
- Colucci Letter – a letter dated July 30, 1986 from Anthony Colucci of RJRUS to James E. Young, outside counsel
- Common Questions - The "principal questions of fact and law to be dealt with collectively", as identified in the Authorization Judgment and redefined in the present judgment
- Council for Tobacco Research – the successor organisation to the Tobacco Institute in the United States as the US tobacco industry's trade association
- COPD - Chronic Obstructive Pulmonary Disease
- *CPA* - the *Consumer Protection Act*, RLRQ, c. P-40.1
- CTMC - Canadian Tobacco Manufacturers' Council / Conseil canadien des fabricants de produits du tabac; the trade association of the Canadian tobacco industry and the successor to the Ad Hoc Committee as of 1971
- Delhi / Delhi Research Station – CDA's experimental farm in Delhi, Ontario
- Delhi Tobacco – New tobacco strains developed by CDA at Delhi during the late 1970s and 1980s
- Diseases – lung cancer, squamous cell carcinoma of the larynx, the oropharynx or the hypopharynx and emphysema
- Entente - "*Entente sur la confidentialité de certaines informations entre les demandeurs et JTIM*": Exhibit 1747.1
- Health Canada – Canadian Ministry of Health; new name of NHWCanada
- ICOSI – International Committee on Smoking Issues
- Imasco – Imasco Limited; incorporated in 1912 under the name "Imperial Tobacco Company of Canada, Limited", this is the company through which ITL carried out its main tobacco operations in Québec throughout the Class Period, apparently directly until 1970 and thereafter until 2000 through a division; it was amalgamated with other companies in 2000 under ITL's name, with BAT as the sole shareholder
- INFOTAB – successor to ICOSI as of 1981
- Interco Contracts - a number of inter-company transactions within the Japan Tobacco Inc. group shortly after it acquired JTM in 1999
- Interco Obligations - payments due by JTM under the Interco Contracts, totalling some $110 million a year in capital, interest and royalties
- Internal Surveys - ITL's regular internal surveys known as "Monthly Monitors", done on a monthly basis, and "CMAs", done at various times throughout the year
- Isabelle Committee – hearings in 1968 and 1969 before the House of Commons Standing Committee on Health chaired by Dr. Gaston Isabelle.

- ITL – Defendant Imperial Tobacco Canada Limited, created in 2000 through an amalgamation of Imasco and other companies
- JTM – Defendant JTI-MacDonald Corp.; formerly MTI until 1978 and RJRM until 1999
- JT International – Japan Tobacco International, S.A.; head office in Geneva, Switzerland; parent company of JTM
- JTT – Japan Tobacco Inc. – head office in Tokyo, Japan; parent company of JTI; acquired RJRI and RJRM in 1999
- Knowledge date – January 1, 1980 in the Blais File and March 1, 1996 in Létourneau
- LaMarsh Conference - the conference on smoking and health held by Health and Welfare Canada in November 1963 and chaired by Judy LaMarsh
- Legacy – Legacy Tobacco Documents Library: a website at the University of California, San Francisco Library and Center for Knowledge Management, established pursuant to the order of a US court and containing documents from tobacco companies' files that the companies are compelled to divulge
- Létourneau Class – the members of the class in the Létourneau File
- Létourneau File – Court file #06-000070-983
- Member –a member of the defined class in either file
- Monthly Monitor – ITL's monthly survey of the general population (smokers and non-smokers) measuring smoking incidence and daily usage; originally called "8M"
- MTI – Macdonald Tobacco Inc.; former name of RJRM and JTM
- NHWCanada – Canadian Ministry of National Health and Welfare; name changed to Ministry of Health ("Health Canada")
- NSRA – Non-Smokers Rights Association
- Pack Year - the equivalent of smoking 7,300 cigarettes, expressed in terms of daily smoking, i.e., 1 pack (of 20) cigarettes a day over one year: 20 x 365 = 7,300
- PhMInc. – Philip Morris Inc.; head office in New York City; parent company of B&H until 1986; 40% shareholder of RBH until 1987 when it transferred those shares to PhMIntl
- PhMIntl – Philip Morris International Inc.; 40% shareholder of RBH from 1987 through 1998
- Policy Statement – Policy Statement by Canadian Tobacco Manufacturers on the Question of Tar, Nicotine and Other Tobacco Constituents That May Have Similar Connotations, signed in 1962
- Quebec Charter - *Québec Charter of Human Rights and Freedoms*, RLRQ c. C-12
- RBH – Defendant Rothmans, Benson & Hedges Inc.

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- RJRUS – R.J. Reynolds Tobacco Company; head office in Winston-Salem, North Carolina; acquired MTI in 1974
- RJRM – RJR-Macdonald Corp.; new name of MTI as of 1978; former name of JTM until 1999
- Rothmans IG - Rothmans International Group; parent company of RPM until 1985 and thereafter majority shareholder of Rothmans Inc. through 1998
- Rothmans Inc. – parent company of RPM as of 1985; 60% shareholder of RBH from 1986 through 1998
- RPMC – Rothmans of Pall Mall Canada Inc.; subsidiary of Rothmans Inc. that was merged with B&H in 1986 to form RBH
- SCC Judgment - *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42
- SFS - Smokers Freedom Society
- Smoking date – January 1, 1976 in the Blais File and March 1, 1992 in Létourneau
- Summaries – Lists of before and after tax earnings of ITL and RBH for the years 2009 through 2013: Exhibits 1730A-CONF, 1730B-CONF, 1732A-CONF, 1732B-CONF
- *Tobacco Act* – S.C. 1997, c. 13
- Tobacco Institute – the trade association of the US tobacco industry; later called the Council for Tobacco Research
- TPCA – *Tobacco Products Control Act*, S.C. 1988, c. 20
- TRDA - the *Tobacco-Related Damages and Health Care Costs Recovery Act*, R.S.Q., c. R-2.2.0.0.1
- Trx – transcript of the trial, e.g., Trx 20120312 refers to the transcript of March 12, 2012
- Voluntary Codes – Cigarette Advertising and Promotion Codes adopted by the Companies as of 1972
- Warnings – the warning notices printed on all cigarette packs sold in Canada
- Young Teens - persons under the age at which it was legal to furnish tobacco products from time to time during the Class Period

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SCHEDULE B - IMPORTANT DATES OVER THE CLASS PERIOD AND BEYOND

BAT obtains corporate control of ITL

1938 Reader's Digest article on cigarette holders and the harm caused by the nicotine and resins in cigarettes

1953 Meeting at the Plaza Hotel in New York City between the heads of US tobacco companies and the public relations firm of Hill & Knowlton

1958 RPM commences doing business in Canada

B&H commences doing business in Canada

Reader's Digest and Consumer Reports articles on the dangers of smoking

1962 The Companies sign the "Policy Statement by Canadian Tobacco Manufacturers on the Question of Tar, Nicotine and Other Tobacco Constituents That May Have Similar Connotations", an agreement to refrain from using the words tar, nicotine or other smoke constituents that may have similar connotations in any advertising, packaging or other communication to the public (Exhibit 40005A)

The Royal College of Physicians in Great Britain publishes its report on Smoking and Health (Exhibit 545)

Meeting at the Royal Montreal Golf Club between ITL executives and US tobacco industry leaders, along with the US public relations firm of Hill & Knowlton

1963 LaMarsh Conference on smoking and health is held in Ottawa

The Ad Hoc Committee, the forerunner of the CTMC, is formed by the Canadian tobacco industry

1964 The Companies agree to the first Voluntary Code (Exhibits 20001-20004 + 40005B-40005S)

The first United States' Surgeon General's Report on smoking and health is published

1968 Health Canada publishes the level of tar and nicotine contained in cigarette brands in League Tables

1969 The House of Commons' Standing Committer on Health, Welfare and Social Affairs, under the chairmanship of Dr. Gaston Isabelle, holds hearings on "the subject matter of tobacco advertising" and publishes its report entitled "CIGARETTE SMOKING – THE HEALTH QUESTION AND THE BASIS FOR ACTION" in December of that year (Exhibit 729B)

1971 CTMC is formed to replace the Ad Hoc Committee

Bill C-248, *An act respecting the promotion and sale of cigarettes*, is introduced

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	The Consumer Protection Act is first enacted, but without the provisions on which the Plaintiffs base their claims in these files
1972	The first warnings appear on cigarette packs, on a voluntary basis (Exhibits 666)
	Health Canada and AgCanada jointly fund research at Delhi for a less hazardous cigarette
1974	RJRUS acquires MTI;
	NSRA formed
	Tar and nicotine figures are printed on cigarette packages
1975	Tar and nicotine figures are indicated in all cigarette advertising
1978	MTI changes name to RJRM
	Health Canada ceases to fund AgCanada research at Delhi for a less hazardous cigarette
1980	The *Consumer Protection Act* is amended to add, i*nter alia*, articles 215-153 and 272, on April 30th
1982	CTMC is incorporated (Exhibit 4331)
1985	Physicians for a Smoke-Free Canada (PSC) founded
	College of Pharmacists of Canada urged its members to stop selling cigarettes
1986	RBH formed as the result of the merger of RPM and B&H, with 60% shareholding to Rothmans Inc. and 40% to PhMI.
1987	Quebec's Bill 84, an Act Respecting The Protection Of Non-Smokers In Certain Public Places, becomes law
1988	The TPCA imposes a ban on most cigarette advertising and dictates new warnings to appear on cigarette packs as of January 1, 1989
	Surgeon General's Report on "Nicotine Addiction" is published (Exhibit 601-1988)
1989	Federal *Non-Smokers' Health Act* came into force, prohibiting smoking on domestic flights
	Report of the Royal Society of Canada on "Tobacco, Nicotine and Addiction" is published (Exhibit 212)
1991	Quebec College of Pharmacists bans the sale of cigarettes in pharmacies
1995	The Supreme Court of Canada overturns parts of the TPCA (Exh. 75)
1996	The Companies implement a new Voluntary Code after the Supreme Court judgment of 1995
1997	The *Tobacco Act* imposes a new ban on most cigarette advertising
1999	JT International acquires RJRM; name changes to JTM
2007	The Supreme Court of Canada upholds the *Tobacco Act* (Exh. 75A)

SCHEDULE C - NON-PARTY, NON-GOVERNMENT WITNESSES

NAME	PRINCIPAL TITLE	CALLED BY AND DATES
1. Michel Bédard	Founder and first President of the SFS	Plaintiffs – April 30, May 1, 2012
2. William Neville	President of CTMC: 1987-1992 Consultant to CTMC: 1985-1987 & 1992-1997	Plaintiffs – June 6 and 7, 2012
3. Jacques Larivière	Consultant to CTMC: 1979-1989 Employee of CTMC: 1989-1994	Plaintiffs – June 13, 14, 20, 2012 and April 4, 2013
4. Jeffrey Wigand	Vice President Research and Development and Environmental Affairs at Brown and Williamson: 1989-1993	Plaintiffs – December 10 and 11, 2012 and March 18, 2013
5. William A. Farone	Director of Applied Research at Philip Morris Inc.: 1976-1984	Plaintiffs – March 13, 14, 2013
6. James Hogg	Outside researcher under contract to the CTMC	ITL – December 16, 2013

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SCHEDULE C.1 - EXPERTS CALLED BY THE PLAINTIFFS

NAME	POSITION AND AREA OF EXPERTISE	DATES
1. Robert Proctor	Recognized by the Court as an expert on the History of Science, the History of Scientific Knowledge and Controversy and the History of the Cigarette and the American Cigarette Industry	November 26, 27, 28 and 29, 2012
2. Christian Bourque	Recognized by the Court as an expert on surveys and marketing research	January 16 and March 12, 2013
3. Richard Pollay	Recognized by the Court as an expert on marketing, the marketing of cigarettes and the history of marketing	January 21, 22, 23 and 24, 2013
4. Alain Desjardins	Recognized by the Court as an expert chest and lung clinician (*pneumologue clininicien*)	February 4 and 5, 2013
5. André Castonguay	Recognized by the Court as an expert on chemistry and tobacco toxicology (*chimie et toxologie du tabac*)	February 6, 7 and 13, 2013
6. Louis Guertin	Recognized by the Court as an expert in ear, nose and throat medicine (*oto-rhino-laryngologie*) and cervico-facial oncological surgery	February 11, 2013
7. Jack Siemiatycki	Recognized by the Court as an expert in epidemiological methods (including statistics), cancer epidemiology, cancer etiology and environmental and lifestyle risk factors for disease	February 18, 19, 20, 21 and March 19 2013
8. Juan C. Negrete	Recognized by the Court as an expert psychiatrist with a specialization in addiction (*Médecin psychiatre expert en dependence*)	March 13 and 21 and April 2, 2013

SCHEDULE D - WITNESSES CONCERNING MATTERS RELATING TO ITL

NAME	PRINCIPAL TITLE	CALLED BY AND DATES
1. Michel Descôteaux	Director of Public Affairs: 1979-2000; Employee: 1965-2002	Plaintiffs - March 13, 14, 15, 19, 20, 21, 22 and May 1, 2, 2012
2. Simon Potter	Former outside counsel to ITL	Plaintiffs - March 22, 2012
3. Roger Ackman	Vice President of Legal Affairs: 1972-1999; Employee: 1970-99	Plaintiffs – April 2, 3, 4 and May 28, 2012
4. Anthony Kalhok	Vice President of Marketing: 1975-1979; Employee: 1962-79, then with IMASCO until 1983	Plaintiffs – April 10, 11, 12, 17, 18 and May 8, 2012 and March 6, 2013 ITL – October 7, 2013
5. Jean-Louis Mercier	President: 1979-91 Employee: 1960-93	Plaintiffs – April 18, 19 and May 2, 3 and 7, 2012
6. Edmond Ricard	Division Head in Charge of Strategy Planning and Insights: 2001-2011 Employee: 1982-2011	Plaintiffs – May 9, 10, 14, 15 and August 27, 28 and 29, 2012 ITL – October 9, 2013
7. David Flaherty	University professor	Plaintiffs - May 15, 2002
8. Carol Bizzaro	Manager Administrative Services - R&D Division Employee: 1968-2004	Plaintiffs - May 16, 2012
9. Jacques Woods	Senior Planner in the Marketing Department: 1980-1984 Employee: 1974-84	Plaintiffs - May 28 and June 12 and 20, 2012
10. Andrew Porter	Principal Research Scientist (Chemistry): 1985-2005	Plaintiffs - May 29, 30, 31 and June 20, 2012

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	employee: 1977-2005, then with BAT until 2007	ITL – August 27 and 28, 2013
11. Marie Polet	President: October 2011 to present Employee of BAT in Europe: 1982-2011	Plaintiffs – June 4 and 5 2012
12. Lyndon Barnes	Outside counsel to ITL: 1988-2007	Plaintiffs – June 18 and 19, 2012
13. Pierre Leblond	Assistant Product Development Manager and Product Development Manager: 1978-mid 1990s; BAT project: mid 1990s-2002 Employee: 1973-2002	Plaintiffs – August 31 and November 15, 2012
14. Rita Ayoung	Supervisor R&D Information Centre: 1978-2000 Employee: 1973-2000	Plaintiffs – September 17 and November 15, 2012
15. Wayne Knox	Marketing Director: 1967-1985 Outside Consultant, *inter alia*, to ITL: 1990-2011 Employee: 1967-1985	Plaintiffs – February 14 and March 11, 2013
16. Wolfgang Hirtle	R&D Manager Employee: 1980-2010	Plaintiffs – December 19, 2012 ITL – October 15, 2013
17. Minoo Bilimoria	Researcher on the effect of tobacco on cell systems Seconded to McGill University: 1975-1991 Employee: 1969-1995	Plaintiffs – March 4 and 5, 2013
18. Graham Read	BAT Head of Group R&D Employee of BAT: 1976-2010	ITL – September 9, 10 and 11, 2013
19. Gaetan Duplessis	Manager of Product Development then Head of R&D Employee: 1981-2010	ITL – September 12 and 16 and October 10, 2013

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20. Neil Blanche	Marketing Communications Manager Employee: 1983-2004 BAT Employee: 2004-2012	ITL – October 16, 2013
21. Robert Robitaille	Division Head of Engineering Employee: 1978-2011	December 19, 2013
22. James Sinclair	Plant Manager – reconstituted tobacco Employee: 1960-1999	April 8, 2013

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SCHEDULE D.1 - EXPERTS CALLED BY ITL

NAME	POSITION AND AREA OF EXPERTISE	DATES
1. David H. Flaherty	Recognized by the Court as an expert historian on the history of smoking and health awareness in Québec	May 21, 22 and 23 and June 20, 2013
2. Claire Durand	Recognized by the Court as an expert in surveys, survey methods and advanced quantitative analysis (*en sondages, méthodologie de sondages et analyse quantitative avancée*)	June 12 and 13, 2013
3. Michael Dixon	Recognized by the Court as an expert in smoking behaviour, cigarette design and the relation between smoking behaviour and cigarette design	September 17, 18 and 19, 2013
4. John B. Davies	Recognized by the Court as an expert in applied psychology, psychometrics, drug abuse and addiction	January 27, 28 and 29 2014
5. Bertram Price	Recognized by the Court as an expert in applied statistics, risk assessment, the statistical analysis of health risks and the use and interpretation of epidemiological methods and data to measure statistical associations and	March 18 and 19, 2014

	to draw causal inferences	
6. Stephen Young	Recognized by the Court as an expert in the theory, design and implementation of consumer product warnings and safety communications	March 24 and 25, 2014
7. James Heckman	Recognized by the Court as an expert economist, an expert econometrician and an expert in the determinants of causality	April 14 and 15, 2014

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SCHEDULE E - WITNESSES CONCERNING MATTERS RELATING TO JTM

NAME	PRINCIPAL TITLE	CALLED BY AND DATES
1. Peter Gage	Vice-Director of MTI: 1968-1972 Employee of MTI: 1955-1972	JTM – September 5, 6 and 7, 2012
2. Michel Poirier	President of JTM: 2000-present; Regional President for the Americas Region of JTI: 2005-present Employee: 1998-present	Plaintiffs – September 18 and 19, 2012 and May 23, 2014
3. Raymond Howie	Manager of Research and Analytical Services: 1977-1988; Director of Research and Development: 1988-2001 Employee: 1974-2001	Plaintiffs – September 20, 24, 25 and 26, 2012 JTM – November 4, 2013
4. Peter Hoult	VP Marketing RJRM: December 1979–1982; Executive VP Marketing, R&D, Sales: 1982-March 1983; VP International Marketing RJRI in US: March 1983–January 1987; President/CEO RJRM: January 1987–August 1988; Executive Chairman RJRM in US: August 1988–1989	Plaintiffs – September 27, October 1, 3 and 4, 2012 JTM – January 13, 14, and 15, 2014
5. John Hood	Research Scientist Employee: May 1977–May 1982	Plaintiffs – October 2, 2012
6. Mary Trudelle	Associate Product Manager: 1982; Product Manager for Vantage: 1983; Product Manager and Group Product Manager for Export A: 1984-1988; Marketing Manager: 1988-1990; Director of Strategic Planning and Research: 1992;	Plaintiffs – October 24 and 25, 2012

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	Director of Public Affairs: 1994; VP Public Affairs: 1996-1998; Outside consultant to CTMC: 1998 Employee: 1982-1998	
7. Guy-Paul Massicotte	In-house counsel, Corporate Secretary and Director of RJRM: October 1977–October 1980	Plaintiffs – October 31 and November 1, 2012
8. Jeffrey Gentry	Executive Vice President - Operations and Chief Scientific Officer of R.J. Reynolds Tobacco Co. Employee of R.J. Reynolds since 1986	JTM – November 5, 6 and 7, 2013
9. Robin Robb	Vice President Marketing Employee of RJRM: 1978-1984	JTM – November 18, 19 and 20, 2013
10. Lance Newman	Director Marketing Development and Fine Cut Employee: 1992-Present	JTM – November 20 and 21, 2013 and January 30, 2014

SCHEDULE E.1 - EXPERTS CALLED BY JTM

NAME	POSITION AND AREA OF EXPERTISE	DATES
1. Jacques Lacoursière	Recognized by the Court as an expert on Quebec popular history (*l'histoire populaire du Québec)*	May 13, 14, 15 and 16, 2013
2. Raymond M. Duch	Recognized by the Court as an expert in the design of surveys, the implementation of surveys, the collection of secondary survey data and the analysis of data generated from survey research	May 27 and 28, 2013
3. Robert Perrins	Recognized by the Court as an expert historian with expertise in the history of medicine, the history of smoking and health in Canada as it relates to	August 19, 20 and 21, 2013

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	the federal government, to the public health community and to the Canadian federal government's response	
4. W. Kip Viscusi	Recognized by the Court as an expert on how people make decisions in risky and uncertain situations and as to the role and sufficiency of information, including warnings to consumers, when making the decision to smoke	January 20 and 21, 2014
4. Dominique Bourget	Recognized by the Court as an expert in the diagnosis and treatment of mental disorders, including tobacco use disorder, as well as in the evaluation of mental	January 22 and 23, 2014
5. Sanford Barsky	Recognized by the Court as an expert in pathology and cancer research	February 17 and 18, 2014
6. Laurentius Marais	Recognized by the Court as an expert in applied statistics, including in the use of bio-statistics and epidemiological data and methods to draw conclusions as to the nature and extent of the relationship between an exposure and its health effects	March 10, 11 and 12, 2014
7. David Soberman	Recognized by the Court as an expert in marketing, marketing theory and marketing execution	April 16, 17, 22, 23 and 24, 2014

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SCHEDULE F - WITNESSES CONCERNING MATTERS RELATING TO RBH

NAME	PRINCIPAL TITLE	CALLED BY AND DATES
1. John Barnett	President/CEO of RBH: 1998–Present: President/CEO of Rothmans Inc.: 1999–Present:	Plaintiffs – November 19, 2012
2. John Broen	Executive VP Export Sales at B&H/PhMI: 1967-1975 President B&H Canada: 1976–May 1978; VP Marketing RPM: 1978–1986 VP Marketing RBH: 1986–1988 VP Corporate Affairs RBH: 1988 – 2000	Plaintiffs – October 15, 16 and October 30, 2012
3. Ronald Bulmer	B&H Senior Product Manager: 1972–1974: B&H National Sales Manager: 1974–1976; B&H Vice President and Director of Marketing: 1976–March 1978; Employee of B&H: 1972-1978	Plaintiffs – October 29, 2012
4. Steve Chapman	Scientific Advisor, Manager of Product Development and Regulatory Compliance Employee: 1988-present	RBH – October 21, 22 and 23, 2013
5. Norman Cohen	Chief chemist RPM: 1968-1970s; Head of R&D Labs RPM: 1970s-1986; Scientific Advisor RBH: 1986-2000	Plaintiffs – October 17 and 18, 2012
6. Patrick Fennel	President/CEO RPM: June 1985; President Rothmans Inc: August 1985; Chairman/CEO RBH: December 1986 (after merger) until September 1989;	Plaintiffs – October 22 and 23, 2012

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SCHEDULE F.1 - EXPERTS CALLED BY RBH

NAME	POSITION AND AREA OF EXPERTISE	DATES
1. Jacques Lacoursière	Recognized by the Court as an expert on "*l'histoire populaire du Québec*"	May 13, 14, 15 and 16, 2013
2. Raymond M. Duch	Recognized by the Court as an expert in the design of surveys, the implementation of surveys, the collection of secondary survey data and the analysis of data generated from survey research	May 27 and 28, 2013
3. W. Kip Viscusi	Recognized by the Court as an expert on how people make decisions in risky and uncertain situations and as to the role and sufficiency of information , including warning to consumers, when making the decision to smoke	January 20 and 21, 2014
4. Kenneth Mundt	Recognized by the Court as an expert in epidemiology, epidemiological methods and principles, cancer epidemiology, etiology and environmental and lifestyle risk factors and disease causation in populations	March 17 and 18, 2014

SCHEDULE G - WITNESSES FROM THE GOVERNMENT OF CANADA

NAME	PRINCIPAL TITLE	CALLED BY AND DATES
1. Denis Choinière	Health Canada - Director of the Office of Tobacco Products Regulations in the Department of Controlled Substances (*Directeur du Bureau de la réglementation des produits du tabac dans la Direction des substances contrôlées et de la lutte au tabagisme*)	JTM – June 10, 11 and 13, 2013
2. Marc Lalonde	Minister of Health for Canada: November 1972–September 1977	Defendants – June 17 and 18, 2013
3. Frank Marks	Director of Delhi Research Station: 1976–1981 and 1995-2000	ITL – December 2 and 3, 2013
4. Peter W. Johnson	Director of Delhi Research Station: 1981-1991	RBH – December 4, 2013
5. Bryan Zilkey	Employee of Agriculture Canada: 1969-1994	ITL – December 9 and 10, 2013
6. Albert Liston	Employee of Health Canada: 1964-92 1984-92 - ADM of Health Protection Branch	ITL - December 11 and 12, 2013

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SCHEDULE H - RELEVANT LEGISLATION

I. CIVIL CODE OF QUEBEC

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

1468. The manufacturer of a movable property is liable to reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.

[...] (The Court's emphasis)

1469. A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in the design or manufacture of the thing, poor preservation or presentation of the thing, or the lack of sufficient indications as to the risks and dangers it involves or as to means to avoid them.

(The Court's emphasis)

1473. The manufacturer, distributor or supplier of a movable property is not liable to reparation for injury caused by a safety defect in the property if he proves that the

1457. Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.

Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.

Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.

1468. Le fabricant d'un bien meuble, même si ce bien est incorporé à un immeuble ou y est placé pour le service ou l'exploitation de celui-ci, est tenu de réparer le préjudice causé à un tiers par le défaut de sécurité du bien.

[...] (Le Tribunal souligne)

1469. Il y a défaut de sécurité du bien lorsque, compte tenu de toutes les circonstances, le bien n'offre pas la sécurité à laquelle on est normalement en droit de s'attendre, notamment en raison d'un vice de conception ou de fabrication du bien, d'une mauvaise conservation ou présentation du bien ou, encore, de l'absence d'indications suffisantes quant aux risques et dangers qu'il comporte ou quant aux moyens de s'en prémunir.

(Le Tribunal souligne)

1473. Le fabricant, distributeur ou fournisseur d'un bien meuble n'est pas tenu de réparer le préjudice causé par le défaut de sécurité de ce bien s'il prouve que la victime

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victim knew or could have known of the defect, or could have foreseen the injury.

Nor is he liable to reparation if he proves that, according to the state of knowledge at the time that he manufactured, distributed or supplied the property, the existence of the defect could not have been known, and that he was not neglectful of his duty to provide information when he became aware of the defect.

(The Court's emphasis)

1477. The assumption of risk by the victim, although it may be considered imprudent having regard to the circumstances, does not entail renunciation of his remedy against the person who caused the injury.

1478. Where an injury has been caused by several persons, liability is shared by them in proportion to the seriousness of the fault of each.

The victim is included in the apportionment when the injury is partly the effect of his own fault.

1480. Where several persons have jointly participated in a wrongful act which has resulted in injury or have committed separate faults, each of which may have caused the injury, and where it is impossible to determine, in either case, which of them actually caused the injury, they are solidarily bound to make reparation thereof.

1526. The obligation to make reparation for injury caused to another through the fault of two or more persons is solidary where the obligation is extra-contractual.

1537. Contribution to the payment of a solidary obligation is made by equal shares among the solidary debtors, unless their interests in the debt, including their shares of the obligation to make reparation for injury

connaissait ou était en mesure de connaître le défaut du bien, ou qu'elle pouvait prévoir le préjudice.

Il n'est pas tenu, non plus, de réparer le préjudice s'il prouve que le défaut ne pouvait être connu, compte tenu de l'état des connaissances, au moment où il a fabriqué, distribué ou fourni le bien et qu'il n'a pas été négligent dans son devoir d'information lorsqu'il a eu connaissance de l'existence de ce défaut.

(Le Tribunal souligne)

1477. L'acceptation de risques par la victime, même si elle peut, eu égard aux circonstances, être considérée comme une imprudence, n'emporte pas renonciation à son recours contre l'auteur du préjudice.

1478. Lorsque le préjudice est causé par plusieurs personnes, la responsabilité se partage entre elles en proportion de la gravité de leur faute respective.

La faute de la victime, commune dans ses effets avec celle de l'auteur, entraîne également un tel partage.

1480. Lorsque plusieurs personnes ont participé à un fait collectif fautif qui entraîne un préjudice ou qu'elles ont commis des fautes distinctes dont chacune est susceptible d'avoir causé le préjudice, sans qu'il soit possible, dans l'un ou l'autre cas, de déterminer laquelle l'a effectivement causé, elles sont tenues solidairement à la réparation du préjudice.

1526. L'obligation de réparer le préjudice causé à autrui par la faute de deux personnes ou plus est solidaire, lorsque cette obligation est extracontractuelle

1537. La contribution dans le paiement d'une obligation solidaire se fait en parts égales entre les débiteurs solidaires, à moins que leur intérêt dans la dette, y compris leur part dans l'obligation de réparer le préjudice

caused to another, are unequal, in which case their contributions are proportional to the interest of each in the debt.

However, if the obligation was contracted in the exclusive interest of one of the debtors or if it is due to the fault of one co-debtor alone, he is liable for the whole debt to the other co-debtors, who are then considered, in his regard, as his sureties.

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.

2811. A fact or juridical act may be proved by a writing, by testimony, by presumption, by admission or by the production of real evidence, according to the rules set forth in this Book and in the manner provided in the Code of Civil Procedure (chapter C-25) or in any other Act.

2846. A presumption is an inference established by law or the court from a known fact to an unknown fact.

2849. Presumptions which are not established by law are left to the discretion of

causé à autrui, ne soit inégal, auquel cas la contribution se fait proportionnellement à l'intérêt de chacun dans la dette.

Cependant, si l'obligation a été contractée dans l'intérêt exclusif de l'un des débiteurs ou résulte de la faute d'un seul des codébiteurs, celui-ci est tenu seul de toute la dette envers ses codébiteurs, lesquels sont alors considérés, par rapport à lui, comme ses cautions.

1621. Lorsque la loi prévoit l'attribution de dommages-intérêts punitifs, ceux-ci ne peuvent excéder, en valeur, ce qui est suffisant pour assurer leur fonction préventive.

Ils s'apprécient en tenant compte de toutes les circonstances appropriées, notamment de la gravité de la faute du débiteur, de sa situation patrimoniale ou de l'étendue de la réparation à laquelle il est déjà tenu envers le créancier, ainsi que, le cas échéant, du fait que la prise en charge du paiement réparateur est, en tout ou en partie, assumée par un tiers.

2804. La preuve qui rend l'existence d'un fait plus probable que son inexistence est suffisante, à moins que la loi n'exige une preuve plus convaincante.

2811. La preuve d'un acte juridique ou d'un fait peut être établie par écrit, par témoignage, par présomption, par aveu ou par la présentation d'un élément matériel, conformément aux règles énoncées dans le présent livre et de la manière indiquée par le Code de procédure civile (chapitre C-25) ou par quelque autre loi.

2846. La présomption est une conséquence que la loi ou le tribunal tire d'un fait connu à un fait inconnu.

2849. Les présomptions qui ne sont pas établies par la loi sont laissées à l'appréciation

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the court which shall take only serious, precise and concordant presumptions into consideration.

du tribunal qui ne doit prendre en considération que celles qui sont graves, précises et concordantes.

2900. Interruption with regard to one of the creditors or debtors of a solidary or indivisible obligation has effect with regard to the others.

2900. L'interruption à l'égard de l'un des créanciers ou des débiteurs d'une obligation solidaire ou indivisible produit ses effets à l'égard des autres.

2908. A motion for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the motion.

2908. La requête pour obtenir l'autorisation d'exercer un recours collectif suspend la prescription en faveur de tous les membres du groupe auquel elle profite ou, le cas échéant, en faveur du groupe que décrit le jugement qui fait droit à la requête.

The suspension lasts until the motion is dismissed or annulled or until the judgment granting the motion is set aside; however, a member requesting to be excluded from the action or who is excluded therefrom by the description of the group made by the judgment on the motion, an interlocutory judgment or the judgment on the action ceases to benefit from the suspension of prescription.

Cette suspension dure tant que la requête n'est pas rejetée, annulée ou que le jugement qui y fait droit n'est pas annulé; par contre, le membre qui demande à être exclu du recours, ou qui en est exclu par la description que fait du groupe le jugement qui autorise le recours, un jugement interlocutoire ou le jugement qui dispose du recours, cesse de profiter de la suspension de la prescription.

In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.

Toutefois, s'il s'agit d'un jugement, la prescription ne recommence à courir qu'au moment où le jugement n'est plus susceptible d'appel.

2925. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise established.

2925. L'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est pas autrement fixé se prescrit par trois ans.

II. CODE OF CIVIL PROCEDURE OF QUEBEC

54.1. A court may, at any time, on request or even on its own initiative after having heard the parties on the point, declare an action or other pleading improper and impose a sanction on the party concerned.

54.1. Les tribunaux peuvent à tout moment, sur demande et même d'office après avoir entendu les parties sur le point, déclarer qu'une demande en justice ou un autre acte de procédure est abusif et prononcer une sanction contre la partie qui agit de manière abusive.

The procedural impropriety may consist in a claim or pleading that is clearly unfounded,

L'abus peut résulter d'une demande en justice ou d'un acte de procédure manifestement mal

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frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.

fondé, frivole ou dilatoire, ou d'un comportement vexatoire ou quérulent. Il peut aussi résulter de la mauvaise foi, de l'utilisation de la procédure de manière excessive ou déraisonnable ou de manière à nuire à autrui ou encore du détournement des fins de la justice, notamment si cela a pour effet de limiter la liberté d'expression d'autrui dans le contexte de débats publics.

54.2. If a party summarily establishes that an action or pleading may be an improper use of procedure, the onus is on the initiator of the action or pleading to show that it is not excessive or unreasonable and is justified in law.

54.2. Si une partie établit sommairement que la demande en justice ou l'acte de procédure peut constituer un abus, il revient à la partie qui l'introduit de démontrer que son geste n'est pas exercé de manière excessive ou déraisonnable et se justifie en droit.

A motion to have an action in the first instance dismissed on the grounds of its improper nature is presented as a preliminary exception.

La requête visant à faire rejeter la demande en justice en raison de son caractère abusif est, en première instance, présentée à titre de moyen préliminaire.

54.3. If the court notes an improper use of procedure, it may dismiss the action or other pleading, strike out a submission or require that it be amended, terminate or refuse to allow an examination, or annul a writ of summons served on a witness.

54.3. Le tribunal peut, dans un cas d'abus, rejeter la demande en justice ou l'acte de procédure, supprimer une conclusion ou en exiger la modification, refuser un interrogatoire ou y mettre fin ou annuler le bref d'assignation d'un témoin.

In such a case or where there appears to have been an improper use of procedure, the court may, if it considers it appropriate,

Dans un tel cas ou lorsqu'il paraît y avoir un abus, le tribunal peut, s'il l'estime approprié:

(1) subject the furtherance of the action or the pleading to certain conditions;

(1) assujettir la poursuite de la demande en justice ou l'acte de procédure à certaines conditions;

(2) require undertakings from the party concerned with regard to the orderly conduct of the proceeding;

(2) requérir des engagements de la partie concernée quant à la bonne marche de l'instance;

(3) suspend the proceeding for the period it determines;

(3) suspendre l'instance pour la période qu'il fixe;

(4) recommend to the chief judge or chief justice that special case management be ordered; or

(4) recommander au juge en chef d'ordonner une gestion particulière de l'instance;

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(5) order the initiator of the action or pleading to pay to the other party, under pain of dismissal of the action or pleading, a provision for the costs of the proceeding, if justified by the circumstances and if the court notes that without such assistance the party's financial situation would prevent it from effectively arguing its case.

(5) ordonner à la partie qui a introduit la demande en justice ou l'acte de procédure de verser à l'autre partie, sous peine de rejet de la demande ou de l'acte, une provision pour les frais de l'instance, si les circonstances le justifient et s'il constate que sans cette aide cette partie risque de se retrouver dans une situation économique telle qu'elle ne pourrait faire valoir son point de vue valablement.

54.4. On ruling on whether an action or pleading is improper, the court may order a provision for costs to be reimbursed, condemn a party to pay, in addition to costs, damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs incurred by that party, and, if justified by the circumstances, award punitive damages.

54.4. Le tribunal peut, en se prononçant sur le caractère abusif d'une demande en justice ou d'un acte de procédure, ordonner, le cas échéant, le remboursement de la provision versée pour les frais de l'instance, condamner une partie à payer, outre les dépens, des dommages-intérêts en réparation du préjudice subi par une autre partie, notamment pour compenser les honoraires et débours extrajudiciaires que celle-ci a engagés ou, si les circonstances le justifient, attribuer des dommages-intérêts punitifs.

If the amount of the damages is not admitted or may not be established easily at the time the action or pleading is declared improper, the court may summarily rule on the amount within the time and under the conditions determined by the court.

Si le montant des dommages-intérêts n'est pas admis ou ne peut être établi aisément au moment de la déclaration d'abus, il peut en décider sommairement dans le délai et sous les conditions qu'il détermine.

547. Notwithstanding appeal, provisional execution applies in respect of all the following matters unless, by a decision giving reasons, execution is suspended by the court:

547. Il y a lieu à exécution provisoire malgré l'appel dans tous les cas suivants, à moins que, par décision motivée, le tribunal ne suspende cette exécution:

(a) possessory actions;

(a) du possessoire;

(b) liquidation of a succession, or making an inventory;

(b) de mesures pour assurer la liquidation d'une succession ou de confections d'inventaires;

(c) urgent repairs;

(c) de réparations urgentes;

(d) ejectment, when there is no lease or the lease has expired or has been cancelled or annulled;

(d) d'expulsion des lieux, lorsqu'il n'y a pas de bail ou que le bail est expiré, résilié ou annulé;

(e) appointment, removal or replacement of tutors, curators or other administrators of the

(e) de nomination, de destitution ou de remplacement de tuteurs, curateurs ou autres

property of others, or revocation of the mandate given to a mandatary in anticipation of the mandator's incapacity;

administrateurs du bien d'autrui, ou encore de révocation du mandataire chargé d'exécuter un mandat donné en prévision de l'inaptitude du mandant;

(f) accounting;

(f) de reddition de comptes;

(g) alimentary pension or allowance or custody of children;

(g) de pension ou provision alimentaire, ou de garde d'enfants;

(h) judgments of sequestration;

(h) de sentences de séquestre;

(i) (subparagraph repealed);

(i) *(paragraphe abrogé);*

(j) judgments with regard to an improper use of procedure.

(j) de jugements rendus en matière d'abus de procédure.

In addition, the court may, upon application, order provisional execution in case of exceptional urgency or for any other reason deemed sufficient in particular where the fact of bringing the case to appeal is likely to cause serious or irreparable injury, for the whole or for part only of a judgment.

De plus, le tribunal peut, sur demande, ordonner l'exécution provisoire dans les cas d'urgence exceptionnelle ou pour quelqu'autre raison jugée suffisante notamment lorsque le fait de porter l'affaire en appel risque de causer un préjudice sérieux ou irréparable, pour la totalité ou pour une partie seulement du jugement.

985. The judgment has the authority of *res judicata* only as to the parties to the action and the amount claimed.

985. Le jugement n'a l'autorité de la chose jugée qu'à l'égard des parties au litige et que pour le montant réclamé.

The judgment cannot be invoked in an action based on the same cause and instituted before another court; the court, on its own initiative or at the request of a party, must dismiss any action or proof based on the judgment.

Le jugement ne peut être invoqué dans une action fondée sur la même cause et introduite devant un autre tribunal; le tribunal doit alors, à la demande d'une partie ou d'office, rejeter toute demande ou toute preuve basée sur ce jugement.

1031. The court orders collective recovery if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; it then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is not established.

1031. Le tribunal ordonne le recouvrement collectif si la preuve permet d'établir d'une façon suffisamment exacte le montant total des réclamations des membres; il détermine alors le montant dû par le débiteur même si l'identité de chacun des membres ou le montant exact de leur réclamation n'est pas établi.

1032. The judgment ordering the collective recovery of the claims orders the debtor either to deposit the established amount in

1032. Le jugement qui ordonne le recouvrement collectif des réclamations enjoint au débiteur soit de déposer au greffe

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the office of the court or with a financial institution operating in Québec, or to carry out a reparatory measure that it determines or to deposit a part of the established amount and to carry out a reparatory measure that it deems appropriate.

ou auprès d'un établissement financier exerçant son activité au Québec le montant établi ou d'exécuter une mesure réparatrice qu'il détermine, soit de déposer une partie du montant établi et d'exécuter une mesure réparatrice qu'il juge appropriée.

Where the court orders that an amount be deposited with a financial institution, the interest on the amount accrues to the members.

Lorsque le tribunal ordonne le dépôt auprès d'un établissement financier, les membres bénéficient alors des intérêts sur les montants déposés.

The judgment may also, for the reasons indicated therein, fix terms and conditions of payment.

Le jugement peut aussi fixer, pour les motifs qu'il indique, des modalités de paiement.

The clerk acts as seizing officer on behalf of the members.

Le greffier agit en qualité de saisissant pour le bénéfice des membres.

1034. The court may, if of opinion that the liquidation of individual claims or the distribution of an amount to each of the members is impossible or too expensive, refuse to proceed with it and provide for the distribution of the balance of the amounts recovered collectively after collocating the law costs and the fees of the representative's attorney.

1034. Le tribunal peut, s'il est d'avis que la liquidation des réclamations individuelles ou la distribution d'un montant à chacun des membres est impraticable ou trop onéreuse, refuser d'y procéder et pourvoir à la distribution du reliquat des montants recouvrés collectivement après collocation des frais de justice et des honoraires du procureur du représentant.

III. CONSUMER PROTECTION ACT

216. For the purposes of this title, representation includes an affirmation, a behaviour or an omission.

216. Aux fins du présent titre, une représentation comprend une affirmation, un comportement ou une omission.

218. To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.

218. Pour déterminer si une représentation constitue une pratique interdite, il faut tenir compte de l'impression générale qu'elle donne et, s'il y a lieu, du sens littéral des termes qui y sont employés.

219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

219. Aucun commerçant, fabricant ou publicitaire ne peut, par quelque moyen que ce soit, faire une représentation fausse ou trompeuse à un consommateur.

220. No merchant, manufacturer or

220. Aucun commerçant, fabricant ou

advertiser may, falsely, by any means whatever,

(a) ascribe certain special advantages to goods or services;

(b) hold out that the acquisition or use of goods or services will result in pecuniary benefit;

(c) hold out that the acquisition or use of goods or services confers or insures rights, recourses or obligations.

publicitaire ne peut faussement, par quelque moyen que ce soit:

(a) attribuer à un bien ou à un service un avantage particulier;

(b) prétendre qu'un avantage pécuniaire résultera de l'acquisition ou de l'utilisation d'un bien ou d'un service;

(c) prétendre que l'acquisition ou l'utilisation d'un bien ou d'un service confère ou assure un droit, un recours ou une obligation.

228. No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

228. Aucun commerçant, fabricant ou publicitaire ne peut, dans une représentation qu'il fait à un consommateur, passer sous silence un fait important.

253. Where a merchant, manufacturer or advertiser makes use of a prohibited practice in case of the sale, lease or construction of an immovable or, in any other case, of a prohibited practice referred to in paragraph a or b of section 220, a, b, c, d, e or g of section 221, d, e or f of section 222, c of section 224 or a or b of section 225, or in section 227, 228, 229, 237 or 239, it is presumed that had the consumer been aware of such practice, he would not have agreed to the contract or would not have paid such a high price.

253. Lorsqu'un commerçant, un fabricant ou un publicitaire se livre en cas de vente, de location ou de construction d'un immeuble à une pratique interdite ou, dans les autres cas, à une pratique interdite visée aux paragraphes *a* et *b* de l'article 220, *a*, *b*, *c*, *d*, *e* et *g* de l'article 221, *d*, *e* et *f* de l'article 222, *c* de l'article 224, *a* et *b* de l'article 225 et aux articles 227, 228, 229, 237 et 239, il y a présomption que, si le consommateur avait eu connaissance de cette pratique, il n'aurait pas contracté ou n'aurait pas donné un prix si élevé.

272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

(a) the specific performance of the obligation;

(b) the authorization to execute it at the merchant's or manufacturer's expense;

272. Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, un règlement ou un engagement volontaire souscrit en vertu de l'article 314 ou dont l'application a été étendue par un décret pris en vertu de l'article 315.1, le consommateur, sous réserve des autres recours prévus par la présente loi, peut demander, selon le cas:

(a) l'exécution de l'obligation;

(b) l'autorisation de la faire exécuter aux frais du commerçant ou du fabricant;

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(c) that his obligations be reduced;

(d) that the contract be rescinded;

(e) that the contract be set aside; or

(f) that the contract be annulled.

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

(c) la réduction de son obligation;

(d) la résiliation du contrat;

(e) la résolution du contrat; ou

(f) la nullité du contrat,

sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.

IV. QUEBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS

1. Every human being has a right to life, and to personal security, inviolability and freedom.

He also possesses juridical personality.

1. Tout être humain a droit à la vie, ainsi qu'à la sûreté, à l'intégrité et à la liberté de sa personne.

Il possède également la personnalité juridique.

4. Every person has a right to the safeguard of his dignity, honour and reputation.

4. Toute personne a droit à la sauvegarde de sa dignité, de son honneur et de sa réputation.

9. Every person has a right to non-disclosure of confidential information.

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

The tribunal must, *ex officio*, ensure that professional secrecy is respected.

9. Chacun a droit au respect du secret professionnel.

Toute personne tenue par la loi au secret professionnel et tout prêtre ou autre ministre du culte ne peuvent, même en justice, divulguer les renseignements confidentiels qui leur ont été révélés en raison de leur état ou profession, à moins qu'ils n'y soient autorisés par celui qui leur a fait ces confidences ou par une disposition expresse de la loi.

Le tribunal doit, d'office, assurer le respect du secret professionnel.

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition,

49. Une atteinte illicite à un droit ou à une liberté reconnu par la présente Charte confère à la victime le droit d'obtenir la cessation de cette atteinte et la réparation du préjudice moral ou matériel qui en résulte.

En cas d'atteinte illicite et intentionnelle, le tribunal peut en outre condamner son auteur

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condemn the person guilty of it to punitive damages.

à des dommages-intérêts punitifs.

V. TOBACCO PRODUCTS CONTROL ACT

9(1). No distributor shall sell or offer for sale a tobacco product unless

9(1). Il est interdit aux négociants de vendre ou mettre en vente un produit du tabac qui ne comporte pas, sur ou dans l'emballage respectivement, les éléments suivants:

(a) the package containing the product displays, in accordance with the regulations, messages pertaining to the health effect of the product and a list of toxic constituents of the product and, where applicable, of the smoke produced from its combustion indicating the quantities of those constituents present therein;

(a) les messages soulignant, conformément aux règlements, les effets du produit sur la santé, ainsi que la liste et la quantité des substances toxiques, que celui-ci contient et, le cas échéant, qui sont dégagées par sa combustion;

(b) if and as required by the regulations, a leaflet furnishing information relative to the health effects of the product has been placed inside the package containing the product.

(b) s'il y a lieu, le prospectus réglementaire contenant l'information sur les effets du produit sur la santé

9(2). No distributor shall sell or offer for sale a tobacco product if the package in which it is contained displays any writing other than the name, brand name and any trade marks of the tobacco product, the messages and list referred to in subsection (1), the label required by the Consumer Packaging and Labelling Act and the stamp and information required by sections 203 and 204 of the Excise Act.

9(2). Les seules autres mentions que peut comporter l'emballage d'un produit de tabac sont la désignation, le nom et toute marque de celui-ci, ainsi que les indications exigées par la *Loi sur l'emballage et l'étiquetage des produits de consommation* et le timbre et les renseignements prévus aux articles 203 et 204 de la Loi sur l'accise.

9(3). This section does not affect any obligation of a distributor, at common law or under any Act of Parliament or of a provincial legislature to warn purchasers of tobacco products of the health effects of those products.

9(3). Le présent article n'a pas pour effet de libérer le négociant de toute obligation qu'il aurait, aux termes d'une loi fédérale ou provinciale ou en *common law*, d'avertir les acheteurs de produits de tabac des effets de ceux-ci sur la santé.

VI. TOBACCO ACT

16. This section does not affect any

16. La présente partie n'a pas pour effet

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obligation of a distributor, at common law or under any Act of Parliament or of a provincial legislature to warn purchasers of tobacco products of the health effects of those products.

de libérer le fabricant ou le détaillant de toute obligation — qu'il peut avoir, au titre de toute règle de droit, notamment aux termes d'une loi fédérale ou provinciale — d'avertir les consommateurs des dangers pour la santé et des effets sur celle-ci liés à l'usage du produit et à ses émissions.

22(2). Subject to the regulations, a person may advertise a tobacco product by means of information advertising or brand-preference advertising that is in:

22(2). Il est possible, sous réserve des règlements, de faire la publicité – publicité informative ou préférentielle – d'un produit du tabac:

(a) a publication that is provided by mail and addressed to an adult who is identified by name;

(a) dans les publications qui sont expédiées par le courrier et qui sont adressées à un adulte désigné par son nom;

(b) a publication that has an adult readership of not less than eighty-five percent; or

(b) dans les publications dont au moins quatre-vingt-cinq pour cent des lecteurs sont des adultes;

(c) signs in a place where young persons are not permitted by law.

(c) sur des affiches placées dans des endroits dont l'accès est interdit aux jeunes par la loi.

22(3). Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons.

22(3). Le paragraphe (2) ne s'applique pas à la publicité de style de vie ou à la publicité dont il existe des motifs raisonnables de croire qu'elle pourrait être attrayante pour les jeunes.

VII. TOBACCO-RELATED DAMAGES AND HEALTH-CARE COSTS RECOVERY ACT

1. The purpose of this Act is to establish specific rules for the recovery of tobacco-related health care costs attributable to a wrong committed by one or more tobacco product manufacturers, in particular to allow the recovery of those costs regardless of when the wrong was committed.

1. La présente loi vise à établir des règles particulières adaptées au recouvrement du coût des soins de santé liés au tabac attribuable à la faute d'un ou de plusieurs fabricants de produits du tabac, notamment pour permettre le recouvrement de ce coût quel que soit le moment où cette faute a été commise.

It also seeks to make certain of those rules applicable to the recovery of damages for an injury attributable to a wrong committed by one or more of those manufacturers.

Elle vise également à rendre certaines de ces règles applicables au recouvrement de dommages-intérêts pour la réparation d'un préjudice attribuable à la faute d'un ou de plusieurs de ces fabricants.

15. In an action brought on a collective basis, proof of causation between alleged

15. Dans une action prise sur une base collective, la preuve du lien de causalité

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facts, in particular between the defendant's wrong or failure and the health care costs whose recovery is being sought, or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling.

existant entre des faits qui y sont allégués, notamment entre la faute ou le manquement d'un défendeur et le coût des soins de santé dont le recouvrement est demandé, ou entre l'exposition à un produit du tabac et la maladie ou la détérioration générale de l'état de santé des bénéficiaires de ces soins, peut être établie sur le seul fondement de renseignements statistiques ou tirés d'études épidémiologiques, d'études sociologiques ou de toutes autres études pertinentes, y compris les renseignements obtenus par un échantillonnage.

The same applies to proof of the health care costs whose recovery is being sought in such an action.

Il en est de même de la preuve du coût des soins de santé dont le recouvrement est demandé dans une telle action.

22. If it is not possible to determine which defendant in an action brought on an individual basis caused or contributed to the exposure to a type of tobacco product of particular health care recipients who suffered from a disease or a general deterioration of health resulting from the exposure, but because of a failure in a duty imposed on them, one or more of the defendants also caused or contributed to the risk for people of contracting a disease or experiencing a general deterioration of health by exposing them to the type of tobacco product involved, the court may find each of those defendants liable for health care costs incurred, in proportion to its share of liability for the risk.

22. Lorsque, dans une action prise sur une base individuelle, il n'est pas possible de déterminer lequel des défendeurs a causé ou contribué à causer l'exposition, à une catégorie de produits du tabac, de bénéficiaires déterminés de soins de santé qui ont souffert d'une maladie ou d'une détérioration générale de leur état de santé par suite de cette exposition, mais qu'en raison d'un manquement à un devoir qui leur est imposé, l'un ou plusieurs de ces défendeurs a par ailleurs causé ou contribué à causer le risque d'une maladie ou d'une détérioration générale de l'état de santé de personnes en les exposant à la catégorie de produits du tabac visée, le tribunal peut tenir chacun de ces derniers défendeurs responsable du coût des soins de santé engagé, en proportion de sa part de responsabilité relativement à ce risque.

23. In apportioning liability under section 22, the court may consider any factor it considers relevant, including

23. Dans le partage de responsabilité qu'il effectue en application de l'article 22, le tribunal peut tenir compte de tout facteur qu'il juge pertinent, notamment des suivants:

(1) the length of time a defendant engaged in the conduct that caused or contributed to the risk;

(1) la période pendant laquelle un défendeur s'est livré aux actes qui ont causé ou contribué à causer le risque;

(2) a defendant's market share in the type of tobacco product that caused or contributed to the risk;

(2) la part de marché du défendeur à l'égard de la catégorie de produits du tabac ayant causé ou contribué à causer le risque;

(3) the degree of toxicity of the substances in the type of tobacco product manufactured by a defendant;

(3) le degré de toxicité des substances contenues dans la catégorie de produits du tabac fabriqués par un défendeur;

(4) the sums spent by a defendant on research, marketing or promotion with respect to the type of tobacco product that caused or contributed to the risk;

(4) les sommes consacrées par un défendeur à la recherche, à la mise en marché ou à la promotion relativement à la catégorie de produits du tabac qui a causé ou contribué à causer le risque;

(5) the degree to which a defendant collaborated or participated with other manufacturers in any conduct that caused, contributed to or aggravated the risk;

(5) la mesure dans laquelle un défendeur a collaboré ou participé avec d'autres fabricants aux actes qui ont causé, contribué à causer ou aggravé le risque;

(6) the extent to which a defendant conducted tests and studies to determine the health risk resulting from exposure to the type of tobacco product involved;

(6) la mesure dans laquelle un défendeur a procédé à des analyses et à des études visant à déterminer les risques pour la santé résultant de l'exposition à la catégorie de produits du tabac visée;

(7) the extent to which a defendant assumed a leadership role in the manufacture of the type of tobacco product involved;

(7) le degré de leadership qu'un défendeur a exercé dans la fabrication de la catégorie de produits du tabac visée;

(8) the efforts a defendant made to warn the public about the health risks resulting from exposure to the type of tobacco product involved, and the concrete measures the defendant took to reduce those risks; and

(8) les efforts déployés par un défendeur pour informer le public des risques pour la santé résultant de l'exposition à la catégorie de produits du tabac visée, de même que les mesures concrètes qu'il a prises pour réduire ces risques;

(9) the extent to which a defendant continued manufacturing, marketing or promoting the type of tobacco product involved after it knew or ought to have known of the health risks resulting from exposure to that type of tobacco product.

(9) la mesure dans laquelle un défendeur a continué la fabrication, la mise en marché ou la promotion de la catégorie de produits du tabac visée après avoir connu ou dû connaître les risques pour la santé résultant de l'exposition à cette catégorie de produits.

24. The provisions of section 15 that relate to the establishment of causation between alleged facts and to proof of health care costs are applicable to actions brought on an individual basis.

24. Les dispositions de l'article 15, relatives à la preuve du lien de causalité existant entre des faits allégués et à la preuve du coût des soins de santé, sont applicables à l'action prise sur une base individuelle.

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25. Despite any incompatible provision, the rules of Chapter II relating to actions brought on an individual basis apply, with the necessary modifications, to an action brought by a person or the person's heirs or other successors for recovery of damages for any tobacco-related injury, including any health care costs, caused or contributed to by a tobacco-related wrong committed in Québec by one or more tobacco product manufacturers.

25. Nonobstant toute disposition contraire, les règles du chapitre II relatives à l'action prise sur une base individuelle s'appliquent, compte tenu des adaptations nécessaires, à toute action prise par une personne, ses héritiers ou autres ayants cause pour le recouvrement de dommages-intérêts en réparation de tout préjudice lié au tabac, y compris le coût de soins de santé s'il en est, causé ou occasionné par la faute, commise au Québec, d'un ou de plusieurs fabricants de produits du tabac.

Those rules also apply to any class action based on the recovery of damages for the injury.

Ces règles s'appliquent, de même, à tout recours collectif pour le recouvrement de dommages-intérêts en réparation d'un tel préjudice.

27. An action, including a class action, to recover tobacco-related health care costs or damages for tobacco-related injury may not be dismissed on the ground that the right of recovery is prescribed, if it is in progress on 19 June 2009 or brought within three years following that date.

27. Aucune action, y compris un recours collectif, prise pour le recouvrement du coût de soins de santé liés au tabac ou de dommages-intérêts pour la réparation d'un préjudice lié au tabac ne peut, si elle est en cours le 19 juin 2009 ou intentée dans les trois ans qui suivent cette date, être rejetée pour le motif que le droit de recouvrement est prescrit.

Actions dismissed on that ground before 19 June 2009 may be revived within three years following that date.

Les actions qui, antérieurement au 19 juin 2009, ont été rejetées pour ce motif peuvent être reprises, pourvu seulement qu'elles le soient dans les trois ans qui suivent cette date.

VIII. TOBACCO SALES TO YOUNG PERSONS ACT

4(1). Everyone who, in the course of a business, sells, gives or in any way furnishes, including a vending machine, any tobacco product to a person under the age of eighteen, whether for the person's own use or not, is guilty of an offence and liable

4(1). Quiconque, dans le cadre d'une activité commerciale, fournit – à titre onéreux ou gratuit –, notamment au moyen d'un appareil distributeur, à une personne âgée de moins de dix-huit ans des produits du tabac, pour l'usage de celle-ci ou non, commet une infraction et encourt :

(a) in the case of a first offence, to a fine not exceeding one thousand dollars;

(a) pour une première infraction, une amende maximale de mille dollars;

(b) in the case of a second offence, to a fine not exceeding two thousand dollars;

(b) pour la première récidive, une amende maximale de deux mille dollars;

(c) in the case of a third offence, to a fine not exceeding ten thousand dollars;

(d) in the case of a fourth or subsequent offence, to a fine not exceeding fifty thousand dollars.

4(3). Where an accused is charged with an offence under subsection (1), it is not a defence that the accused believed that the person to whom the tobacco product was sold, given or otherwise furnished was eighteen years of age or more at the time the offence is alleged to have been committed, unless the accused took all reasonable steps to ascertain the age of the person to whom the tobacco product was sold, given or otherwise furnished.

(c) pour la deuxième récidive, une amende maximale de deux mille dollars;

(d) pour toute autre récidive, une amende maximale de cinquante mille dollars.

4(3). Le fait que l'accusé croyait que la personne à qui le produit du tabac a été fourni était âgée de dix-huit and ou plus au moment de la perpétration de l'infraction reprochée ne constitue un moyen de défense que s'il a pris toutes les mesures voulues pour s'assurer de l'âge de la personne.

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SCHEDULE I – EXTRACTS OF THE VOLUNTARY CODES

1972

Rule 1: There will be no cigarette advertising after December 31, 1971, on radio and television.

Rule 2: All cigarette packages produced after April 1, 1972 shall bear, clearly and prominently displayed on one side thereof, the following words:

WARNING: THE DEPARTMENT OF NATIONAL HEALTH AND WELFARE ADVISES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED. (French version omitted)

Rule 9: All advertising, the purpose of which is solely to increase individual brand shares as such, shall be in conformity with the Canadian Code of Advertising Standards ...

Rule 10: Cigarette advertising shall be addressed to adults 18 years of age and over.

Rule 11: No advertising shall state or imply that smoking the brand advertised promotes physical health or that smoking a particular brand is better for health than smoking any other brand of cigarettes, or is essential to romance, prominence, success or personal advancement.

1975

Rule 1: There will be no cigarette or cigarette tobacco advertising on radio or television, nor will such media be used for the promotion of sponsorships of sports or other popular events whether through the use of brand or corporate name or logo.

Rule 6: All advertising will be in conformity with the Canadian Code of Advertising Standards …

Rule 7: Cigarette or cigarette tobacco advertising will be addressed to adults 18 years of age or over and will be directed solely to the increase of cigarette brand shares.

Rule 8: Same as Rule 11 in 1972

Rule 12: All cigarette packages, cigarette tobacco packages and containers will bear, clearly and prominently displayed on one side thereof, the following words:

WARNING: HEALTH AND WELFARE CANADA ADVISES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED – AVOID INHALING. (French version omitted)

Rule 13: The foregoing words will also be used in cigarette and cigarette tobacco print advertising … Furthermore, it will be prominently displayed on all transit advertising (interior and exterior), airport signs, subway advertising and market place advertising (interior and exterior) and point of sale material over 144 square inches in size but only in the language of the advertising message.

Rule 15: The average tar and nicotine content of smoke per cigarette will be shown on all packages and in print media advertising.

1984 (1)

Rule 1: Same as Rule 1 in 1975

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Rule 6: Same as Rule 6 in 1975

Rule 7: Same as Rule 7 in 1975

Rule 8: Same as Rule 8 in 1975

Rule 12: All cigarette packages, cigarette tobacco packages and containers imported of manufactured for use in Canada will bear, clearly and prominently displayed on one side thereof, the following words:

WARNING: HEALTH AND WELFARE CANADA ADVISES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED – AVOID INHALING. (French version omitted)

Rule 13: The foregoing words will also be used in cigarette and cigarette tobacco print advertising. Furthermore, they will be prominently displayed on all transit advertising (interior and exterior), airport signs, subway advertising and market place advertising (interior and exterior) and point of sale material over 930 square centimetres (144 square inches) in size but only in the language of the advertising message

Rule 15: Same as Rule 15 in 1975

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SCHEDULE J – PARAGRAPHS 2138-2145 OF THE PLAINTIFFS' NOTES

2138. The Financial Statements of JTI-M do not tell (or purport to tell) the whole story and do not reflect the "patrimonial situation" of the company.

2139. The evidence before the Court revealed that JTI was able to manipulate its patrimonial situation in order to suits its interests. JTI has the capacity to pay a substantial amount even though such capacity is not reflected per se in their financial statements. The patrimonial situation of JTI-M is not affected nor diminished by the strategic movement of funds, trademarks, etc. within its family of companies.

2140. The amount of punitive damages sought is certainly justifiable "in light of all the appropriate circumstances including the patrimonial situation of JTI-M".[522]

2141. Here are some of the facts established at trial which support this point of view:

(a) Both class actions were filed in September/November 1998 against JTI-M's predecessor RJR-M;

(b) In March 1999, RJR-M was independently and professionally valued at $2.2 billion, of which its trademarks were independently valued at $1.2 billion; [523]

(c) The Company (RJR-M) which became JTI-M was and still is a manufacturer and distributor of cigarettes; its manufacturing facility was and still is located on Ontario Street East in Montreal;[524] its market share was and still is approximately 19.59%;[525] its annual earnings from operations were and still are in the $100 million range and it did not and still does not have any (significant) long-term debt owed to any party at arm's length;[526]

(d) JTI-TM is a wholly-owned subsidiary of JTI-M;[527] it was created for the sole purpose of holding the trademarks for creditor-proofing purposes;[528] its business address is the same as that of JTI-M;[529] all of its officers are employees of JTI-M and it does not carry on any business activities;[530]

(e) For tax and/or creditor-proofing purposes it has "parked" the trademarks in its wholly-owned subsidiary (JTI-TM), it has "loaded" JTI-M with debt

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522 Article 1621 C.C.Q.
523 *Ibidem*, pp. 53-54, Qs. 23-25; pp. 64-64, Qs. 55-56.
524 *Ibidem*, p 82, Q. 109; Exhibit 1749-r-CONF.
525 Exhibit 1437A.
526 Testimony of Michel Poirier, May 23, 2014, p. 71, Q. 62; pp. 166, Q. 388.
527 *Ibidem*, p. 81, Qs. 103-105.
528 *Ibidem*, pp. 85-87, Qs. 121-127; p. 95, Q. 145; pp. 166-167, Qs. 389-394; Exhibit 1750-r-CONF.
529 *Ibidem*, p. 82, Qs. 108-109; Exhibit 1749-r-conf; Exhibit 1749.1-r-conf.
530 *Ibidem*, p. 165, Qs. 382-384.

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through a circular exchange of cheques and complex inter-corporate transactions, etc.;[531]

(f) However the "patrimonial situation" of JTI-M remains the same – it was and still is a highly profitable $2 billion company with annual earnings from operations (well) in excess of $100 million.[532]

(g) The evidence has shown that notwithstanding the constantly changing inter-corporate structure, the transactions and the $200 Million (plus) deficit on JTI-M's 2003 – 2013 Financial Statements, JTI-M has been fully able of paying or not paying huge sums of money to its subsidiary JTI-TM, whenever it suits JTI-M:[533]

2004	JTI-M sought protection under CCAA and it requested the presiding judge in Ontario (Justice James Farley) to issue a Stay Order to prevent JTI-M from paying principal, interest, royalties and dividends (in excess of $100 Million per year) to its subsidiary (JTI-TM) and related companies;[534]
2005	No interest or royalty payments were made to JTI-TM;[535]
2006	JTI-M paid JTI-TM $186 Million in interest and royalties after furnishing the CCAA Monitor with Letters of Credit issued on the strength of a related company;[536]
2007 - 2008	No interest or royalty payments were made to JTI-TM;[537]
2009, 2010, 2011 & 2012	JTI-M "amended" the Debenture Agreement with JTI-TM to reduce the rate of interest on the "loan" of $1.2 billion from 7% to 0% (approximately) thereby reducing the interest payment from $100 Million (approximately) to zero (approximately);[538]
2009	JTI-M "amended" its Royalty Agreement with JTI-TM to reduce the rate of royalty payments by 50%;[539]
2010	JTI-M paid $150 million to the Quebec and Federal Governments as its contribution toward the settlement of the

[531] *Ibidem*, pp. 107-109, Qs. 168-176; pp. 114-115, Qs. 188-189; Exhibit 1751.2-r-conf (according to Plaintiffs) or 1751.1.8-r-CONF (according to Defendants).
[532] *Ibidem*, p. 166, Q.388; Exhibit 1731-1998-r-conf to Exhibit 1731-2013-r-conf.
[533] *Ibidem*, pp. 160-167, Qs. 362-394.
[534] *Ibidem*, pp. 128-129, Qs. 249-254; p. 131, Q.265.
[535] *Ibidem*, pp. 141-142, Q. 289.
[536] *Ibidem*, pp. 152-153, Qs. 318-321.
[537] *Ibidem*, pp. 153-154, Qs. 323-324.
[538] *Ibidem*, pp. 156-158, Qs. 340-352.
[539] *Ibidem*, pp. 155-156, Qs. 333-337.

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	smuggling claims;[540]
Dec. 2012	JTI-M once again "amended" its Debenture Agreements with JTI-TM so as to increase the interest rate from 0% - 7% per annum, thereby resulting in an obligation to pay approximately $100 Million in "interest" to JTI-TM starting in 2013;[541]
2012	JTI-M "wiped out" a $410 million debt owed by JTI-TM.[542]

2142. In the case of JTI, the term "capacity" to pay punitive damages may be misleading; it would be more appropriate to talk of its "ability" to do so. While JTI may not have the "capacity" to pay punitive damages based on its financial statements and its obligations to its subsidiary, the evidence shows that it has the "ability" to pay notwithstanding its theoretical "incapacity" to do so. By way of example, in 2010, JTI did not have the "capacity" to pay $150 million to settle the smuggling claim based on its financial statements which showed a deficit and based on its "obligation" to pay JTI-M $100 million in "interest".[543] Nevertheless, the evidence showed that it had the "ability" to pay and did pay $150 million to settle the smuggling claim despite its theoretical "incapacity" to do so.

2143. Here, the Court is not being asked to "ignore" the inter-corporate transactions nor to pronounce on their legality, nor to annul them. On the contrary, the Court is invited to take those transactions and their stated purpose into account when assessing the award for punitive damages "in light of all the appropriate circumstances and, in particular, the patrimonial situation" of the company.

2144. For example, the following answers from Michel Poirier during his examination in chief need to be taken into account to conclude that an exemplary high amount of punitive damages is warranted against JTI here[544]:

> [172]Q." […]The modifications suggested will enhance our ability to protect our most valuable assets." Most valuable assets in this context are the trademarks valued at one point two (1.2) billion dollars?
>
> A- Yes. Yes.
>
> [173]Q-And it's to protect your most valuable assets from creditors, creditors like perhaps the plaintiffs in this lawsuit?
>
> A- Perhaps the plaintiffs. It's a tobacco company.
>
> [173]Q-It's a what?

---

540 *Ibidem*, pp. 159-160, Qs. 358-360.

541 *Ibidem*, pp. 162-163, Q. 374; pp. 165-166, Q.386; Exhibit 1752-r-conf (according to Plaintiffs) or Exhibit 1748.1-r-conf (according to Defendants).

542 *Ibidem*, p. 250, Qs. 602-603; Exhibit 1748.2-R-CONF, pdf 14.

543 *Ibidem*, p. 159, Q. 358.

544 Mr. Poirier was asked to comment on the stated purpose of those transactions as mentioned in Exhibit 1751.2-R-CONF (according to Plaintiffs) or Exhibit 1751.1.8-R-CONF (according to Defendants).

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A- It's a tobacco company.[545]

2145. JTI-M will satisfy the judgment awarding punitive damages or it will file for bankruptcy (or, once again, seek CCAA protection). A Trustee (or Monitor) will be appointed and, if necessary, appropriate measures taken.

(Emphasis in the original)

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[545] *Ibidem*, at pages 108-109.

TAB 9

See para. 43

CITATION: Markson v. MBNA Canada Bank, 2012 ONSC 5891
COURT FILE NO.: 03-CV-254970CP
DATE: 20121017

2012 ONSC 5891 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	)	
	)	
STEPHEN MARKSON	)	*Margaret L. Waddell* and *Kirk Baert*, for the
	)	Plaintiff/Moving Party
Plaintiff	)	
	)	
– and –	)	
	)	
MBNA CANADA BANK	)	*Jill Lawrie* and *David Noseworthy*, for the
	)	Defendant/Respondent
Defendant	)	
	)	
	)	**HEARD:** October 11, 2012

C. HORKINS J.

[1] This is a motion for approval of the settlement of this class action and class counsel fees pursuant to s. 29 of the *Class Proceedings Act*, 1992, S.O. 1992, c. C.6 ("*Class Proceedings Act*"). Notice of this approval hearing has been given to the class.

BACKGROUND

[2] This action was commenced on September 9, 2003. The plaintiff asserts causes of action for: (i) breach of contract, (ii) unjust enrichment and for restitution of criminal interest paid to MBNA Canada Bank ("MBNA"), and (iii) a declaration that MBNA has violated s. 347 of the *Criminal Code*, R.S.C. 1985 c. C-46.

[3] The action relates to cash advance transaction fees and related compound interest that MBNA charged and received. The fees and interest occurred when MBNA customers took a cash advance using the credit facilities accessed through their MBNA credit cards ("Cash Advances").

[4] MBNA charged its cardholders a transaction fee of 1% of the principal amount of each Cash Advance, subject to minimum and maximum fees (the "Cash Advance Fee"). In addition to

the Cash Advance Fee, MBNA charged compound periodic interest on each cash advance transaction until it was repaid in full. It is the imposition of a flat fee that can cause the interest received to exceed the maximum effective annual interest rate, if the debt is repaid in a short period of time.

[5] In situations where the Cash Advance and associated periodic interest and the Cash Advance Fee are repaid in full in a relatively short period of time, the plaintiff alleges that MBNA received interest at an effective annual rate in excess of 60%, contrary to the provisions of s. 347(1) of the *Criminal Code* and in breach of the terms of its cardholder agreements.

[6] The plaintiff alleges, and MBNA now admits that the Cash Advance Fee as well as the periodic interest charged and received by MBNA on Cash Advances are "interest" as defined in s. 347(2) of the *Criminal Code*. While MBNA conceded this point for the certification motion, it did not concede this point for the purpose of trial until the plaintiff brought the motion for summary judgment.

[7] The following overview of the litigation demonstrates how vigorously the action was pursued and defended. Since the commencement of this action in 2003, the parties have taken numerous steps as follows:

(a) The motion for certification was heard June 28 and July 5, 2004. The motion was denied by order dated July 28, 2004.

(b) The plaintiff appealed to the Divisional Court. The appeal was heard on May 26 and 27, 2005, and the appeal was denied on October 27, 2005, with Justice O'Driscoll dissenting.

(c) Leave to appeal to the Court of Appeal was granted by order dated April 2, 2006.

(d) The appeal was argued on December 7, 2006. Certification was granted by the Court of Appeal by order dated May 2, 2007.

(e) The defendant sought and was denied leave to appeal to the Supreme Court of Canada by order dated November 15, 2007.

(f) On October 21, 2009, the parties brought competing motions for approval of their respective litigation plans. The defendant was granted an order bifurcating the trial.

(g) By order dated February 4, 2011, the court ordered MBNA to produce additional documents.

(h) MBNA's representative was examined for discovery on July 19, 2011 and undertakings were then answered.

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(i) The plaintiff brought a motion for summary judgment on the Phase 1 common issues (liability). This motion was scheduled to be argued during the week of June 25 and August 20 and 21, 2012.

(j) The plaintiff conducted cross-examinations of the defendant's affiants in response to the motion for summary judgment on April 20, 2012.

(k) A mediation was held on May 14, 2012.

(l) The general parameters of a settlement were reached at the mediation on May 14, 2012. The final terms of the settlement are set out in a Settlement Agreement, dated August 10, 2012.

[8] Finally, I add some background evidence about the defendant's business that is relevant to how this settlement is structured. MBNA commenced its Canadian credit card operations in November 1997. It issued credit card products in Canada within the MBNA MasterCard® brand. On January 1, 2009, MBNA amalgamated with CUETS Financial Ltd. ("CUETS"), and continued to carry on business as MBNA. From January 1, 2009 to November 30, 2011, CUETS' customers' MasterCard® credit cards were issued by MBNA. On December 1, 2011, MBNA sold substantially all of its credit card business to The Toronto Dominion Bank ("TD"), including the accounts held through CUETS.

SUMMARY OF THE SETTLEMENT

[9] The key terms of the Settlement Agreement are:

(a) The Class will be expanded to include all MBNA cardholders who, at any time between March 12, 2008 and November 30, 2011, held an MBNA credit card on which Cash Advances could be taken and all individuals who held a CUETS Financial credit card issued between January 1, 2009 and November 30, 2011 on which Cash Advances could be taken.

(b) MBNA will pay $8,000,000 into an interest bearing account, which will comprise the Settlement Fund to be paid out as follows:

1. Class Counsel's fees and disbursements, inclusive of taxes, as approved by the court, will be deducted from the Settlement Fund.

2. 10% of the net balance will be paid to the Class Proceedings Fund, along with reimbursement of the disbursements paid by the Fund.

3. $500,000 will be paid to the Law Foundation's Access to Justice Fund.

4. The balance of the Settlement Fund will be divided by the number of open MBNA accounts as of November 30, 2011 where at least one Cash

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Advance has been taken (the "Distribution Class Members" as defined in the Settlement Agreement) to determine the amount of credit (the "distribution credit") to be applied to each qualifying account.

(c) The distribution credit will be applied to the Distribution Class Members' accounts that remain active as at the date of distribution.

(d) Any remaining undistributed amount of the Settlement Fund will also be paid to the Law Foundation's Access to Justice Fund.

(e) MBNA will bear the costs of the notice programs and administration of the settlement, which will cost an estimated $425,000.

[10] It is important to note that only Distribution Class Members will receive a credit. Class Counsel's best estimate of the amount of each credit is in the range of $5, assuming there are approximately 625,000 Distribution Class Members.

[11] A credit will only be paid to a Class Member who took at least one cash advance and whose account at TD remains open on the date of the distribution, regardless of whether the individual Class Member ever paid interest at a criminal rate.

[12] To actually identify which Class Member paid interest at a criminal rate (and calculate the actual interest) would require an individual review of about 1.925 million accounts. Such a process would be prohibitively expensive and time consuming. The parties agreed that this was not justified given the value of the estimated credit and the total amount of the Settlement Fund.

[13] When MBNA sold the credit card accounts to TD, the electronic credit card records for open accounts were transferred to TD. MBNA (and therefore Class Counsel) no longer have access to these records. However these records must be searched to identify who qualifies as a Distribution Class Member. TD has agreed to conduct the electronic search in accordance with the Settlement Agreement. TD is not providing a list of names of those who qualify. Rather, they will confirm the number of eligible open account holders and arrange for each eligible account holder to receive a credit on their account.

[14] The parties also decided to limit direct recovery to those Class Members who currently have open accounts that meet TD's searchability criteria because of the prohibitive cost of identifying and processing payments to those whose accounts have been closed.

[15] Payment to a closed account holder would require a search to identify closed accounts and locate the closed account holder. MBNA's electronic records only went back to 2005, so to identify those cardholders whose accounts were closed in 2004 or prior and who took one or more cash advances would require a manual search of micro-fiche records. The cost would be prohibitive and it would take an excessive amount of time.

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[16] While it might be possible to identify accounts closed after January 2005, where one or more cash advances had been taken, MBNA's records would not provide current address information for the closed account holder. As a result, there would be an additional cost to try and locate these Class Members.

[17] Even if current addresses could be found, the cost to process a cheque to pay these class members their share of the Settlement Fund would be excessive in relation to the amount of the payment. Alternatively, someone would have to contact each person and request current banking information to allow an electronic transfer of the credit. This too would be time consuming and expensive.

[18] As a result, the parties agreed to pay $500,000 to the Law Foundation's Access to Justice Fund. They propose that this payment be made as a *cy près* distribution in lieu of direct payment to those Class Members who do not have open accounts at TD on the date of distribution of the Settlement Fund.

EXPANSION OF CLASS

[19] As noted above, the settlement includes an agreement to expand the definition of the class. The approved class definition is "[a]ll persons in Canada who, at any time before the last of the dates on which notice of certification is given pursuant to the order of the Ontario Superior Court of Justice, hold or have held, an MBNA credit card on which cash advances could be obtained." The Class Period ran from November 1, 1997, when MBNA commenced business in Canada, until March 12, 2008, the last date on which MBNA gave notice of certification.

[20] Under the proposed settlement the original Class Period will be extended until the end on November 30, 2011, which is when MBNA sold substantially all of its accounts to TD. The parties have agreed to extend the Class Period so that all MBNA cardholders are treated equally and receive the benefits of the settlement. The expanded definition is as follows:

> All individuals who, at any time before March 12, 2008 held an MBNA credit card on which cash advances could be taken (Original Class) and who is not an Opt-Out; and all individuals who held an MBNA credit card issued between March 12, 2008 and November 30, 2011 on which cash advances could be taken and all individuals who held a CUETS Financial credit card issued between January 1, 2009 and November 30, 2011 on which cash advances could be taken (New Class) and who is not an Opt-Out (together, the "Class").

[21] The parties negotiated the settlement assuming that this expansion would be accepted. As a result the quantum of the settlement was based on this expanded class. The fair and reasonable approach to settlement is to treat all MBNA cardholders equally. I accept the expansion of the class as set out above.

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SETTLEMENT APPROVAL

Legal Framework

[22] Section 29(2) of the *Class Proceedings Act* provides that a settlement of a class proceeding is not binding unless it has been approved by the court. The test for approving a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, taking into account the claims and defences in the litigation and any objections to the settlement.

[23] When considering the approval of negotiated settlements, the court may consider, among other things the following factors: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arm's length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: See *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 440-44 (Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372; *Parsons v. Canadian Red Cross Society* (1999), 103 O.T.C. 161, [1999] O.J. No. 3572 at paras. 71-72 (S.C.J.); *Frohlinger v. Nortel Networks Corp.* (2007), 40 C.P.C. (6th) 62, [2007] O.J. No. 148 at para. 8 (S.C.J.); *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.T.C. 36 (S.C.J.), [2005] O.J. No. 175 at paras. 12-13; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.T.C. 233, [2002] O.J. No. 1361 at para. 10 (S.C.J.).

[24] These factors provide a guide for analysis rather than a rigid set of criteria that must be applied to every settlement. In practice, it may be that all of the factors are not applicable or should not be given equal weight. (See *Parsons v. Canadian Red Cross Society*, *supra*, at para. 73.)

[25] The court is not required to have evidence sufficient to decide the merits of the issue. This "is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture. This is imperative in order that the court might be satisfied that the settlement delivers adequate relief for the class in exchange for the surrender of litigation rights against the defendants" (*Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245 at para. at 92 (S.C.J.)).

[26] A settlement does not have to be perfect. It need only fall "within a zone or range of reasonableness": *Ontario New Home Warranty Program v. Chevron Chemical Co., supra*, at para. 89: See also *Parsons*, at para. 69 (S.C.J.); *Bilodeau v. Maple Leaf Foods Inc.*, [2009] O.J. No. 1006 at paras. 45-46 (S.C.J.); *Dabbs v. Sun Life Assurance Co. of Canada*, *supra*, at pp. 439-440; *Frohlinger v. Nortel Networks Corp., supra*, at para. 8.

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[27] The "zone of reasonableness" concept helps to guide the exercise of the court's supervisory jurisdiction over the approval of a settlement of class actions. It is not the court's responsibility to determine whether a better settlement might have been reached. Nor is it the responsibility of the court to send the parties back to the bargaining table to negotiate a settlement that is more favourable to the class. Where the parties are represented, as they are in this case, by reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.

[28] As stated in *Dabbs v. Sun Life Assurance Co. of Canada, supra*, at p. 440, there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by class counsel, is presented for Court approval:

> [T]he recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.

Factors Supporting Approval

[29] I accept that the settlement was the product of hard fought negotiations conducted by experienced counsel at arm's length. The settlement is grounded in a principled approach to the assessment of damages and is reasonably reflective of the litigation risks, costs and delays that would result from taking the matter to trial.

[30] Counsel had a sufficient evidentiary basis to evaluate liability and damages. Both parties engaged numerous experts to assist them. The plaintiff retained an actuary and a forensic accounting firm that included accounting experts, computer programming experts and statisticians. When the parties agreed to attend mediation on May 14 2012, they had been litigating this action for nine years. Production of documents, examinations for discovery and data analysis, retaining expert witnesses, holding cross-examinations on the motion for summary judgment and engaging in arm’s length settlement discussions had all been completed. A comprehensive record was available. Both sides had fully considered the merits of the claim in anticipation of the summary judgment motion that was set to be argued in June 2012.

[31] When negotiating the settlement, counsel took into consideration the various risk factors. In particular, there was the risk that MBNA’s voluntariness defence would succeed. As well, there were risks associated with the unique nature of the action. Counsel believed that this was the first case to allege that a credit card issuer received criminal interest as a result of fees it charged for credit advanced under the credit card agreement. Counsel also believed that it was the first class action to consider how sampling of the defendant’s data could be used to decide liability and damages.

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[32] There was a fundamental dispute about which assumptions should apply to calculate the effective annual rate of interest on cash advances. There was a risk that the trial judge would not accept the plaintiff's assumptions.

[33] There was also the risk of further delay in reaching the end of the litigation if not settled. While a summary judgment motion was scheduled for June and August 2012, this was a motion that would only determine liability. Regardless of who succeeded on the summary judgment motion, an appeal was likely. Assuming eventual success on the liability issue, the class faced considerable delay and costs before the damages would be tried.

[34] It is significant that Mr. Markson supports and recommends approval of the settlement. He understands the inherent risks associated with the pending summary judgment motion, a possible trial on liability, a further trial to assess damages and the possibility of appeals from each step that would be taken. He believes that the settlement is in the best interests of the expanded class.

[35] It is also relevant to note that during the mediation, the mediator shared his view of the merits of the action and the value of a reasonable settlement. The amount of the settlement exceeds the figure that the mediator recommended.

[36] Since notice of the settlement approval hearing was published, Class Counsel have received over 90 calls, emails, and letters from Class Members. The overwhelming majority of the Class Members who have contacted Class Counsel are supportive of the settlement. Only two Class Members have raised any concerns about the Settlement Agreement that could be classified as objections. Both individuals have closed their accounts and will not receive a credit. They say this is unjust and arbitrary.

[37] The court considered similar objections to a settlement in *Gilbert v. Canadian Imperial Bank of Commerce*, [2004] O.T.C. 902, [2004] O.J. No. 4260 at paras. 19-20 (S.C.J.) ("*Gilbert*"). In *Gilbert*, past cardholders did not receive a distribution from the settlement fund. In that case, as in this one, a *cy près* donation was made in lieu of payment to past cardholders and this was determined to be "[…] acceptable given the peregrinations involved in pursuing those claims. This approach is acceptable in the present circumstances given the impossibility of identifying such Class Members."

[38] I take into consideration that given the size of the Class, the number of objectors is exceedingly small. "It must be remembered that the test is not whether the settlement meets the approval of each Class Member. Rather, it is whether the settlement is in the best interests of the Class as a whole." (*Gilbert* at para.19).

[39] The decision to limit recovery to those with open accounts was not arbitrary. I accept the evidence that explains the difficulty one would face trying to locate closed account holders, the prohibitive cost of such a search and effecting payment if located. Counsel carefully considered

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these challenges and decided to limit recovery to those with open accounts. In my view this approach is fair and reasonable.

[40] The facts of this case support use of a *cy près* distribution in lieu of direct payment to closed account holders. There is ample authority to support the use of a *cy près* distribution in these circumstances (See *Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128, 79 C.C.L.T. (3d) 272; *Cassano v. Toronto-Dominion Bank* (2009), 79 C.P.C. (6th) 110, [2009] O.J. No. 2922 (S.C.J.); *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602).

[41] Further, the *Class Proceedings Act* "permits the court to direct the distribution of settlement monies by any means it considers appropriate, whether or not such a distribution would benefit persons who are not class members". (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758, [2005] O.J. No. 1118 (S.C.J.)

[42] The Ontario Law Foundation's Access to Justice Fund is a suitable recipient of the *cy près* distribution. Counsel propose the Justice Fund as the *cy près* recipient because it directly achieves one of the overarching goals of the *Class Proceedings Act*. Specifically, it aids in providing public access to justice throughout Canada. The Justice Fund is the only national source of grants with an access to justice mandate, and it provides funding to projects that are national, regional or local in scope. The five themes for the current grants from the Fund are: linguistic and rural access to justice, aboriginal access to justice, self help, family violence, and consumer rights. Since this action is a consumer rights action at its heart, the choice of the Access to Justice Fund is appropriate.

[43] When counsel propose a *cy près* distribution as a term to settle a class action, they often identify a charity that has no connection to the issues in the litigation and no ability to improve access to justice. In my view this should be avoided. The recipient of the *cy près* distribution should either be directly connected to the issues in the class action (as in *Serhan v. Johnson & Johnson*) or like the Law Foundation, able to use the money to further the goals of the *Class Proceedings Act* .

[44] In summary, I conclude that this settlement is fair and reasonable and in the best interests of the class as a whole.

APPROVAL OF CLASS COUNSEL FEES

The Retainer Agreement

[45] Class Counsel entered into a contingency fee retainer agreement with Mr. Markson. This agreement provided that fees were to be fixed at 30% of any settlement or award, subject to court approval. Class Counsel seek approval of their fees in accordance with this agreement, in the amount of $2,400,000 (30% of $8,000,000), plus applicable taxes and disbursements.

[46] An agreement respecting fees and disbursements between class counsel and a representative plaintiff is enforceable if approved by the court.

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Legal Framework

[47] The court's task is to determine a fee that is "fair and reasonable" in all of the circumstances: see *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 at paras. 13 and 56 (S.C.J.).

[48] In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.T.C. 208, [2005] O.J. No. 1117 at para. 67 (S.C.J.), Cumming J. summarized some of the factors to be considered by the court when fixing class counsel's fees:

(a) the factual and legal complexities of the matters dealt with;

(b) the risk undertaken, including the risk that the matter might not be certified;

(c) the degree of responsibility assumed by class counsel;

(d) the monetary value of the matters in issue;

(e) the importance of the matter to the class;

(f) the degree of skill and competence demonstrated by class counsel;

(g) the results achieved;

(h) the ability of the class to pay;

(i) the expectations of the class as to the amount of fees; and

(j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[49] With these factors in mind, the following review confirms the reasonableness of the proposed fees and disbursements.

The Fee is Fair and Reasonable

[50] Class Counsel have invested almost $2 million of time in this case. Under the terms of the contingency fee retainer agreement, they will receive a premium of about $500,000, or less than a multiple of 1.3 on their docketed fees. No one in the class has complained about the amount of fees.

[51] Class Counsel assumed considerable risk in this case because the nature of the allegations advanced against MBNA was somewhat unique. Further to the knowledge of Class Counsel, this is the first class action in which the plaintiff has engaged in sampling for the purpose of seeking to demonstrate liability and quantifying potential damages.

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[52] The litigation process was complicated as both sides had differing views on the most appropriate manner to press the case forward, particularly with respect to the sampling of the cardholder data from MBNA's records.

[53] MBNA is a sophisticated opponent who defended the action vigorously from the outset. It challenged and opposed many of the plaintiff's assumptions regarding calculation of criminal interest and interpretation of the cardholder agreement.

[54] Class Counsel assumed the risks of this litigation in agreeing to act on a contingency basis. The results were not certain. The case was litigated for nine years before a settlement was achieved. The result achieved is a fair and reasonable one.

COMPENSATION FOR MR. MARKSON

[55] The court is asked to approve payment of a $5,000 "honorarium" to Mr. Markson. Class Counsel propose that this be paid from the fees awarded to them. In essence, they are asking that he be compensated for his work.

[56] Compensation for a representative plaintiff is rare and "must be awarded sparingly" (*Sutherland v. Boots Pharmaceutical Plc,* [2002] O.T.C. 233, [2002] O.J. No. 1361 at para. 22 (S.C.J.)("*Sutherland*")). As the court stated in *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369 at para. 28 (Ont. Gen. Div.) ("*Windisman")* "such awards should not be seen as routine." (See also *McCarthy v. Canadian Red Cross Society* (2007), 158 A.C.W.S. (3d) 12, [2007] O.J. No. 2314 at para. 20 (S.C.J.); *Bellaire v. Daya* (2007), 162 A.C.W.S. (3d) 371, [2007] O.J. No. 4819 at para. 71 (S.C.J.); *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 at para. 93, [2011] O.J. No. 5781; *Garland v. Enbridge Gas Distribution Inc.* (2006), 153 A.C.W.S. (3d) 785, [2006] O.J. No. 4907 at paras. 45-46 (S.C.J.); *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-43, [2012] 5 C.T.C. 24).

[57] Compensation must only be awarded if the representative plaintiff has made an exceptional contribution that has resulted in success for the class. As Winkler J. stated in *Sutherland* at para. 22, the representative plaintiff's assistance must be "necessary" and "such assistance must result in monetary success for the class and in any event, if granted, should not be in excess of an amount that would be purely compensatory on a quantum meruit basis."

[58] If compensation is justified it should be paid out of the settlement fund and not from class counsel fees as requested in this case (see *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 at paras. 135, 276 O.A.C. 237) As the court explained in *Smith Estate v. National Money Mart Co.* at para. 135 "[cl]ass counsel fees are predicated on the work that class counsel have done for the class. Allocating a part of that fee to a layperson, especially a representative plaintiff, raises the spectre of fee splitting".

[59] There is good reason to limit compensation to the exceptional cases. This was explained in *Sutherland* at para. 22:

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> … Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims.

[60] I accept that Mr. Markson was dedicated to his job as the representative plaintiff and I acknowledge his contribution. However, this is not a case where the contribution justifies compensation. My reasons follow.

[61] Mr. Markson fulfilled the usual tasks expected of the position. For example, he retained counsel and received reports as the litigation progressed, informed himself about the issues, reviewed documents, swore affidavits to support motions and was cross-examined on his affidavit for certification. These are tasks that every representative plaintiff is expected to perform. As McLachlin C.J.C. stated in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 41, it is expected "that the proposed representative will vigorously and capably prosecute the interests of the class". Fulfilling this role does not lead to compensation.

[62] Mr. Markson adds that he was prepared to have his name and professional reputation put under public scrutiny for the benefit of the class. However, this is not unique because every representative plaintiff bears this burden.

[63] Class Counsel and Mr. Markson say that the contribution was exceptional because of the value that Mr. Markson added through his expertise. Mr. Markson is a registered professional engineer. His career has focused on computerized financial analysis and electronic database design, programming and analysis.

[64] Mr. Markson states that because of his "mathematical and computing skills, which the average person does not have" he was "able to figure out that MBNA was receiving interest at a criminal rate in some circumstances." Class Counsel credits Mr. Markson for discovering that the defendant was charging excessive interest. They say that Mr. Markson's expertise allowed him to identify the interest rate and, but for his expertise, the class would not be receiving any restitution.

[65] A proceeding under the *Class Proceedings Act* alleging that a defendant received interest at a criminal rate, contrary to s. 347 of the *Criminal Code* was not new when this action was started (see *Garland v. Consumers' Gas Co.*, [1995] O.J. No. 302, 22 O.R. (3d) 451).

[66] Mr. Markson may have brought the idea of this specific claim to class action counsel. This is not exceptional. The concept of pursuing a class action for a criminal interest charge was

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already present in the legal community. Some class actions are started because individuals who have suffered a loss reach out to class counsel. They do not receive compensation because they take an idea and approach counsel. This may be a factor among others that justifies compensation, but alone it is not exceptional.

[67] I accept that Mr. Markson's math skills allowed him to calculate the rate of interest. However this was not necessary to the action being commenced. Someone with average math skills could have looked at the MBNA charge, questioned the amount of the charge and without knowing the exact interest rate, they could have decided to approach counsel. It is usual and expected that a representative plaintiff will have a close connection and understanding of the harm that is the subject of the action.

[68] Mr. Markson states that because of his work experience he had a good understanding of the complexity involved in assembling and analyzing MBNA's data. I accept that he had this understanding. Many representative plaintiffs have a good understanding of the issues and the documents involved because of their connection to the subject matter of the litigation. This is not exceptional.

[69] Mr. Markson states he was able to assist the experts that counsel retained to create a program to analyze MBNA's data and calculate criminal interest. Mr. Markson may have provided assistance but there is no evidence that it was necessary and resulted in the monetary success of the class action. Class counsel retained well known valuation experts (Campbell Valuation Experts). I have read their report dated October 27, 2011 and the affidavit of Errol Soriano, the Managing Director at Campbell Valuations who authored the report. There is no indication in the report that Mr. Soriano relied on and required Mr. Markson's assistance.

[70] This is not a case like *Windisman* where the representative plaintiff assumed the risk of costs and devoted an unusual amount of time and effort to communicating with other class members, acting as a liaison with the solicitors, and assisting the solicitors at all stages of the proceeding. The representative plaintiff in *Windisman* kept careful records of her time and effort. In this case, I have no record of the time Mr. Markson invested and class counsel agreed to indemnify Mr. Markson for any costs that were awarded against him.

[71] In summary, while I appreciate that Mr. Markson was a dedicated representative plaintiff, this is not an exceptional case that justifies compensation for the representative plaintiff.

CONCLUSION

[72] In summary, I approve the expanded class definition, the settlement and the fees and disbursements of class counsel. With the exception of the request for compensation for Mr. Markson, I grant the relief set out in the notice of motion dated October 1, 2012.

[73] When the administration of the settlement is completed, I request that counsel and the Administrator notify the court.

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_____

C. Horkins J.

Released: October 17, 2012

2012 ONSC 5891 (CanLII)

CITATION: Markson v. MBNA Canada Bank, 2012 ONSC 5891
COURT FILE NO.: 03-CV-254970CP
DATE: 20121017

2012 ONSC 5891 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

STEPHEN MARKSON

Plaintiff

– and –

MBNA CANADA BANK

Defendant

REASONS FOR JUDGMENT

C. Horkins J.

Released: October 17, 2012

TAB 10

See para. 16

CITATION: O'Neil v. Sunopta, 2015 ONSC 6213
COURT FILE NO.: 57453CP
DATE: 2015/10/28

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: John O'Neil (Plaintiff)

AND:

Sunopta, Inc., Steven R. Bromley and John H. Dietrich (Defendants)

BEFORE: Justice H. A. Rady

COUNSEL: Douglas Worndl, for the plaintiff
No one appearing, for the defendants

CITATION: Devlin v. Noval, 2015 ONSC 6213
COURT FILE NO.: 1626CP
DATE: 2015/10/28

RE: Douglas Devlin, Pathway Multi Series Fund Inc. and Robert Rae (Plaintiffs)

AND:

Greg S. Noval, Leigh Bilton, Michael E. Coolen, Charles Dallas, Thomas J. Harp, Craig McKenzie, Alexander Squires, Robb D. Thompson, Richard Watkins, Leif Snethun, Sonde Resources Corp. (f.k.a. Canadian Superior Energy Inc.) and Challenger Energy Corp. (Defendants)

BEFORE: Justice H. A. Rady

COUNSEL: Douglas Worndl, for the plaintiffs
No one appearing for the defendants

HEARD: October 6, 2015

ENDORSEMENT

Introduction

2015 ONSC 6213 (CanLII)

[1] The plaintiffs move for an order for the following relief: a) approving a *cy près* payment of a total of $12,125.95 CAD to the Canadian Foundation for Advancement of Investor Rights (FAIR Canada); and b) discharging NPT Ricepoint Class Action Services Inc. as the settlement administrator in this action, to be effective upon Ricepoint making the *cy près* payment to FAIR Canada.

[2] The settlement agreement reached by the parties in this case was approved by court order on May 17, 2010. The issue of a payment of *cy près* monies was not addressed in the settlement agreement nor in the settlement approval order.

[3] The Canadian administrator of the Canadian settlement fund has confirmed that $4,178.41 remains in the Canadian settlement account in the *O'Neil* v. *Sunopta* matter. The sum of $7,947.54 remains in the Canadian settlement account in the *Devlin* v. *Noval* matter. In the administrator's opinion, it is not practical, economical or equitable to distribute these relatively modest amounts to class members. The cost of cheques, printing and postage would substantially or completely exhaust these funds. A second round of distribution would result in 94 percent of eligible claimants receiving cheques of $100 or less, which in the administrator's experience often are uncashed. This would result in another positive balance when the cheques become stale dated after six months.

The Issue

[4] In this case, the plaintiffs propose FAIR Canada as the recipient of the *cy près* distribution. The issue is whether FAIR Canada is an appropriate *cy près* recipient in light of the decision *Sorenson* v. *easyhome Ltd.*, 2013 ONSC 4017 (S.C.J.)

[5] Before discussing the issue, it is helpful to set out some information about FAIR Canada, which is set out in detail in the affidavit of Neil Gross, the executive director of FAIR Canada. It is a national non-profit organization dedicated to

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investor protection. It was founded in 2008. FAIR Canada is independent of governments, regulators and the financial industry. Its purpose is to be a national voice for investors in the area of securities regulation, speaking on behalf of Canadian shareholders and individual investors as consumers of financial products. It has been granted charitable status. Its charitable objects are to provide education to the public and to policy makers on investor protection issues, to conduct and make available public research on such issues and to hold public conferences, round tables and symposiums on them.

[6] FAIR Canada is funded by Market Regulation Services Inc. (MRS) and the Investment Dealers Association of Canada (IDA) using funds derived from fines levied against their member firms. Apparently, the MRS and IDA viewed the funding of FAIR Canada as a desirable use of their money for projects that benefit the public, recognizing that retail investors are differently situated from institutional market participants and lack a voice in policy debates pertaining to securities regulation.

[7] In 2012, the Ontario Securities Commission and the Investment Industry Regulatory Organization of Canada committed to provide additional funding for FAIR Canada's operations. In 2013, the Jarislowsky Foundation established a permanent endowment fund for FAIR Canada. The OSC made a financial contribution to this endowment fund in 2014.

[8] FAIR Canada's work includes:

- making submissions to securities regulators, governments, stock exchanges and other persons on priorities, policy, legislative change and enforcement;

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- identifying emerging issues that affect individual investors and seeking reform to mitigate the possibility of harm to investors; and

- identifying conduct by issuers, registered persons and other market participants that is or may be detrimental to investors and where appropriate, encouraging action to enhance investors rights and protections.

[9] In furtherance of its objectives, FAIR has made over 140 written submissions to regulatory, industry and government stakeholders in Canada's capital markets on issues such as:

- the OSC's proposed whistle-blower program;

- the OSC's no-contest settlement policy;

- the standard of conduct for investment advisors and dealers;

- crowdfunding; and

- mutual fund fees.

[10] It appears that FAIR Canada is one of only a very few organizations advocating for shareholders in Canada and it alone expresses the perspective of retail investors in policy making process.

[11] FAIR Canada has received *cy près* distributions in the context of securities class actions in the past including in *Dobbie* v. *Arctic Glacier Income Fund*.

[12] From time to time, FAIR Canada has asked to intervene in court proceedings as a friend of the court to provide the perspective of Canadian retail investors. It retains counsel in that regard. The evidence is that it has retained counsel

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seasoned in class proceedings, including but not limited to Siskinds, in matters before the courts. It bears observing that the experienced class action bar is comprised of a relatively small group of firms.

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Cy Près Distributions

[13] The general rule is that cy près distributions should not be approved where direct compensation to class members is practicable: *Cassano* v. *Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (S.C.J.).

[14] Where the court is satisfied that a settlement amount (or what remains) cannot be distributed economically to individual class members, the court will approve a *cy près* distribution to reputable organizations that will provide an indirect benefit to class members. See *Sutherland* v. *Boots Pharmaceutical PLC,* [2002] O.J. No. 1361 (S.C.J.) and *Markson* v. *MBNA Canada Bank,* 2012 ONSC 5891 (S.C.J.).

[15] I am satisfied that a *cy près* distribution is warranted.

[16] When identifying a suitable recipient, the court must have regard to the objectives of the *Class Proceedings Act*, including access to justice for class members and behavior modification of a defendant. Moreover, there should be some rational connection between the subject matter of a particular case, the interests of class members and the *cy près* recipient. That takes me to the issue presented in this case.

The *Sorenson* v. *easyhome Ltd.* decision

[17] In his customary thoughtful and thorough analysis, Justice Perell rejected FAIR Canada as an appropriate *cy près* recipient based on his conclusion that Siskinds, as class counsel, would receive an indirect benefit if such an order were made.

[18] His set out the rationale for his conclusion as follows:

[12] As may be noted, the settlement envisions what may be a very modest *cy près* distribution. Recently, easyhome learned that Siskinds and FAIR Canada have linkages that were not known to the Defendants before the settlement. The linkages are that: (1) FAIR Canada has been a *pro bono* client of the firm; and (2) it and the law firm have been allies in making responses to the Ontario Securities Commission. More precisely, FAIR Canada took a similar position to Siskinds in submissions to the Ontario Securities Commission with regard to OSC Staff Notice 15-704, which related to so-called "no-contest settlements." The Defendants submit that these linkages are such that the Court should consider requiring the parties to name a new *cy près* beneficiary…

[13] Mr. Sorenson submits that none of the linkages rise to the level that would invalidate FAIR Canada as a *cy près* beneficiary. He submits that the most that can be said is that FAIR Canada seeks to protect investors, and thus from time-to-time takes a similar view as Class Counsel, which practices investor protection litigation. He submits that in the absence of any pecuniary or personnel connection, FAIR Canada is an appropriate beneficiary.

[30] *Cy près* relief should attempt to serve the objectives of the particular case and the interests of the class members. It should not be forgotten that the class action was brought on behalf of the class members and a *cy près* distribution is meant to be an indirect benefit for the class members and an approximation of remedial compensation for them. However well meaning, the prospect of a *cy près* distribution should not be used by Class Counsel, defence counsel, the defendant, or a judge as an opportunity to benefit charities with which they may be associated or which they may favour. To maintain the integrity of the class action regime, the indirect benefits of the class action should be exclusively for the class members.

[31] In the case at bar, I accept that since the class members were seeking to enforce shareholders' rights that exist under Canadian securities law, the class members may obtain an indirect benefit by donating a portion of the settlement proceeds to an association that is dedicated to advancing investors' rights, which I accept is a commendable project.

[32] However, in the case at bar, if Fair Canada is the *cy près* recipient, then Class Counsel also obtains an indirect benefit because they can take credit for the class members' contribution to Fair Canada, another client of the firm. Further, for those that are cynically minded, there is the optics or appearance of a business development synergy in Class Counsel's supporting FAIR Canada's mission and this synergy would be another indirect benefit to Class Counsel.

[33] In my opinion, however well meaning, it is inappropriate for Class Counsel to indirectly benefit from a *cy près* distribution and it is inappropriate for Class Counsel to have any direct connection with a recipient of a *cy près* distribution. I think that it is undesirable for courts to have to determine whether the connection rises to any particular level. Given that there are many other worthy recipients of *cy près* distributions, in my opinion, in the circumstances of the case at bar, it is not in the best interests of class members to have a *cy près* distribution to FAIR Canada, and I do not approve this aspect of the proposed settlement.

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[19] I agree that the prospect of a *cy près* distribution should not be used by anyone involved in the proceeding to benefit charities that they favour. The whole point is to benefit, albeit indirectly, class members.

Analysis

[20] The difficulty is that *Sorenson* may be interpreted as establishing a bright line rule that would disqualify organizations that would otherwise be highly or perhaps uniquely qualified to receive *cy près* distributions, something recognized as commendable by the court.

[21] There was evidence before me that to the extent that *Sorenson* articulates such a rule, three leading shareholder rights organizations would be precluded from receiving such distributions in cases where leading class counsel (and not just Siskinds) are involved. One consequence could be to discourage qualified class counsel from taking *pro bono* briefs from charities and not-for-profit organizations seeking to intervene in matters for which they bring an important perspective.

[22] I respectfully disagree that it is undesirable to determine whether a connection rises to any particular level. In my view, the test should be whether a reasonable person in possession of the facts, rather than the cynically minded, would conclude that any real benefit is conferred.

[23] In this case, the evidence filed in the case demonstrates the following:

- Siskinds will not obtain any direct or indirect benefit from the proposed *cy près* payments to FAIR Canada;
- there is no "business development synergy in Class Counsel supporting FAIR Canada's mission"; and

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- there has never been a referral of an actual or potential client by FAIR Canada to Siskinds, nor is there any understanding or expectation that such would occur.

[24] The proposed distributions are therefore approved and the settlement administrator shall be discharged once payment has been made.

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"Justice H. A. Rady"
Justice H. A. Rady

Date: October 28, 2015

TAB 11

See paras. 69, 70

COURT FILE NO.: 98-CV-141369

DATE:19990922

SUPERIOR COURT OF JUSTICE

99 274 015

BETWEEN:

DIANNA LOUISE PARSONS, MICHAEL HERBERT CRUICKSHANKS, DAVID TULL, MARTIN HENRY GRIFFEN, ANNA KARDISH, ELSIE KOTYK, Executrix of the Estate of Harry Kotyk, deceased and ELSIE KOTYK, personally	*Harvey Strosberg, Q.C., Heather Rumble Peterson* and *Patricia Speight* for the Plaintiffs
Plaintiffs	*Wendy Matheson, Jane Bailey* for the Canadian Red Cross Society
-and-	*Michèle Smith* and *R.F. Horak* for Her Majesty the Queen in Right of Ontario
THE CANADIAN RED CROSS SOCIETY, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AND THE ATTORNEY GENERAL OF CANADA	*Ivan G. Whitehall, Q.C., Catherine Moore* and *J.C. Spencer* for the Attorney General of Canada
Defendants	*Wilson McTavish, Q.C., Linda Waxman* and *Marian Jacko* for the Office of the Children's Lawyer
	Laurie Redden for the Office of the Public Guardian and Trustee
Proceeding under the *Class Proceedings Act, 1992*	*Beth Symes* for the Thalassemia Foundation of Canada, Friend of the Court
	William P. Dermody for the Intervenors, Hubert Fullarton and Tracey Goegan
	L.Craig Brown for the Hepatitis C Society of Canada, Friend of the Court
	Pierre R. Lavigne for Dominique Honhon, Friend of the Court
	Bruce Lemer for Anita Endean, Friend of

	) the Court
	)
	) *Elizabeth M. Stewart* for the Provinces
	) and Territories other than British
	) Columbia and Quebec
	)

COURT FILE NO.:98-CV-146405

SUPERIOR COURT OF JUSTICE

BETWEEN:

JAMES KREPPNER, BARRY ISSAC,	)
NORMAN LANDRY, as Executor of the Estate	) *Bonnie A. Tough* and *David Robins* for
of the late SERGE LANDRY, PETER	) the Plaintiffs
FELSING, DONALD MILLIGAN, ALLAN	)
GRUHLKE, JIM LOVE and PAULINE	)
FOURNIER, as Executrix of the Estate of the	)
late PIERRE FOURNIER	) *Wendy Matheson, Jane Bailey* for the
	) Canadian Red Cross Society
Plaintiffs	)
-and-	) *Michèle Smith* and *R.F. Horak* for Her
	) Majesty the Queen in Right of Ontario
	)
THE CANADIAN RED CROSS SOCIETY,	) *Ivan G. Whitehall, Q.C., Catherine*
THE ATTORNEY GENERAL OF CANADA	) *Moore* and *J.C. Spencer* for the Attorney
AND HER MAJESTY THE QUEEN IN	) General of Canada
RIGHT OF ONTARIO	)
	) *Janice E. Blackburn* and *James P.*
Defendants	) *Thomson* for the Canadian Hemophilia
	) Society, Friend of the Court
	)
Proceeding under the *Class Proceedings Act, 1992*	) Heard: August 19-21, 1999

REASONS FOR DECISION

WINKLER J.:

Nature of the Motion

[1] This is a motion for approval of a settlement in two companion class proceedings commenced under the *Class Proceedings Act 1992*, S.O. 1992, c. 6, the "Transfused Action" and the "Hemophiliac Action", brought on behalf of persons infected by Hepatitis-C from the Canadian blood supply. The Transfused Action was certified as a class proceeding by order of this court on June 25, 1998, as later amended on May 11, 1999. On the latter date, an order was also issued certifying the Hemophiliac Action. There are concurrent class proceedings in respect of the same issues before the courts in Quebec and British Columbia. The Ontario proceedings apply to all persons in Canada who are within the class definition with the exception of any person who is included in the proceedings in Quebec and British Columbia. The motion before this court concerns a Pan-Canadian agreement intended to effect a national settlement, thus bringing to an end this aspect to the blood tragedy. Settlement approval motions similar to the instant proceeding have been contemporaneously heard by courts in Quebec and British Columbia with a view to bringing finality to the court proceedings across the country.

The Parties

[2] The plaintiff class in the Transfused Action are persons who were infected with Hepatitis C from blood transfusions between January 1, 1986 to July 1, 1990. The plaintiff class in the Hemophiliac Action are persons infected with Hepatitis C from the taking of blood or blood products during the same time period.

[3] The defendants in the Ontario actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario, and the Attorney General of Canada. The Ontario classes are national in scope. Therefore, the other Provincial and Territorial Governments of Canada, with the exception of Quebec and British Columbia, have moved to be included in the Ontario actions as defendants but only if the settlement is approved.

[4] The court has granted intervenor status to a number of individuals, organizations and public bodies, namely, Hubert Fullarton and Tracy Goegan, the Canadian Hemophilia Society, the Thalassemia Foundation of Canada, the Hepatitis C Society of Canada, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee of Ontario.

[5] Pursuant to an order of this court, PricewaterhouseCoopers received and presented to the court over 80 written objections to the settlement from individuals afflicted with Hepatitis-C. In addition, 11 of the objectors appeared at the hearing of the motion to proffer evidence as to their reasons for objecting to the settlement.

[6] The approval of the settlement before the court is supported by class counsel and the Ontario and Federal Crown defendants. In addition to these parties, the Provincial and Territorial governments who seek to be included if the settlement is approved, and the intervenors, the Canadian Hemophilia Society, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee made submissions in support of approval of the settlement. The Canadian Red Cross Society ("CRCS") appeared, but did not participate, all actions against it having been

stayed by order of Mr. Justice Blair dated July 28, 1999, pursuant to a proceeding under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The other intervenors and individual objectors voiced concerns about the settlement and variously requested that the court either reject the settlement or vary some of its terms in the interest of fairness.

Background

[7] Both actions were commenced as a result of the contamination of the Canadian blood supply with infectious viruses during the 1980s. The background facts are set out in the pleadings and the numerous affidavits forming the record on this motion. The following is a brief summary.

[8] The national blood supply system in Canada was developed during World War II by the CRCS. Following WWII, the CRCS was asked to carry on with the operation of this national system, and did so as part of its voluntary activities without significant financial support from any government. As a result of its experience and stewardship of system, the CRCS had a virtual monopoly on the collection and distribution of blood and blood products in Canada.

[9] Over time the demand for blood grew and Canada turned to a universal health care system. Because of these developments, the CRCS requested financial assistance from the provincial and territorial governments. The governments, in turn, demanded greater oversight

over expenditures. This led to the formation of the Canadian Blood Committee which was composed of representatives of the federal, provincial and territorial governments. The CBC became operational in the summer of 1982. Other than this overseer committee, there was no direct governmental regulation of the blood supply in Canada.

[10] The 1970s and 80s were characterized medically by a number of viral infection related problems stemming from contaminated blood supplies. These included hepatitis and AIDS. The defined classes in these two class actions, however, are circumscribed by the time period beginning January 1, 1986 and ending July 1, 1990. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The viral infection at the center of these proceedings is now known as Hepatitis C.

[11] Hepatitis is an inflammation of the liver that can be caused by various infectious agents, including contaminated blood and blood products. The inflammation consists of certain types of cells that infiltrate the tissue and produce by-products called cytokines or, alternatively, produce antibodies which damage liver cells and ultimately cause them to die.

[12] One method of transmission of hepatitis is through blood transfusions. Indeed, it was common to contract hepatitis through blood transfusions. However, due to the limited knowledge of the effects of contracting hepatitis, the risk was considered acceptable in view of the alternative of no transfusion which would be, in many cases, death.

[13] As knowledge of the disease evolved, it was discovered that there were different strains of hepatitis. The strains identified as Hepatitis A ("HAV") and Hepatitis B ("HBV") were known to the medical community for some time. HAV is spread through the oral-fecal route and is rarely fatal. HBV is blood-borne and may also be sexually transmitted. It can produce violent illness for a prolonged period in its acute phase and may result in death. However, most people infected with HBV eliminate the virus from their system, although they continue to produce antibodies for the rest of their lives.

[14] During the late 1960s, an antigen associated with HBV was identified. This discovery led to the development of a test to identify donated blood contaminated with HBV. In 1972, the CRCS implemented this test to screen blood donations. It soon became apparent that post-transfusion hepatitis continued to occur, although much less frequently. In 1974, the existence of a third form of viral hepatitis, later referred to as Non-A Non-B Hepatitis ("NANBH") was postulated.

[15] This third viral form of hepatitis became identified as Hepatitis C ("HCV") in 1988. Its particular features are as follows:

> (a) transmission through the blood supply if HCV infected donors are unaware of their infected condition and if there is no, or no effective, donor screening;
>
> (b) an incubation period of 15 to 150 days;
>
> (c) a long latency period during which a person infected may transmit the virus to others through blood and blood products, or sexually, or from mother to fetus; and

(d) no known cure.

[16] The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after a "surrogate" test for HCV became available and had been put into widespread use in the United States.

[17] In a surrogate test a donor blood sample is tested for the presence of substances which are associated with the disease. The surrogate test is an indirect method of identifying in a blood sample the likelihood of an infection that cannot be identified directly because no specific test exists. During the class period, there were two surrogate tests capable of being used to identify the blood donors suspected of being infected with HCV, namely, a test to measure the ALT enzyme in a donor's blood and a test to detect the anti-HBc, a marker of HBV, in the blood.

[18] The ALT enzyme test was useful because it highlights inflammation of the liver. There is an increased level of ALT enzymes in the blood when a liver is inflamed. The test is not specific for any one liver disease but rather indicates inflammation from any cause. Elevated ALT enzymes are a marker of liver dysfunction which is often associated with HCV.

[19] The anti-HBc test detects exposure to HBV and is relevant to the detection of HCV because of the assumption that a person exposed to HBV is more likely than normal to have been exposed to HCV, since both viruses are blood-borne and because the populations with higher

rates of seroprevalence were believed to be similar.

[20] The surrogate tests were subjected to various studies in the United States. Among other aspects, the studies analyzed the efficacy of each test in preventing NANBH post-transfusion infection and the extent to which the rejection of blood donations would be increased. The early results of the studies did not persuade the agencies responsible for blood banks in the U.S. to implement surrogate testing as a matter of course. However, certain individuals, including Dr. Harvey Alter, a leading U.S. expert on HCV, began a campaign to have the U.S. blood agencies change their policies. In consequence, in April 1986 the largest U.S. blood agency decided that both surrogate tests should be implemented, and further, that the use of the tests would become a requirement of the agency's standard accreditation program in the future. This effectively made surrogate testing the national standard in the U.S. and by August 1, 1986, all or virtually all volunteer blood banks in the U.S. screened blood donors by using the ALT and anti-HBc tests.

[21] This course was not followed in Canada. Although there was some debate amongst the doctors involved with the CRCS, surrogate testing was not adopted. Rather, in 1984 a meeting was held at the CRCS during which a multi-centre study was proposed. The purpose of the study was to determine the incidence of NANBH in Canada. The CRCS blood centres proposed to take part in the study were those in Toronto, Montreal, Ottawa, Edmonton and Vancouver.

[22] Prior to the 1984 meeting however, Dr. Victor Feinman of Mount Sinai Hospital had already begun a study to determine the incidence of NANBH in those who had received blood

transfusions. This study had a significant limitation in that it did not measure the effectiveness of surrogate testing. Although the limitation was known to the CRCS, the medical directors agreed at their meeting on March 29-30, 1984 to review Dr. Feinman's research to determine whether the proposed CRCS multi-centre study was still required. Ultimately, the CRCS did not conduct the multi-centre study.

[23] The CRCS was aware of the American decision to implement surrogate testing in 1986 but opted instead to await a full assessment of the results of the Dr. Feinman study and the impact of testing for the Human-Immunodeficiency Virus ("HIV") and "self-designation" as possible surrogates to screen for NANBH.

[24] This decision was criticized by Dr. Alter. In an article published in the *Medical Post* in February 1988. Dr. Alter was quoted as stating that:

> "while the use of surrogate markers is far from ideal, the lack of any specific test to identify [NANBH], coupled with the serious chronic consequences of the disease, makes the need for these surrogate tests essential."

[25] The CRCS never implemented surrogate testing. In late 1988, HCV was isolated. The Chiron Corporation developed a test for anti-HCV for use by blood banks. In March 1990, the CRCS blood centres began implementing the anti-HCV test, and by June 30, 1990, all centres had implemented the test. Hence the class definitions stipulated in the two certification orders before this court, covers the period between January 1, 1986 and July 1, 1990, which corresponds to the interval between the widespread use of surrogate testing in the U.S. and the universal

adoption of the Chiron HCV test in Canada. The classes are described fully below.

The Claims

[26] It is alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidence of HCV infection from contaminated blood would have been reduced by as much as 75% during the class period. Consequently, they bring the actions on behalf of classes described as the Ontario Transfused Class and the Ontario Hemophiliac Class. The plaintiffs assert claims based in negligence, breach of fiduciary duty and strict liability in tort as against all of the defendants.

The Classes

[27] The Ontario Transfused Class is described as:

> (a) all persons who received blood collected by the CRCS contaminated with HCV during the Class Period and who are or were infected for the first time with HCV and who are:
>
> > (i) presently or formerly resident in Ontario and receive blood in Ontario and who are or were infected with post-transfusion HCV;
> >
> > (ii) resident in Ontario and received blood in any other Province or Territory of Canada other than Quebec and who are or were infected with post-transfusion HCV;
> >
> > (iii) resident elsewhere in Canada and received blood in Canada, other than in the Provinces of British Columbia and

Quebec, and who are or were infected with post-transfusion HCV;

(iv) resident outside Canada and received blood in any Province or Territory of Canada, other than in the Province of Quebec, and who are or were infected with post-transfusion HCV; and

(v) resident anywhere and received blood in Canada and who are or were infected with post-transfusion HCV and who are not included as class members in the British Columbia Transfused Class Action or the Quebec Transfused Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to in subparagraph (a) or (b) who is or was infected with HCV by such person.

[28] The Ontario Hemophiliac Class is described as:

(a) all persons who have or had a congenital clotting factor defect or deficiency, including a defect or deficiency in Factors V, VII, VIII, IX, XI, XII, XIII or von Willebrand factor, and who received or took Blood (as defined in Section 1.01 of the Hemophiliac HCV Plan) during the Class Period and who are:

(i) presently or formerly a resident in Ontario and received or took Blood in Ontario and who are or were infected with HCV;

(ii) resident in Ontario and received or took Blood in any other Province or Territory of Canada other than Quebec and who are or were infected with HCV;

(iii) resident elsewhere in Canada and received or took Blood in Canada other than in the Provinces of British Columbia and Quebec, and who are or were infected with HCV;

(iv) resident outside Canada and received or took Blood in any Province or Territory in Canada, other than in the Province of Quebec, and who are or were infected with HCV; and

(v) resident anywhere and received or took Blood in Canada

and who are not included as class members in the British Columbia Hemophiliac Class Action or the Quebec Hemophiliac Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to subparagraph (a) or (b) who is or was infected with HCV by such person.

[29] In addition in each of the actions, there is a "Family" class described, in the Ontario Transfused Class, as follows:

(a) the Spouse, child, grandchild, parent, grandparent or sibling of an Ontario Transfused Class Member;

(b) the spouse of a child, grandchild, parent or grandparent of an Ontario Transfused Class Member;

(c) a former Spouse of an Ontario Transfused Class Member;

(d) a child or other lineal descendant of a grandchild of an Ontario Transfused Class Member;

(e) a person of the opposite sex to an Ontario Transfused Class Member who cohabitated for a period of at least one year with that Class Member immediately before his or her death;

(f) a person of the opposite sex to an Ontario Transfused Class Member who was cohabitating with that Class Member at the date of his or her death and to whom that Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and

(g) any other person to whom an Ontario Transfused Class Member was providing support for a period of at least three years immediately prior to his or her death.

There is a similarly described Family Class in the Hemophiliac Action.

The Proposed Settlement

[30] The parties have presented a comprehensive package to the court. Not only does it pertain to these actions, but it is also intended to be a Pan-Canadian agreement to settle the simultaneous class proceedings before the courts in Quebec and British Columbia. The settlement will not become final and binding until it is approved by courts in all three provinces. It consists of a Settlement Agreement, a Funding Agreement and Plans for distribution of the settlement funds in the Transfused Action and the Hemophiliac Action.

[31] The Settlement Agreement creates the following two Plans:

> (1) the Transfused HCV Plan to compensate persons who are or were infected with HCV through a blood transfusion received in Canada in the Class Period, their secondarily-infected Spouses and children and their other family members; and
>
> (2) the Hemophiliac HCV Plan to compensate hemophiliacs who received or took blood or blood products in Canada in the Class Period and who are or were infected with HCV, their secondarily-infected Spouses and children and their other family members.

[32] To fund the Agreement, the federal, provincial and territorial governments have promised to pay the settlement amount of $1,118,000,000 plus interest accruing from April 1, 1998. This will total approximately $1,207,000,000 as of September 30, 1999.

[33] The Funding Agreement contemplates the creation of a Trust Fund on the following basis:

(i) a payment by the Federal Government to the Trust Fund, on the date when the last judgment or order approving the settlement of the Class Actions becomes final, of 8/11ths of the settlement amount, being the sum of approximately $877,818,181, subject to adjustments plus interest accruing after September 30, 1999 to the date of payment; and

(ii) a promise by each Provincial and Territorial Government to pay a portion of its share of the 3/11ths of the unpaid balance of the settlement amount as may be requested from time to time until the outstanding unpaid balance of the settlement amount together with interest accruing has been paid in full.

[34] The Governments have agreed that no income taxes will be payable on the income earned by the Trust, thereby adding, according to the calculations submitted to the court, a present value of about $357,000,000 to the settlement amount.

[35] The Agreement provides that the following claims and expenses will be paid from the Trust Fund:

(a) persons who qualify in accordance with the provisions of the Transfused HCV Plan;

(b) persons who qualify in accordance with the provisions of the Hemophiliac HCV Plan;

(c) spouses and children secondarily-infected with HIV to a maximum of 240 who qualify pursuant to the Program established by the Governments (which is not subject to Court approval);

(d) final judgments or Court approved settlements payable by any FPT Government to a Class Member or Family Class Member who opts out of one of the Class Actions or is not bound by the provisions of the Agreement or a person who claims over or brings a third-party claim in respect of the Class Member's receiving or taking of blood or blood products in Canada in the Class Period and his or her infection with HCV, plus one-third of Court-approved defence costs;

(e) subject to the Courts' approval, the costs of administering the Plans, including the costs of the persons hereafter enumerated to be appointed to perform various functions under the Agreement;

(f) subject to the Courts' approval, the costs of administering the HIV Program, which Program administration costs, in the aggregate, may not exceed $2,000,000; and

(g) subject to Court approval, fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel.

Class Members Surviving as of January 1, 1999

[36] Other than the payments to the HIV sufferers, which I will deal with in greater detail below, the plans contemplate that compensation to the class members who were alive as of January 1, 1999, will be paid according to the severity of the medical condition of each class member. All class members who qualify as HCV infected persons are entitled to a fixed payment as compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical condition at the time of qualification under the Plan. However, the class member will be subsequently entitled to additional compensation if and when his or her medical condition deteriorates to a medical condition described at a higher compensation level. This compensation ranges from a single payment of $10,000, for a person who has cleared the disease and only carries the HCV antibody, to payments totaling $225,000 for a person who has decompensation of the liver or a similar medical condition.

[37] The compensation ranges are described in the Agreement as "Levels". In addition to the payments for loss of amenities, class members with conditions described as being at

compensation Level 3 or a higher compensation Level (4 or above), and whose HCV caused loss of income or inability to perform his or her household duties, will be entitled to compensation for loss of income or loss of services in the home.

[38] The levels, and attendant compensation, for class members are described as follows:

(i) Level 1

Qualification	Compensation
A blood test demonstrates that the HCV antibody is present in the blood of a class member.	A lump sum payment of $10,000 plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(ii) Level 2

Qualification	Compensation
A polymerase chain reaction test (PCR) demonstrates that HCV is present in the blood of a class member.	Cumulative compensation of $30,000 which comprises the $10,000 payment at level 1, plus a payment of $15,000 immediately and another $5,000 when the court determines that the Fund is sufficient to do so, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iii) Level 3

Qualification	Compensation
If a class member develops non-bridging fibrosis, or receives compensable drug therapy (i.e. Interferon or Ribavirin), or	Option 1 — $60,000 comprised of the level 1 and 2 payments plus an additional $30,000

meets a protocol for HCV compensable treatment regardless of whether the treatment is taken, then the class member qualifies for Level 3 benefits.	Option 2 — $30,000 from the Level 1 and 2 benefits, and if the additional $30,000 from Option 1 is waived, compensation for loss of income or loss of services in the home, subject to a threshold qualification. In addition, at this level, the class member is entitled to an additional $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iv) Level 4

Qualification	Compensation
If a class member develops bridging fibrosis, he or she qualifies as a Level 4 claimant	There is no further fixed payment beyond that of Level 3 at this level. In addition to those previously defined benefits, the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(v) Level 5

Qualification	Compensation
A class member who develops (a)cirrhosis; (b) unresponsive porphyria cutanea tarda which is causing significant disfigurement and disability; (c) unresponsive thrombocytopenia (low platelets) which result in certain other conditions; or (d)	$125,000 which consists of the prior $60,000, if the claimant elected Option 1 at Level 3, plus an additional $65,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of

glomerulonephritis not requiring dialysis, he or she qualifies as a Level 5 claimant.	completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(vi) Level 6

Qualification	Compensation
If a class member receives a liver transplant, or develops: (a) decompensation of the liver; (b) hepatocellular cancer; (c) B-cell lymphoma; (d) symptomatic mixed cryoglobullinemia; (e) glomerulonephritis requiring dialysis; or (f) renal failure, he or she qualifies as a Level 6 claimant.	$225,000 which consists of the $125,000 available at the prior levels plus an additional $100,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses. The claimant is also entitled to reimbursement for costs of care up to $50,000 per year.

[39] There are some significant "holdbacks" of compensation at certain levels. As set out in the table above, a claimant who is entitled to the $20,000 compensation payment at level 2 will initially be paid $15,000 while $5,000 will be held back in the Fund. If satisfied that there is sufficient money in the Fund, the Courts may then declare that the holdback shall be removed in accordance with Section 10.01(1)(i) of the Agreement and Section 7.03 of the Plans. Claimants with monies held back will then receive the holdback amount with interest at the prime rate from the date they first became entitled to the payment at Level 2. In addition, any claimant that qualifies for income replacement at Level 4 or higher will be subjected to a holdback of 30% of the compensation amount. This holdback may be removed, and the compensation restored, on the

same terms as the Level 2 payment holdback.

[40] There is a further limitation with respect to income, namely, that the maximum amount subject to replacement has been set at $75,000 annually. Again this limitation is subject to the court's review. The court may increase the limit on income, after the holdbacks have been removed, and the held benefits restored, if the Fund contains sufficient assets to do so.

[41] Payment of loss of income is made on a net basis after deductions for income tax that would have been payable on earned income and after deduction of all collateral benefits received by the Class Member. Loss of income payments cease upon a Class Member reaching age 65. A claim for the loss of services in the home may be made for the lifetime of the Class Member.

Class Members Dying Before January 1, 1999

[42] If a Class Member who died before January 1, 1999, would have qualified as a HCV infected person but for the death, and if his or her death was caused by HCV, compensation will be paid on the following terms:

> (a) the estate will be entitled to receive reimbursement for uninsured funeral expenses to a maximum of $5,000 and a fixed payment of $50,000, while approved family members will be entitled to compensation for loss of the deceased's guidance, care and companionship on the scale set out in the chart at paragraph 82 below and approved dependants may be entitled to compensation for their loss of support from the deceased or for the loss of the deceased's services in the home ("Option 1"); or

(b) at the joint election of the estate and the approved family members and dependants of the deceased, the estate will be entitled to reimbursement for uninsured funeral expenses to a maximum of $5,000, and the estate and the approved family members and dependants will be jointly entitled to compensation of $120,000 in full settlement of all of their claims ("Option 2").

[43] Under the Plans when a deceased HCV infected person's death is caused by HCV, the approved dependants may be entitled to claim for loss of support until such time as the deceased would have reached age 65 but for his death.

[44] Payments for loss of support are made on a net basis after deduction of 30% for the personal living expenses of the deceased and after deduction of any pension benefits from CPP received by the dependants.

[45] The same or similar holdbacks or limits will initially be imposed on the claim by dependants for loss of support under the Plans as are imposed on a loss of income claim. The $75,000 cap on pre-claim gross income will be applied in the calculation of support and only 70% of the annual loss of support will be paid. If the courts determine that the Trust Fund is sufficient and vary or remove the holdbacks or limits, the dependants will receive the holdbacks, or the portion the courts direct, with interest from the time when loss of support was calculated subject to the limit.

[46] Failing agreement among the approved dependants on the allocation of loss of support between them, the Administrator will allocate loss of support based on the extent of support

received by each of the dependants prior to the death of the HCV infected person.

Class Members Cross-Infected with HIV.

[47] Notwithstanding any of the provisions of the Hemophiliac HCV Plan, a primarily-infected hemophiliac who is also infected with HIV may elect to be paid $50,000 in full satisfaction of all of his or her claims and those of his or her family members and dependants.

[48] Persons infected with HCV and secondarily-infected with HIV who qualify under a Plan (or, where the person is deceased, the estate and his or her approved family members and dependants) may not receive compensation under the Plan until entitlement exceeds the $240,000 entitlement under the Program after which they will be entitled to receive any compensation payable under the Plan in excess of $240,000.

[49] Under the Hemophiliac HCV Plan, the estate, family members and dependants of a primarily-infected hemophiliac who was cross-infected with HIV and who died before January 1, 1999 may elect to receive a payment of $72,000 in full satisfaction of their claims.

The Family Class Claimants

[50] Each approved family class member of a qualified HCV infected person whose death was caused by HCV is entitled to be paid the amount set out below for loss of the deceased's

guidance, care and companionship:

Relationship	Compensation
Spouse	$25,000
Child under 21 at time of death of class member	$15,000
Child over 21 at time of death of class member	$5,000
Parent or sibling	$5,000
Grandparent or Grandchild	$500

[51] If a loss of support claim is not payable in respect of the death of a HCV infected person whose death was caused by his or her infection with HCV, but the approved dependants resided with that person at the time of the death, then these dependants are entitled to be compensated for the loss of any services that the HCV infected person provided in the home at the rate of $12 per hour to a maximum of 20 hours per week.

[52] The Agreement and/or the Plans also provide that:

(a) all compensation payments to claimants who live in Canada will be tax free;

(b) compensation payments will be indexed annually to protect against inflation;

(c) compensation payments other than payments for loss of income will not affect social benefits currently being received by claimants;

(d) life insurance payments received by or on behalf of claimants will not be taken into account for any purposes whatsoever under the Plans; and

(e) no subrogation payments will be paid directly or indirectly.

The Funding Calculations

[53] Typically in settlements in personal injury cases, where payments are to be made on a periodic basis over an extended period of time, lump sum amounts are set aside to fund the extended liabilities. The amount set aside is based on a calculation which determines the "present value" of the liability. The present value is the amount needed immediately to produce payments in the agreed value over the agreed time. This calculation requires factoring in the effects of inflation, the return on the investment of the lump sum amount and any income or other taxes which might have to be paid on the award or the income it generates. Dealing with this issue in a single victim case may be relatively straightforward. Making an accurate determination in a class proceeding with a multitude of claimants suffering a broad range of damages is a complex matter.

[54] Class counsel retained the actuarial firm of Eckler Partners Ltd. to calculate the present value of the liabilities for the benefits set out in the settlement. The calculations performed by Eckler were based on a natural history model of HCV constructed by the Canadian Association for the Study of the Liver ("CASL") at the request of the parties. As stated in the Eckler report at p. 3, "the results from the [CASL] study form the basis of our assumptions regarding the development of the various medical outcomes." However, the Eckler report also notes that in instances where the study was lacking in information, certain extensions to some of the

probabilities were supplied by Dr. Murray Krahn who led the study. In certain other situations, additional or alternative assumptions were provided by class counsel.

[55] The class in the Transfused Action is comprised of those persons who received blood transfusions during the class period and are either still surviving or have died from a HCV related cause. The CASL study indicates that the probable number of persons infected with HCV through blood transfusion in the class period, the "cohort" as it is referred to in the study, is 15,707 persons. The study also estimates the rates of survival of each infected person. From these estimates, Eckler projects that the cohort as of January 1, 1999 is 8,104 persons. Of those who have died in the intervening time, 76 are projected to be HCV related deaths and thus eligible for the death benefits under the settlement.

[56] In the case of the Hemophiliac class, the added factor of cross-infection with HIV, and the provisions in the plan dealing with this factor, require some additional considerations. Eckler was asked to make the following assumptions based primarily on the evidence of Dr. Irwin Walker:

> (a) the Hemophiliac cohort size is approximately 1645 persons
>
> (b) 15 singularly infected and 340 co-infected members of this cohort have died prior to January 1, 1999; the 15 singularly infected and 15 of those co-infected will establish HCV as the cause of death and claim under the regular death provisions (but there is no $120,000 option in this plan); the remaining 325 co-infected will take the $72,000 option.
>
> (c) a further 300 co-infected members are alive at January 1, 1999; of these, 80%, i.e. 240, will take the $50,000 option;

(d) 990 singularly infected hemophiliacs are alive at January 1, 1999

(e) the remaining 60 co-infected and the 990 singularly infected hemophiliacs will claim under the regular provisions and should be modeled in the same way as the transfused persons, i.e. apply the same age and sex profiles, and the same medical, mortality and other assumptions as for the transfused group, except that the 60 co-infected claimants will not have any losses in respect of income.

[57] Because of the structure of this agreement, Eckler was not required to consider the impact of income or other taxes on the investment returns available from the Fund. With respect to the rate of growth of the Fund, Eckler states at p. 10 that:

> A precise present value calculation would require a formula incorporating the gross rate of interest and the rate of inflation as separate parameters. However, virtually the same result will flow from a simpler formula where the future payments are discounted at a net rate equal to the excess of the gross rate of interest over the assumed rate of inflation.

Eckler calculates the annual rate of growth of the Fund will be 3.4% per year on this basis. This is referred to as the "net discount rate".

[58] There is one other calculation that is worthy of particular note. In determining the requirements to fund the income replacement benefits set out in the settlement, Eckler used the average industrial aggregate earnings rate in Canada estimated for 1999. From this figure, income taxes and other ordinary deductions were made to arrive at a "pre-claim net income". Then an assumption is made that the class members claiming income compensation will have other earnings post-claim that will average 40% of the pre-claim amount. The 60% remaining loss, in dollars expressed as $14,500, multiplied by the number of expected claimants, is the amount for which funding is required. Eckler points out candidly at p. 20 that:

> [in regard to the assumed average of Post-claim Net Income]...we should bring to your attention that without any real choice, the foregoing assumed level of 40% was still based to a large extent on anecdotal input and our intuitive judgement on this matter rather than on rigourous scientific studies which are simply not available at this time.

There are other assumptions and estimates which will be dealt with in greater detail below.

[59] The Eckler conclusion is that if the settlement benefits, including holdbacks, and the other liabilities were to be paid out of the Fund, there is a present value deficit of $58,533,000. Prior to the payment of holdbacks, the Fund would have a surplus of $34,173,000.

The Thalassemia Victims

[60] Prior to analyzing the settlement, I turn to the concerns advanced by The Thalassemia Foundation of Canada. The organization raises the objection that the plan contains a fundamental unfairness as it relates to claims requirements for members of the class who suffer from Thalassemia.

[61] Thalassemia, also known as Mediterranean Anemia or Cooley's Anemia, is an inherited form of anemia in which affected individuals are unable to make normal hemoglobin, the oxygen carrying protein of the red blood cell. Mutations of the hemoglobin genes are inherited. Persons with a thalassemia mutation in one gene are known as carriers or are said to have thalassemia minor. The severe form of thalassemia, thalassemia major, occurs when a child inherits two

mutated genes, one from each parent. Children born with thalassemia major usually develop the symptoms of severe anemia within the first year of life. Lacking the ability to produce normal adult hemoglobin, children with thalassemia major are chronically fatigued; they fail to thrive; sexual maturation is delayed and they do not grow normally. Prolonged anemia causes bone deformities and eventually will lead to death, usually by their fifth birthday.

[62] The only treatment to combat thalassemia major is regular transfusions of red blood cells. Persons with thalassemia major receive 15 cubic centimeters of washed red blood cells per kilogram of weight every 21 to 42 days for their lifetime. That is, a thalassemia major person weighing 60 kilograms (132 pounds) may receive 900 cubic centimeters of washed red blood cells each and every transfusion. Such a transfusion corresponds to four units of blood. Persons with thalassemia major have not been treated with pooled blood. Therefore, in each transfusion a thalassemia major person would receive blood from four different donors and over the course of a year would receive 70 units of blood from potentially 70 different donors. Over the course of the Class Period, a class member with thalassemia major might have received 315 units of blood from potentially 315 different donors.

[63] Over the past three decades, advances in scientific research have allowed persons with thalassemia major in Canada to live relatively normal lives. Life expectancy has been extended beyond the fourth decade of life, often with minimal physical symptoms. In Canada approximately 300 persons live with thalassemia major.

[64] Of the 147 transfused dependent thalassemia major patients currently being treated in the Haemoglobinopathy Program at the Hospital for Sick Children and Toronto General Hospital, 48 have tested positive using HCV antibody tests. Fifty-one percent of the population at TGH have tested positive; only 14% of the population of HSC have tested positive. The youngest of these persons was born in 1988; 9 of them are 13 years of age or older but less than 18 years of age; the balance are adults. Nine thalassemia major patients in the Haemoglobinopathy Program have died since HCV testing was available in 1991. Seven of these persons were HCV positive. The Foundation estimates that there are approximately 100 thalassemia major patients across Canada who are HCV positive.

[65] The unfairness pointed to by the Thalassemia Foundation is that class members suffering from thalassemia are included in the Transfused Class, and therefore must follow the procedures for that class in establishing entitlement. It is contended that this is fundamentally unfair to thalassemia victims because of the number of potential donors from whom each would have received blood or blood products. It is said that by analogy to the hemophiliac class, and the lesser burden of proof placed on members of that class, a similar accommodation is justified. I agree.

[66] This is a situation where it is appropriate to create a sub-class of thalassemia victims from the Transfused Class. Sub-classes are provided for in s. 5(2) of the *CPA* and the power to amend the certification order is contained in s. 8(3) of the *Act*. The settlement should be amended to apply the entitlement provisions in the Hemophiliac Plan *mutatis mutandis* to the Thalassemia

sub-class.

Law and Analysis

[67] Section 29(2) of the *CPA* provides that:

> A settlement of a class proceeding is not binding unless approved by the court.

[68] While the approval of the court is required to effect a settlement, there is no explicit provision in the *CPA* dealing with criteria to be applied by the court on a motion for approval. The test to be applied was, however, stated by Sharpe J. in *Dabbs v. Sun Life Assurance,* [1998] O.J. No. 1598 (Gen.Div.) (*Dabbs No.1)* at para. 9:

> ...the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

[69] In the context of a class proceeding, this requires the court to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular member. As this court stated in *Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245 (Sup.Ct.) at para. 89:

> The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

[70] Sharpe J. stated in *Dabbs v. Sun Life Assurance* (1998), 40 O.R. (3d) 429 (Gen.Div.), aff'd 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. dismissed October 22, 1998, (*Dabbs No.*

2) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

[71] Generally, in determining whether a settlement is "fair, reasonable and in the best interests of the class as a whole", courts in Ontario and British Columbia have reviewed proposed class proceeding settlements on the basis of the following factors:

1. Likelihood of recovery, or likelihood of success;
2. Amount and nature of discovery evidence;
3. Settlement terms and conditions;
4. Recommendation and experience of counsel;
5. Future expense and likely duration of litigation;
6. Recommendation of neutral parties if any;
7. Number of objectors and nature of objections; and
8. The presence of good faith and the absence of collusion.

See *Dabbs No.1* at para. 13, *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565 (B.C.S.C.) at 571. See also Conte, *Newberg on Class Actions*, (3rd ed) (West Publishing) at para. 11.43.

[72] In addition to the foregoing, it seems to me that there are two other factors which might be considered in the settlement approval process: i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and ii) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation. These two additional factors go hand-in-glove and provide the court with insight into whether the bargaining was interest-based, that is reflective of the needs of the class members, and whether the parties were bargaining at equal or comparable strength. A reviewing court, in exercising its supervisory jurisdiction is, in this way, assisted in appreciating fully whether the concerns of the class have been adequately addressed by the settlement.

[73] However, the settlement approval exercise is not merely a mechanical *seriatim* application of each of the factors listed above. These factors are, and should be, a guide in the process and no more. Indeed. in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process.

[74] Morover, the court must take care to subject the settlement of a class proceeding to the proper level of scrutiny. As Sharpe J. stated in *Dabbs No. 2* at 439-440:

> A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's

> comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.

[75] The preceding admonition is especially apt in the present circumstances. Class counsel described the agreement before the court as "the largest settlement in a personal injury action in Canadian history." The settlement is Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years. It cannot be seriously contended that the tragedy at the core of these actions does not have a present and lasting impact on the class members and their families. While the resolution of the litigation is a noteworthy aim, an improvident settlement would have repercussions well into the future.

[76] Consequently, this is a case where the proposed settlement must receive the highest degree of court scrutiny. As stated in the *Manual for Complex Litigation*, 3rd Ed. (Federal Judicial Centre: West Publishing, 1995) at 238:

> Although settlement is favoured, court review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties— even those with the best intentions— to give insufficient weight to the interests of at least some class members. *The court's responsibility is particularly weighty when reviewing a settlement involving a non-opt-out class or future claimants.* (Emphasis added.)

[77] The court has been assisted in scrutinizing the proposed settlement by the submissions of several intervenors and objectors. I note that some of the submissions, as acknowledged by

counsel for the objectors, raised social and political concerns about the settlement. Without in any way detracting from the importance of these objections, it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

[78] However, although there may have been social or political undertones to many of the objections, legal issues raised by those objections, either directly or peripherally, are properly considered by the court in reviewing the settlement. Counsel for the objectors described the legal issues raised, in broad terms, as objections to:

(a) the adequacy of the total value of the settlement amount;

(b) the extent of compensation provided through the settlement;

(c) the sufficiency of the settlement Fund to provide the proposed compensation;

(d) the reversion of any surplus;

(e) the costs of administering the Plans; and

(f) the claims process applicable to Thalassemia victims.

I have dealt with the objection regarding the Thalassemia victims above. The balance of these objections will be addressed in the reasons which follow.

[79] It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscient wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The *CPA* mandates that class members retain, for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the class.

[80] This settlement must be reviewed on an objective standard, taking into account the need to provide compensation for all of the class members while at the same time recognizing the inherent difficulty in crafting a universally satisfactory settlement for a disparate group. In other words, the question is does the settlement provide a reasonable alternative for those Class Members who do not wish to proceed to trial?

[81] Counsel for the class and the Crown defendants urged this court to consider the question on the basis of each class member's likely recovery in individual personal injury tort litigation. They contend that the benefits provided at each level are similar to the awards class members who are suffering physical manifestations of HCV infection approximating those set out in the different levels of the structure of this settlement would receive in individual litigation. In my

view, this approach is flawed in the present case.

[82] An award of damages in personal injury tort litigation is idiosyncratic and dependent on the individual plaintiff before the court. Here, although the settlement is structured to account for Class Members with differing medical conditions by establishing benefits on an ascending classification scheme, no allowances are made for the spectrum of damages which individual class members within each level of the structure may suffer. The settlement provides for compensation on a "one-size fits all" basis to all Class Members who are grouped at each level. However, it is apparent from the evidence before the court on this motion that the damages suffered as a result of HCV infection are not uniform, regardless of the degree of progression.

[83] The evidence of Dr. Frank Anderson, a leading practitioner working with HCV patients in Vancouver, describes in detail the uncertain prognosis that accompanies HCV and the often debilitating, but unevenly distributed, symptomology that can occur in connection with infection. He states:

> Once infected with HCV, a person will either clear HCV after an acute stage of develop chronic HCV infection. At present, the medical literature establishes that approximately 20-25% of all persons infected clear HCV within approximately one year of infection. Those persons will still test positive for the antibody and will probably do so for the rest of their lives, but will not test positive on a PCR test, nor will they experience any progressive liver disease due to HCV.
>
> Persons who do not clear the virus after the acute stage of the illness have chronic HCV. They may or may not develop progressive liver disease due to HCV, depending on the on the course HCV takes in their body and whether treatment subsequently achieves a sustained remission. A sustained remission means that the virus is not detectable in the blood 6 months after treatment, the liver enzymes are normal, and that on a liver biopsy, if one were done, there would be no

inflammation. Fibrosis in the liver is scar tissue caused by chronic inflammation, and as such is not reversible, and will remain even after therapy. It is also possible to spontaneously clear the virus after the acute phase of the illness but when this happens and why is not well understood. The number of patients spontaneously clearing the virus is small.

HCV causes inflammation of the liver cells. The level of inflammation varies among HCV patients. ... the inflammation may vary in intensity from time to time.

...

Inflammation and necrosis of liver cells results in scarring of liver tissue (fibrosis). Fibrosis also appears in various patterns in HCV patients... Fibrosis can stay the same or increase over time, but does not decrease, because although the liver can regenerate cells, it cannot reverse scarring. On average it takes approximately 20 years from point of infection with Hepatitis C until cirrhosis develops, and so on a scale of 1 to 4 units the best estimate is that the rate of fibrosis progression is 0.133 units per year.

...

Once a patient is cirrhotic, they are either a compensated cirrhotic, or a decompensated cirrhotic, depending on their liver function. In other words, the liver function may still be normal even though there is fibrosis since there may be enough viable liver cells remaining to maintain function. These persons would have compensated cirrhosis. If liver function fails the person would then have decompensated cirrhosis. The liver has very many functions and liver failure may involve some or many of these functions. Thus decompensation may present in a number of ways with a number of different signs and symptoms.

A compensated cirrhotic person has generally more than one third of the liver which is still free from fibrosis and whose liver can still function on a daily basis. They may have some of the symptoms discussed below, but they may also be asymptomatic.

Decompensated cirrhosis occurs when approximately 2/3 of the liver is compromised (functioning liver cells destroyed) and the liver is no longer able to perform one or more of its essential functions. It is diagnosed by the presence of one or more conditions which alone or in combination is life threatening without a transplant. This clinical stage of affairs is also referred to as liver failure or end stage liver disease. The manifestations of decompensation are discussed below. Once a person develops decompensation, life expectancy is short and they will generally die within approximately 2-3 years unless he or she receives a liver transplant.

Patients who progress to cirrhosis but not to decompensated cirrhosis may

> develop hepatocellular cancer ("HCC"). This is a cancer, which originates from liver cells, but the exact mechanism is uncertain. The simple occurrence of cirrhosis may predispose to HCC, but the virus itself may also stimulate the occurrence of liver cell cancer. Life expectancy after this stage is approximately 1-2 years.
>
> ...
>
> The symptoms of chronic HCV infection, prior to the disease progressing to cirrhosis or HCC include: fatigue, weight loss, upper right abdominal pain, mood disturbance, and tension and anxiety....
>
> Of those symptoms, fatigue is the most common, the most subjective and the most difficult to assess... There is also general consensus that the level of fatigue experienced by an individual infected with HCV does not correlate with liver enzyme levels, the viral level in the blood, or the degree of inflammation or fibrosis on biopsy. It is common for the degree of fatigue to fluctuate from time to time.

Dr. Anderson identifies some of the symptoms associated with cirrhosis which can include skin lesions, swelling of the legs, testicular atrophy in men, enlarged spleen and internal hemorrhaging. Decompensated cirrhosis symptomatic effects, he states, can include jaundice, hepatic encephalopathy, protein malnutrition, subacute bacterial peritonitis and circulatory and pulmonary changes. Dr. Anderson also states, in respect of his own patients, that "at least 50% of my HCV infected patients who have not progressed to decompensated cirrhosis or HCC are clinically asymptomatic."

[84] It is apparent, in light of Dr. Anderson's evidence, that in the absence of evidence of the individual damages sustained by class members, past precedents of damage awards in personal injury actions cannot be applied to this case to assess the reasonableness of the settlement for the class.

[85] This fact alone is not a fatal flaw. There have long been calls for reform of the "once and for all" lump sum awards that are usually provided in personal injury actions. As stated by Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2. S.C.R. 229 at 236:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

[86] The "once-and-for-all" lump sum award is the common form of compensation for damages in tort litigation. Although the award may be used to purchase annuities to provide a "structured" settlement, the successful claimant receives one sum of money that is determined to be proper compensation for all past and future losses. Of necessity, there is a great deal of speculation involved in determining the future losses. There is also the danger that the claimant's future losses will prove to be much greater than are contemplated by the award of damages received because of unforeseen problems or an inaccurate calculation of the probability of future contingent events. Thus even though the claimant is successful at trial, in effect he or she bears the risk that there may be long term losses in excess of those anticipated. This risk is especially pronounced when dealing with a disease or medical condition with an uncertain prognosis or

where the scientific knowledge is incomplete.

[87] The present settlement is imaginative in its provision for periodic subsequent claims should the class member's condition worsen. The underlying philosophy upon which the settlement structure is based is set forth in the factum of the plaintiffs in the Transfused Action. They state at para. 10 that:

> The Agreement departs from the common law requirement of a single, once-and-for-all lump sum assessment and instead establishes a system of periodic payments to Class Members and Family Class Members depending on the evolving severity of their medical condition and their needs.

[88] This forward-looking provision addresses the concern expressed by Dickson J. with respect to the uncertainty and unfairness of a once and for all settlement. Indeed, the objectors and intervenors acknowledge this in that they do not take issue with the benefit distribution structure of the settlement as much as they challenge the benefits provided at the levels within the structure.

[89] These objections mirror the submissions in support of the settlement, in that they are largely based on an analogy to a tort model compensation scheme. For the reasons already stated, this analogy is not appropriate because the proper application of the tort model of damages compensation would require an examination of each individual case. In the absence of an individualized examination, the reasonableness, or adequacy, of the settlement cannot be determined by a comparison to damages that would be obtained under the tort model. Rather the only basis on which the court can proceed in a review of this settlement is to consider whether

the total amount of compensation available represents a reasonable settlement, and further, whether those monies are distributed fairly and reasonably among the class members.

[90] The total value of the Pan-Canadian settlement is estimated to be $1.564 billion dollars. This is calculated as payment or obligation to pay by the federal, provincial and territorial governments in the an amount of $1.207 billion on September 30, 1999, plus the tax relief of $357 million over the expected administrative term of the settlement. This amount is intended to settle the class proceedings in Ontario, British Columbia and Quebec. The Ontario proceeding, as stated above, covers all of those class members in Canada other than those included in the actions in British Columbia and Quebec.

[91] Counsel for the plaintiffs and for the settling defendants made submissions to the court with respect the length and intensity of the negotiations leading up to the settlement. There was no challenge by any party as to the availability of any additional compensation. I am satisfied on the evidence that the negotiations achieved the maximum total funding that could be obtained short of trial.

[92] In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The CRCS is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to

satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.

[93] Moving to the remaining factors, although there have been no examinations for discovery, the extensive proceedings before the Krever Commission serve a similar purpose. The settlement is supported by the recommendation of experienced counsel as well as many of the intervenors. There is no suggestion of bad faith or collusion tainting the settlement. The support of the intervenors, particularly the Canadian Hemophilia Society which made submissions regarding the meetings held with class members, is indicative of communication between class counsel and the class members. Although, there were some objectors who raised concerns about the degree of communication with the Transfused Class members, these complaints were not strenuously pursued. Perhaps the most compelling evidence of the adequacy of the communications with the class members regarding the settlement is the relatively low number of objections presented to the court considering the size of the classes. Finally, counsel for all parties made submissions, which I accept, regarding the rigourous negotiations that resulted in the final settlement.

[94] In conclusion, I find that the global settlement represents a reasonable settlement when the significant and very real risks of litigation are taken into account.

[95] The next step in the analysis is to determine whether the monies available are allocated in such a way as to provide for a fair and reasonable distribution among the class members. In my view, as the settlement agreement is presently constituted, they are not. My concern lies with the provision dealing with opt out claimants. Under the agreement, if opt out claimants are successful in individual litigation, any award such a claimant receives will be satisfied out of the settlement Fund. While this has the potential of depleting the Fund to the detriment of the class members, thus rendering the settlement uncertain, the far greater concern is the risk of inequity that this creates in the settlement distribution. The *Manual for Complex Litigation* states at 239 that whether "claimants who are not members of the class are treated significantly differently" than members of the class is a factor that may "be taken into account in the determination of the settlement's fairness, adequacy and reasonableness...".

[96] In principle, there is nothing egregious about the payment of settlement funds to non-class members. Section 26(6) of the *CPA* provides the court with the discretion to sanction or direct payments to non-class members. In effect, the opt out provision reflects the intention of the defendants to settle all present and future litigation. This objective is not contrary to the scheme of the *CPA per se.* See, for example, the reasons of Brenner J. in *Sawatzky v. Societe Chirurgiale Instrumentarium Inc.* [1999] B.C.J. 1814 (S.C.), adopted by this court in *Bisignano*

v. La Corporation Instrumentarium Inc. (September 1, 1999, Court File No. 22404/96, unreported.)

[97] However, given that the settlement must be "fair, reasonable and in the best interests of the class", the court cannot sanction a provision which gives opt out claimants the potential for preferential treatment in respect of access to the Fund. The opt out provision as presently written has this potential effect where an opt out claimant either receives an award or settlement in excess of the benefits that he or she would have received had they not opted out and which must be satisfied out of the Fund. Alternatively, the preferential treatment could also occur where the opt out claimant receives an award similar to their entitlement under the settlement in quantum but without regard for the time phased payment structure of the settlement.

[98] In my view, where a defendant wishes to settle a class proceeding by providing a single Fund to deal with both the claims of the class members and the claims of individuals opting out of the settlement, the payments out of the Fund must be made on an equitable basis amongst all of the claimants. Fairness does not require that each claimant receive equal amounts but what cannot be countenanced is a situation where an opt out claimant who is similarly situated to a class member receives a preferential payment.

[99] The federal government argues that fairness ensues, even in the face of the different treatment, because the opt out claimant assumes the risk of individual litigation. I disagree. Because the defendants intend that all claims shall be satisfied from a single fund, individual

litigation by a claimant opting out of the class pits that claimant against the members of the class. The opt out claimant stands to benefit from success because he or she may achieve an award in excess of the benefits provided under the settlement. This works to the detriment of the class members by the reducing the total amount of the settlement. More importantly however, the benefits to the class members will not increase as a result of unsuccessful opt out claimants.

[100] In the instant case, fairness requires a modification to the opt out claimant provision of the settlement. The present opt out provision must be deleted and replaced with a provision that in the event of successful litigation by an opt out claimant, the defendants are entitled to indemnification from the Fund only to the extent that the claimant would have been entitled to claim from the Fund had he or she remained in the class. This must of necessity include the time phasing factor. Such a provision ensures fairness in that there is no prospect of preferential distribution from the Fund, nor will the class suffer any detrimental effect as a result of the outcome of the individual litigation. The change also provides a complete answer to the complaint that the current opt out provision renders the settlement uncertain. Similarly, the modification renders the provision for defence costs to be paid out of the Fund unnecessary and thus it must be deleted.

[101] Accordingly, the opt out provision of the settlement would not be an impediment to court approval with the modifications set out above.

[102] In my view, the remainder of distribution scheme is fair and reasonable with this

alteration to the opt out provision. It is beyond dispute that the compensation at any level will not be perfect, nor will it be tailored to individual cases but perfection is not the standard to be applied. The benefit levels are fair. More pointedly, fairness permeates the settlement structure in that each and every class member is provided an opportunity to make subsequent claims if his or her condition deteriorates. An added advantage is that there is a pre-determined, objective qualifying scheme so that class members will be able to readily assess their eligibility for additional benefits. Thus, while a claimant may not be perfectly compensated at any particular level, the edge to be gained by a scheme which terminates the litigation while avoiding the pitfalls of an imperfect, one-time-only lump sum settlement is compelling.

[103] In any event, the settlement structure also provides a reasonable basis for the distribution of the funds available. Class counsel described the distribution method as a "need not greed" system, where compensation is meant, within limits, to parallel the extent of the damages. There were few concerns raised about the compensation provided at the upper levels of the scheme. Rather, the majority of the objections centred on the benefits provided at Levels 1, 2 and 3. The damages suffered by those whose conditions fall within these Levels are clearly the most difficult to assess. This is particularly true in respect of those considered to be at Level 2. However, in order to provide for the subsequent claims, compromises must be made and in this case, I am of the view that the one chosen is reasonable.

[104] Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory benefits assigned to claimants at

different levels were largely influenced by the total of the monies available for allocation. As stated in the CASL study at p. 3:

> At the request of the Federal government of Canada, provincial governments, and Hepatitis C claimants, i.e. individuals infected with hepatitis C virus during the period of 1986 to 1990, an impartial group, the Canadian Association for the Study of the Liver (CASL) was asked to construct a natural history model of Hepatitis C. *The intent of this effort was to generate a model that would be used by all parties, as guide to disbursing funds set aside to compensate patients infected with hepatitis C virus through blood transfusion.*

[105] Of necessity, the settlement cannot, within each broad category, deal with individual differences between victims. Rather it must be general in nature. In my view, the allocation of the monies available under the settlement is "fair, reasonable and in the best interests of the class as a whole."

[106] In making this determination, I have not ignored the submissions made by certain objectors and intervenors regarding the sufficiency of the Fund. They asserted that the apparent main advantage of this settlement, the ability to "claim time and time again" is largely illusory because the Fund may well be depleted by the time that the youngest members of the class make claims against it.

[107] I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $34,173,000. Admittedly, Eckler currently projects a deficit of

$58,533,000 if the holdbacks are released.

[108] However, the Eckler report contains numerous caveats regarding the various assumptions that have been made as a matter of necessity, including the following, which is stated in section 12.2:

> A considerable number of assumptions have been made in order to calculate the liabilities in this report. Where we have made the assumptions, we used our best efforts based on our understanding of the plan benefits; in general, where we have made simplifying assumptions or approximations, we have tried to err on the conservative side, i.e. increasing costs and liabilities. In many instances we have relied on counsel for the assumptions and understand that they have used their best efforts in making these. Nevertheless, the medical outcomes are very unclear - e.g. the CASL report indicates very wide ranges in its confidence intervals for the various probabilities it developed. There is substantial room for variation in the results. The differences will emerge in the ensuing years as more experience is obtained on the actual cohort size and characteristics of the infected claimants. These differences and the related actuarial assumptions will be re-examined at each periodic assessment of the Fund.

[109] Unfortunately, but not unexpectedly, the limitations of the underlying medical studies upon which Eckler has based its report require the use of assumptions. For example, the report prepared by Dr. Remis, dated July 6, 1999, states at p. 642:

> There are important limitations to the analyses presented here and, in particular, with the precision of the estimates of the number of HCV-infected recipients who are likely to qualify for benefits under the Class Action Settlement...
>
> The proportion of transfusion recipients who will ultimately be diagnosed is particularly important in this regard and has substantial impact on the final estimate. We used an estimate of 70% as the best case estimate for this proportion based on the BC experience but the actual proportion could be substantially

> different from this, depending on the type, extent and success of targeted notification activities that will be undertaken, especially in Ontario and Quebec. This could alter the ultimate number who eventually qualify for benefits by as much as 1,500 in either direction.

[110] The report of the CASL study states at p. 22:

> Our attempt to project the natural history of the 1986-1990 post transfusion HCV infected cohort has limitations. Perhaps foremost among these is our lack of understanding of the long-term prognosis of the disease. For periods beyond 25 years, projections remain particularly uncertain. The wide confidence intervals surrounding long-term projections highlight this uncertainty.
>
> Other key limitations are lack of applicability of these projections to children and special groups.

[111] The size of the cohort and the percentage of the cohort which will make claims against the Fund are critical assumptions. Significant errors in either assumption will have a dramatic impact on the sufficiency of the Fund. Recognizing this, Eckler has chosen to use the most conservative estimates from the information available. The cohort size has been estimated from the CASL study rather than other studies which estimate approximately 20% less surviving members. Furthermore, Eckler has calculated liabilities on the basis that 100% of the estimated cohort will make claims against the Fund.

[112] Class counsel urged the court to consider the empirical evidence of the "take-up rate" demonstrated in the completed class proceeding, *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen.Div.), leave to appeal dismissed (1995), 129 D.L.R. (4th) 110 (Ont.Div.Ct.), to support a conclusion that the Fund is sufficient. In *Nantais*, all of the class members were known and accordingly received actual notice of the settlement. Seventy-two per

cent of the class chose to make claims, or "take-up" the settlement. It was contended that this amounted to strong evidence that less than one hundred per cent of the classes in these proceedings would take up this settlement. I cannot accept the analogy. While I agree that it is unlikely that the entire estimated cohort will take up the settlement, it is apparent from the caveats expressed in the reports provided to the court that the estimate of the cohort size may be understated by a significant number. Accordingly, for practical purposes, a less than one hundred per cent take up rate could well be counter-balanced by a concurrent miscalculation of the cohort size.

[113] Although I cannot accept the *Nantais* experience as applicable on this particular point, the Eckler report stands alone as the only and best evidence before the court from which to determine the sufficiency of the Fund. Eckler has recognized the deficiencies inherent in the information available by using the most conservative estimates throughout. This provides the court with a measure of added comfort. Not to be overlooked as well, the distribution of the Fund will be monitored by this court and the courts in Quebec and British Columbia, guided by periodically revised actuarial projections. In my view, the risk that the Fund will be completely depleted for latter claimants is minimal.

[114] Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000,000 considered in

the context of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus, in this respect, the settlement is reasonable.

[115] I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the defendants. The Society contends that this provision *simpliciter* is repugnant to the basis on which this settlement is constructed. It argues that the benefit levels were established on the basis of the total monies available, rather than a negotiation of benefit levels *per se.* Thus, it states there is a risk that the Fund will not be sufficient to provide the stated benefits and further, that this risk lies entirely with the class members because the defendants have no obligation to supplement the Fund if it proves to be deficient for the intended purpose. Moreover, the Society argues that the use of conservative estimates in defining the benefit levels, although an attempt at ensuring sufficiency, has the ancillary negative effect of minimizing the benefits payable to each class member under the settlement. Therefore, the Society contends that a surplus, if any develops in the ongoing administration of the Fund, should be used to augment the benefits for the class members.

[116] The issue here is whether a reversion clause is appropriate in a settlement agreement in this class proceeding, and by extension, whether the inclusion of this clause is such that it would render the overall settlement unacceptable.

[117] It is important to frame the submission of the Society in the proper context. This is not a case where the question of entitlement to an existing surplus is presented. Indeed, given the deficit projected by the Eckler report, it is conjectural at this stage whether the Fund will ever generate a surplus. If the Fund accumulates assets over and above the current Eckler projections, they must first be directed toward eliminating the deficit so that the holdbacks may be released.

[118] The plan also provides that after the release of the holdbacks, the administrator may make an application to raise the $75,000 annual cap on income replacement if the Fund has sufficient assets to do so. It is only after these two areas of concern have been fully addressed that a surplus could be deemed to exist.

[119] The clause in issue does not, according to the interpretation given to the court by class counsel, permit the withdrawal by the defendants of any actuarial surplus that may be identified in the ongoing administration of the Fund. Rather, they state that it is intended that the remainder of the Fund, if any, revert to the defendants only after the Plans have been fully administered in the year 2080.

[120] Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party

took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefitting neither party during the entire 80 year term of the settlement.

[121] Quite apart from the question of tying up the surplus for this unreasonable period of time, there is the underlying question of whether in the context of this settlement, it is appropriate for the surplus to revert in its entirety to the defendants.

[122] The court is asked to approve the settlement even though the benefits are subject to fluctuation and regardless that the defendants are not required to make up any shortfall should the Fund prove deficient. This is so notwithstanding that the benefit levels are not perfect. It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

[123] This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. This is in keeping with the *CPA* which provides in s. 26(4) that surplus funds may "be applied in any manner that may reasonably be expected to benefit class members, even

though the order does not provide for monetary relief to individual class members...". On the other hand, in the proper circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.

[124] To attempt to determine the range of reasonable solutions at present, when the prospect of a surplus is uncertain at best, would be to pile speculation upon speculation. In the circumstances therefore, the only appropriate course, in my opinion, is to leave the question of the proper application of any surplus to the administrator of the Fund. The administrator may recommend to the court from time to time, based on facts, experience with the Fund and future considerations, that all or a portion of the surplus be applied for the benefit of the class members or that all or a portion be released to the defendants. In the alternative, the surplus may be retained within the Fund if the administrator determines that this is appropriate. Any option recommended by the administrator would, of course, be subject to requisite court approval. This approach is in the best interests of the class and creates no conflicts between class members. Moreover, it resolves the anomaly created by freezing any surplus for the duration of the administration of the settlement. If the present surplus reversion clause is altered to conform with the foregoing reasons, it would meet with the court's approval.

[125] There was an expressed concern as to the potential for depletion of the Fund through excessive administrative costs. The court shares this concern. However, the need for efficient access to the plan benefits for the class members and the associated costs that this entails must

also be recognized. This requires an ongoing balancing so as to keep administrative costs in line while at the same time providing a user friendly claims administration. The courts, in their supervisory role, will be vigilant in ensuring that the best interests of the class will be the predominant criterion.

Disposition

[126] In ordinary circumstances, the court must either approve or reject a settlement in its entirety. As stated by Sharpe J. in *Dabbs No. 1* at para. 10:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; *Poulin v. Nadon*, [1950] O.R. 219 (C.A.) at 222-3.

[127] These proceedings, emanating from the blood tragedy, are novel and unusually complex. The parties have adverted to this in the settlement agreement which contemplates the necessity for changes of a non-material nature in Clause 12.01:

> This Agreement will not be effective unless and until it is approved by the Court in each of the Class Actions, and *if such approvals are not granted without any material differences therein*, this Agreement will be thereupon terminated and none of the Parties will be liable to any other Parties hereunder. (Emphasis added.)

[128] The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial.

Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.

[129] I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. Thirdly, in the interests of fairness, a sub-class must be created for the thalassemia victims to take into account their special circumstances.

[130] The defendants have expressed their intention to be bound by the settlement if it receives court approval absent any material change. As stated, this reflects their acknowledgment of the complexity of the case, the scientific uncertainty surrounding the infections and the fact this settlement is crafted with a degree of improvisation.

[131] The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by

counsel for the defendants, the variation indicated is *de minimis* in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. The creation of the sub-class of thalassemia victims, in the context of the cohort size is equally *de minimis*. I am prepared to approve the settlement with these changes.

[132] However, should the parties to the agreement not share the view that these changes are not material in nature, they may consider the proposed changes as an indication of "areas of concern" within the meaning the words of Sharpe J. in *Dabbs No. 1* at para. 10:

> As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement...

[133] The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However,

perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

I am obliged to counsel, the parties and the intervenors and especially to the individual objectors who took the time to either file a written objection or appear in person at the hearings.

WINKLER J.

Released: September 22, 1999

COURT FILE NO.: 98-CV-141369

SUPERIOR COURT OF JUSTICE

BETWEEN:

DIANNA LOUISE PARSONS et al.

Plaintiffs

-and-

THE CANADIAN RED CROSS SOCIETY et al.

Defendants

REASONS FOR DECISION

WINKLER J.

Released: September 22, 1999

59 p.

TAB 12

See paras. 22, 24, 25, 27

CITATION: Robertson v. ProQuest Information and Learning Company, 2011 ONSC 1647
COURT FILE NO.: 03-CV-252945CP / CV-10-8533-00CL
DATE: 20110315

ONTARIO

SUPERIOR COURT OF JUSTICE
(Commercial List)

2011 ONSC 1647 (CanLII)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

- AND -

HEATHER ROBERTSON, Plaintiff

AND:

PROQUEST INFORMATION AND LEARNING COMPANY, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC., Defendants

BEFORE: Pepall J.

COUNSEL: *Kirk Baert*, for the Plaintiff

Peter J. Osborne and *Kate McGrann*, for Canwest Publishing Inc.

Alex Cobb, for the CCAA Applicants

Ashley Taylor and *Maria Konyukhova*, for the Monitor

REASONS FOR DECISION

Overview

[1] On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by

Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

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Facts

[2] The Representative Plaintiff commenced this class proceeding by statement of claim dated July 25, 2003 and the action was case managed by Justice Cullity. He certified the action as a class proceeding on October 21, 2008 which order was subsequently amended on September 15, 2009.

[3] The Representative Plaintiff claimed compensatory damages of $500 million plus punitive and exemplary damages of $250 million against the named defendants, ProQuest Information and Learning LLC, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and CPI for the alleged infringement of copyright and moral rights in certain works owned by class members. She alleged that class members had granted the defendants the limited right to reproduce the class members' works in the print editions of certain newspapers and magazines but that the defendant publishers had proceeded to reproduce, distribute and communicate the works to the public in electronic media operated by them or by third parties.

[4] As set out in the certification order, the class consists of:

> A. All persons who were the authors or creators of original literary works ("Works") which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively "Print Media") which Print Media have been reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any

electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively "Electronic Media"), excluding:

(a) persons who by written document assigned or exclusively licensed all of the copyright in their Works to a defendant, a licensor to a defendant, or any third party; or

(b) persons who by written document granted to a defendant or a licensor to a defendant a license to publish or use their Works in Electronic Media; or

(c) persons who provided Works to a not for profit or non-commercial publisher of Print Media which was licensor to a defendant (including a third party defendant), and where such persons either did not expect or request, or did not receive, financial gain for providing such Works; or

(d) persons who were employees of a defendant or a licensor to a defendant, with respect to any Works created in the course of their employment.

Where the Print Media publication was a Canadian edition of a foreign publication, only Works comprising of the content exclusive to the Canada edition shall qualify for inclusion under this definition.

(Persons included in clause A are thereinafter referred to as "Creators". A "licensor to a defendant" is any party that has purportedly authorized or provided permission to one or more defendants to make Works available in Electronic Media. References to defendants or licensors to defendants include their predecessors and successors in interest)

B. All persons (except a defendant or a licensor to a defendant) to whom a Creator, or an Assignee, assigned, exclusively licensed, granted or transmitted a right to publish or use their Works in Electronic Media.

(Persons included in clause B are hereinafter referred to as "Assignees")

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> C. Where a Creator or Assignee is deceased, the personal representatives of the estate of such person unless the date of death of the Creator was on or before December 31, 1950.

[5] As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for $500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at $0 on a preliminary basis.

[6] The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

[7] Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

[8] When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

[9] Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the CCAA proceedings. While I was the supervising CCAA judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

[10] Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided

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more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

[11] In this case, given the hybrid nature of the proceedings, the motion for an order approving notice of the settlement in both the class action proceeding and the *CCAA* proceeding was brought before me as the supervising *CCAA* judge. The notice procedure order required:

1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;

2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;

3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and

4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

[12] The notice order allowed class members to file a notice of appearance on or before a date set forth in the order and if a notice of appearance was delivered, the party could appear in person at the settlement approval motion and any other proceeding in respect of the class proceeding settlement. Any notices of appearance were to be provided to the service list prior to the approval hearing. In fact, no notices of appearance were served.

[13] In brief, the terms of the settlement were that:

a) the *CCAA* claim in the amount of $7.5 million would be allowed for voting and distribution purposes;

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b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;

c) the action would be dismissed as against CPI;

d) CPI did not admit liability; and

e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

[14] The claims in the action in respect of CPI would be fully settled but the claims which also involved ProQuest would be preserved. The licence was a non-exclusive licence to reproduce one or more copies of the freelance subject works in electronic media and to authorize others to do the same. The licence excluded the right to licence freelance subject works to ProQuest until such time as the action was resolved against ProQuest, thereby protecting the class members' ability to pursue ProQuest in the action. The settlement did not terminate the lawsuit against the other remaining defendants. Under the *CCAA* Plan, all unsecured creditors, including the class, would be entitled to share on a pro rata basis in a distribution of shares in a new company. The Representative Plaintiff would share pro rata to the extent of the settlement amount with other affected creditors of the LP Entities in the distributions to be made by the LP Entities, if any.

[15] After the notice motion, CPI and the Representative Plaintiff brought a motion to approve the settlement. Evidence was filed showing, among other things, compliance with the claims procedure order. Arguments were made on the process and on the fairness and reasonableness of the settlement.

[16] In her affidavit, Ms. Robertson described why the settlement was fair, reasonable and in the best interests of the class members:

> In light of Canwest's insolvency, I am advised by counsel, and verily believe, that, absent an agreement or successful award in the Canwest Claims Process, the prospect of recovery for the Class

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> against Canwest is minimal, at best. However, under the Settlement Agreement, which preserves the claims of the Class as against the remaining defendants in the class proceeding in respect of each of their independent alleged breaches of the class members' rights, as well as its claims as against ProQuest for alleged violations attributable to Canwest content, there is a prospect that members of the Class will receive some form of compensation in respect of their direct claims against Canwest.
>
> Because the Settlement Agreement provides a possible avenue of recovery for the Class, and because it largely preserves the remaining claims of the Class as against the remaining defendants in the class proceeding, I am of the view that the Settlement Agreement represents a reasonable compromise of the Class claim as against Canwest, and is both fair and reasonable in the circumstances of Canwest's insolvency.

[17] In the affidavit filed by class counsel, Anthony Guindon of the law firm Koskie Minsky LLP noted that he was not in a position to ascertain the approximate dollar value of the potential benefit flowing to the class from the potential share in a pro rata distribution of shares in the new corporation. This reflected the unfortunate reality of the *CCAA* process. While a share price of $11.45 was used, he noted that no assurance could be given as to the actual market price that would prevail. In addition, recovery was contingent on the total quantum of proven claims in the claims process. He also described the litigation risks associated with attempting to obtain a lifting of the *CCAA* stay of proceedings. The likelihood of success was stated to be minimal. He also observed the problems associated with collection of any judgment in favour of the Representative Plaintiff. He went on to state:

> … The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of $0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.

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> … a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.
>
> Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

[18] The Monitor was also involved in the negotiation of the settlement and was also of the view that the settlement agreement was a fair and reasonable resolution for CPI and the LP Entities' stakeholders. The Monitor indicated in its report that the settlement agreement eliminated a large degree of uncertainty from the *CCAA* proceeding and facilitated the approval of the Plan by the requisite majorities of stakeholders. This of course was vital to the successful restructuring of the LP Entities. The Monitor recommended approval of the settlement agreement.

[19] The settlement of the class proceeding action was made prior to the creditors' meeting to vote on the Plan for the LP Entities. The issues of the fees and disbursements of class counsel and the ultimate distribution to class members were left to be dealt with by the class proceedings judge if and when there was a resolution of the action with the remaining defendants.

Discussion

[20] Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

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[21] As noted by Jay A. Swartz and Natasha J. MacParland in their article "*Canwest Publishing – A Tale of Two Plans*"[1]:

> "There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society, (Re:) Grace Canada Inc., Muscletech Research and Development Inc.,* and *(Re:) Hollinger Inc.* … The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings." [citations omitted]

(a) Approval

(i) *CCAA* Settlements in General

[22] Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Re Lehndorff General Partner Ltd.*,[2] the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Re Calpine Canada Energy Ltd.*[3]; *Re Air Canada*[4]; and *Re Playdium Entertainment Corp.*[5] To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the

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[1] Annual Review of Insolvency Law, 2010, J.P. Sarra Ed, Carswell, Toronto at page 79.

[2] (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) at 31.

[3] [2007] A.B.Q.B. 504 at para. 71; leave to appeal dismissed [2007] A.B.C.A. 266 (Alta. C.A.).

[4] (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).

[5] (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.) at para. 23.

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settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Re Air Canada*[6] and *Re Calpine*.[7]

(ii) Class Proceedings Settlement

[23] The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992[8]. That section states:

> 29(1) A proceeding commenced under this *Act* and a proceeding certified as a class proceeding under this *Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceedings;
>
> (b) a statement of the result of the proceeding; and
>
> (c) a description of any plan for distributing settlement funds.

[24] The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada*[9]. The court must find that in all of the circumstances the

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[6] *Supra.* at para. 9.

[7] *Supra.* at para. 59.

[8] S.O. 1992, C.6.

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settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

a) the likelihood of recovery or success at trial;

b) the recommendation and experience of class counsel; and

c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

[25] A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada*[10]:

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

[26] Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program et al. v. Chevron Chemical et al.*[11]

(iii) The Robertson Settlement

[27] I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act*.

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[9] [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9.

[10] (1998) 40 O.R. (3rd) 429 at para 30.

[11] [1999] O.J. No. 2245 (Ont. S.C.J.) at para. 97.

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[28] As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

[29] The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

[30] In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

[31] The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for $11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

> The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in communication with class members about the litigation since its inception and has obtained funds from

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> them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada*[12].

[32] The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada*. In approving that settlement, Justice Cullity stated:

> Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation.[13]

[33] In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore,

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[12] [2009], O.J. No. 2650 at para. 15.

[13] *Robertson v. Thomson Canada*, [2009] O.J. No. 2650 para. 20.

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it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the CCAA Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

[34] The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

Pepall J.

Released: March 15, 2011

2011 ONSC 1647 (CanLII)

CITATION: Robertson v. ProQuest Information and Learning Company, 2011 ONSC 1647
COURT FILE NO.: 03-CV-252945CP / CV-10-8533-00CL
DATE: 20110315

2011 ONSC 1647 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

- AND -

HEATHER ROBERTSON,

Plaintiff

AND:

PROQUEST INFORMATION AND LEARNING COMPANY, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC.,

Defendants

REASONS FOR DECISION

Pepall J.

Released: March 15, 2011

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TAB 13

See paras. 36-39

CITATION: Slark v. Ontario, 2017 ONSC 4178
COURT FILE NO.: CV-09-376927CP
COURT FILE NO.: CV-10-411191CP
COURT FILE NO.: CV-10-417343CP
DATE: 20170707

2017 ONSC 4178 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
MARILYN DOLMAGE AS LITIGATION GUARDIAN OF MARIE SLARK and JIM DOLMAGE AS LITIGATION GUARDIAN OF PATRICIA SETH Plaintiffs	*Jody Brown* for the Plaintiffs *Jasminka Kalajdzic* for the subclass in action CV-09-376927CP
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO Defendant	*Sonal Gandhi* and *Lisa Brost* for the Defendant
AND BETWEEN:	
DAVID McKILLOP BY HIS LITIGATION GUARDIAN CHRISTINE VICTORIA GRACE CLARKE Plaintiff	
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO Defendant	
AND BETWEEN:	
MICHAEL SHARRON AS LITIGATION GUARDIAN OF MARY ELLEN FOX Plaintiff	
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO Defendant	
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: June 5, 2017

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, Marie Slark, by her litigation guardian Marilyn Dolmage, and Patricia Seth, by her litigation guardian Jim Dolmage, sued Her Majesty the Queen in Right of Ontario (the Crown) with respect to institutional abuse at the Huronia Regional Centre in Orillia, Ontario, which was a centre for students with developmental disabilities.

[2] In a second class action, David McKillop, by his litigation guardian Christine Clarke, sued the Crown with respect to institutional abuse at the Rideau Regional Centre in Smith Falls, Ontario, which was another centre for students with developmental disabilities.

[3] In a third class action, Mary Ellen Fox, by her litigation guardian Michael Sharron, sued the Crown with respect to institutional abuse at the Southwestern Regional Centre in Cedar Springs, Ontario, which was another centre for students with developmental disabilities.

[4] The three class actions settled, and three settlements were approved by Justice Conway in 2013 and 2014, for a settlement fund of $67.7 million. Of this sum, a capped sum of $7 million plus interest was to be distributed as "Strategic Program Investments." See *Slark (Litigation guardian of) v. Ontario*, 2013 ONSC 6686 and *McKillop (Litigation guardian of) v. Ontario*, 2014 ONSC 1282.

[5] The administration of the settlement claims process was completed in September 2016, and approximately $7.45 million remains to be allocated as Strategic Program Investments. The settlement agreements provided that the parties were to consult and try to achieve consensus on the allocation of these funds.

[6] In the action about Huronia, in August 2016, I appointed counsel for a subclass comprised of the Representative Plaintiffs for the sole purpose of representing them in the consultations about the distribution of the funds. Class Counsel's fees are to be paid out of the Huronia funds subject to court approval.

[7] The parties distributed notice of the available funds and received 80 applications of interest, mainly from organizations that had some expertise and experience providing services or advocating for persons with developmental disabilities.

[8] By this motion, the Plaintiffs seek approval of an allocation of Strategic Program Investment funds to 37 applicants.

[9] The Crown agreed with respect to approximately $4.8 million of the allocation, but disagreed about the proposal to allocate the balance of approximately $2.7 million, which funds it submitted should be allocated to People First of Ontario, an organization specifically identified in the settlement agreements, or as an alternative, the Crown suggests adding to the allocation to be made to the University of Toronto and McMaster University, which made an application for an allocation of Strategic Program Investment funds that was accepted.

[10] For the reasons that follow, subject to certain directions and with some adjustments and disqualifications, I approve the Plaintiffs' allocation of the Strategic Program Investments. The major changes are the disapproval, in whole or in part, of eight applications totaling $1,804,790, of which $772,973.13 should instead be allocated to the McMaster University project and the

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balance of $1,031,816.87 being allocated to People First of Ontario.

B. Factual and Procedural Background

[11] Huronia, Rideau, and Southwestern were residential institutions for child and adult students with developmental disabilities. The schools closed in 2009. In the three class actions, the class periods ranged from 1945-2009. In each class action, the Plaintiffs alleged that residents were subjected to systemic abuse.

[12] The *Huronia* action settled on the first day of trial, and the *Southwestern* and *Rideau* matters settled shortly thereafter. The Crown recognized that the model of secluded institutional care for developmentally challenged persons, without any independence or personal autonomy, was deeply flawed.

[13] On December 9, 2013, the Premier of Ontario made a speech of apology in the Legislature. Premier Wynne stated:

> Mr. Speaker,
>
> One of a government's foremost responsibilities is to care for its people, to make sure they are protected and safe. And therein lies a basic trust between the state and the people. It is on that foundation of trust that everything else is built: our sense of self, our sense of community, our sense of purpose. And when that trust is broken with any one of us, we all lose something - we are all diminished.
>
> I stand to address a matter of trust before this house and my assembled colleagues, but I am truly speaking to a group of people who have joined us this afternoon and to the many others who could not make it here today. I am humbled to welcome to the legislature today former residents of the Huronia Regional Centre and Rideau Regional Centre in Smiths Falls and to also address former residents of the Southwestern Regional Centre near Chatham, along with all their families and supporters. I want to honour them for their determination and their courage and to thank them for being here to bear witness to this occasion.
>
> Today, Mr. Speaker, we take responsibility for the suffering of these people and their families. I offer an apology to the men, women and children of Ontario who were failed by a model of institutional care for people with developmental disabilities. We must look in the eyes of those who have been affected, and those they leave behind, and say: "We are sorry."
>
> As Premier, and on behalf of all the people of Ontario, I am sorry for your pain, for your losses, and for the impact that these experiences must have had on your faith in this province, and in your government. I am sorry for what you and your loved ones experienced, and for the pain you carry to this day.
>
> In the case of Huronia, some residents suffered neglect and abuse within the very system that was meant to provide them care. We broke faith with them - with you - and by doing so, we diminished ourselves. Over a period of generations, and under various governments, too many of these men, women, children and their families were deeply harmed and continue to bear the scars and the consequences of this time. Their humanity was undermined; they were separated from their families and robbed of their potential, their comfort, safety and their dignity. At Huronia, some of these residents were forcibly restrained, left in unbearable seclusion, exploited for their labour and crowded into unsanitary dormitories.
>
> And while the model of care carried out by this institution is now acknowledged to have been deeply flawed, there were also cases of unchecked physical and emotional abuse by some staff and residents. Huronia was closed in 2009 when Ontario closed the doors to its last remaining provincial institutions for people with developmental disabilities.

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> Today, Mr. Speaker, we no longer see people with developmental disabilities as something "other." They are boys and girls, men and women, with hopes and dreams like all of us. In Ontario, all individuals deserve our support, our respect and our care. We must look out for one another, take care of one another, challenge ourselves to be led by our sense of moral purpose before all else.
>
> Today, we strive to support people with developmental disabilities so they can live as independently as possible and be more fully included in all aspects of their community.
>
> As a society, we seek to learn from the mistakes of the past. And that process continues. I know, Mr. Speaker, that we have more work to do. And so we will protect the memory of all those who have suffered, help tell their stories and ensure that the lessons of this time are not lost.

[14] The gross settlement for the *Huronia* action, the *Rideau* action, and the *Southwestern* action was $67.7 million. The maximum compensation in each settlement was $42,000 per Class Member. Less than half of eligible Class Members received compensation, and of those who did, many received only the minimum $2,000 payment.

[15] All of the settlements contained a provision whereby unclaimed funds, up to a maximum of $7.7 million dollars, would be allocated *cy-près* according to Schedule "D" of each settlement agreement, which described the allocations as Strategic Program Investments.

[16] In the *Huronia* action, the surplus is $4.7 million with no reversion to the Crown, and this sum forms part of the $7.7 million dollars. A portion of the surplus from the other settlements was remitted to the Crown. The Huronia amount continues to accrue in interest and grow toward the maximum available of $5 million. The Rideau and Southwestern amounts have reached their maximum.

[17] The following amounts of Strategic Program Investment funds remain in each of the actions: (a) approximately $4.75 million in the *Huronia* action (all costs of the subclass counsel retainer will be paid out of this amount and interest will continue to accrue until the maximum amount is reached); (b) $1.7 million in the *Rideau* action; and (c) $1.0 million in the *Southwestern* action.

[18] Each Schedule "D" states that the purpose of the Strategic Program Investment fund is to enhance the ability of individuals with a developmental disability to guide and influence decisions affecting them.

[19] There are similarities and differences between the three settlements, which I will identify below, but taken together, the settlement agreements envisioned four categories of recipients of Strategic Program Investment funds; namely:

> (1) An allocation to support People First of Ontario to establish strong governance and organizational capacity to represent and support individuals with a developmental disability.
>
> (2) An allocation to organizations that offer support to institutional survivors to tell and document their stories.
>
> (3) An expansion to funding for Person-Directed Planning which will support individuals with developmental disabilities to build their lives in the community by helping them to identify their life vision and goals, and then find and access services and supports in the community to meet these goals.
>
> (4) An allocation to organizations to develop an education and training program to raise awareness of students, family members, service providers, and governmental actors about the history of the

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> [Southwestern Regional Centre][Rideau Regional Centre], the history of institutionalization, and the attitudes, factors and cultural dynamics which contributed to and perpetuated the conditions at Southwestern, and similar institutions, and the harm experienced by some class members while resident there.

[20] A significant difference is that the fourth allocation provision is not a part of the *Huronia* action settlement.

[21] In each of the settlement agreements, People First of Ontario is the only expressly identified organization for which an allocation may be made for the expressed purpose of establishing strong governance and organizational capacity to represent and support individuals with a developmental disability.

[22] People First of Ontario operates across the province. It was very supportive of the Representative Plaintiffs in advancing the three class actions. As an organization, it has the ability and scope to reach, benefit and empower individuals with disabilities, including Class Members, regardless of where they are in the province. On its website, People First of Ontario describes itself as follows:

> People First of Ontario is a provincial organization of men and women labelled with an intellectual disability, supporting each other to reclaim our rights to be recognized as full citizens of Ontario. We do this through: Peer Support; Sharing Our Personal Stories; Developing Leadership Skills; Promoting Our Rights to Choose Where and With Whom to Live; and Making Sure Our Voices are Heard and Respected.

[23] Notice of the *cy-près* fund availability was distributed, and applicants had four months to apply. The notice advised applicants that successful applicant organizations would be required to, among other things: (a) sign an indemnity to save harmless the Crown from all legal claims made in respect of the allocations of funds; and (b) obtain and maintain in force insurance as is necessary and reasonable to meet its indemnity obligations.

[24] Organizations made up the bulk of the applications. After extensive consultation with Class Members about how to allocate the approximately $7.45 million of the Strategic Program Investment funds, the Representative Plaintiffs selected 37 applicants from 80 projects (worth approximately $37.5 million). The Representative Plaintiffs submit that the 37 applicants meet the legal requirements for a proper *cy-près* distribution and comply with the spirit and letter of Schedule "D" of the settlement agreements.

[25] In each of the settlement agreements, the parties agreed that they would consult and seek to agree on the specific organizations and specific one-time allocations to each organization. In the *Rideau* action settlement and in the *Southwestern* action settlement, if the parties fail to agree on which organizations are to receive allocations, the dispute may be referred to a mediator.

[26] The parties met and conferred on April 19, 2017, but were unable to agree on allocations of the Schedule "D" funds. The settlement agreements do not address what is to happen if the consultation and mediation were not successful, which is what happened.

[27] The Crown does not dispute 19 applications. (I have included Community Living Kingston and District as one of the undisputed applications because the Crown's concern was technical about a modest ambiguity in the amount requested.)

[28] The Crown also does not oppose the application of People First of Ontario, but it requests that it be increased from $600,000 to $2,975,000, a $2,375,000 increase.

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[29] Among the undisputed applications, the Crown accepted four applications provided that additional terms or conditions were added. The Crown's concern was that certain applicants were not organizations and the applicants wanted for accountability structures to ensure that the funds could and would be used for their designated purposes.

[30] Thus, subject to conditions being added to ensure that there was proper accountability about the use of the funds, the Crown did not oppose the following four applications: (1) Vita Community Living Services; (2) Remember Every Name Art; (3) Project Creative Users - children's book; and (4) Greg Hoskins. The Crown suggested that these applications would be acceptable if the applicant partnered with an organization that had the capacity to provide oversight and accountability measures.

[31] Among the opposed applications, there were two that, in addition to being opposed on their merits, were also opposed for the absence of accountability structures; namely: (1) Ximena Griscti; and, (2) Tear It Down Collective.

[32] It was also the Crown's position that funds cannot be allocated to projects whose tenability is subject to approvals or permission outside of the applicant's control. For this reason and others, the Crown opposes, in whole or in part, the following applications, totaling $2,264,690 (which would be redirected to People First of Ontario):

1. $7,920 (of $69,300) - Community Living Upper Ottawa
2. $69,000 – Root Spring Media
3. $482,200 – Tear It Down Collective
4. $217,000 – Inclusion Press Gathering
5. $35,408 – DAFRS Beatrice
6. $44,000 – L'Arche Toronto
7. $75,000 – YWCA Muskoka Book
8. $500,000 – White Pine Pictures
9. $48,900 – L'Arche Toronto – cemetery memorial
10. $90,000 (of $221,650) – Limestone Family Support Group
11. $248,452 (of $441,100) – Community Involvement Legacy Homes
12. $377,910 – Annabelle Chvostek
13. $62,900 – Ximena Griscti

C. Discussion and Analysis

1. The Law of *Cy-Près* Distributions

[33] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No.

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3533 (S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[34] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[35] The *Class Proceedings Act, 1992*, does not expressly provide for *cy-près* distributions as a part of a settlement, but they are envisioned under the *Act* as an aspect of distributing a judgment for aggregated damages. Section 26 empowers the court with a broad discretion to distribute an aggregate assessment of damages (available pursuant to s. 24 of the *Act*) and s. 26(4) states:

> (4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.

[36] The court's statutory authority for the distribution of a judgment or settlement award that includes a *cy-près* award is therefore circumscribed, and it must meet the requirements of s. 29 of the *Act* and be fair, reasonable, and in the best interests of the class. A *cy-près* award is subject to the same approach and the same principles that apply to the rest of the proposed settlement or to the administration of an approved settlement: *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 at para. 141. A reasonable number of class members who would not otherwise receive monetary relief must benefit from the order.

[37] From a policy perspective, *cy-près* awards fulfill the compensatory and access to justice purposes of the *Class Proceedings Act, 1992*, and they also fulfill the behaviour modification policy goals of the *Act*.

[38] *Cy-près* distributions are generally intended to meet at least two of the principal objectives of class actions. They are meant to enhance access to justice by directly or indirectly benefitting class members, and they may provide behaviour modification by ensuring that the unclaimed portion of an award or settlement is not reverted to the defendant: *Carom v. Bre-X Minerals Ltd., supra*, at para. 123.

[39] A *cy-près* distribution should be justified within the context of the particular class action for which settlement approval is being sought, and there should be some rational connection between the subject matter of a particular case, the interests of class members, and the recipient or recipients of the *cy-près* distribution: *Serhan Estate v. Johnson & Johnson*, 2011 ONSC 128 at para. 59; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at para. 43; *Sorenson v. Easyhome Ltd.*, 2013 ONSC 4017; *O'Neil v. Sunopta, Inc.*, 2015 ONSC 6213 at para. 16.

[40] In *Sorenson v. Easyhome Ltd., supra*, at para. 30, I stated:

> 30. *Cy près* relief should attempt to serve the objectives of the particular case and the interests of the class members. It should not be forgotten that the class action was brought on behalf of the class members and a *cy près* distribution is meant to be an indirect benefit for the class members and an approximation of remedial compensation for them. However well meaning, the prospect of a *cy près* distribution should not be used by Class Counsel, defence counsel, the defendant, or a judge as an opportunity to benefit charities with which they may be associated or which they may

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> favour. To maintain the integrity of the class action regime, the indirect benefits of the class action should be exclusively for the class members.

[41] In *Alfresh Beverages Canada Corp. v. Hoescht AG*, [2002] O.J. No. 79 (S.C.J.) at para. 16, in one of the earliest *cy-près* decisions, Justice Cumming said that *cy-près* awards serve the important policy objective of general and specific deterrence of wrongful conduct. The theory is that the reversion of surplus settlement funds to the defendant does not further the deterrence function of class actions. Both the deterrence and the compensation goals of class actions are furthered where the monies are used in a manner that closely approximates the nature of the underlying action, and that aligns with the interests of the class members themselves.

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2. The Crown's Prioritization Submission and its Concerns and Objections

[42] In the allocation scheme promoted by Class Counsel and by the Representative Plaintiffs for the $7.45 million of Strategic Program Investment funds, $600,000 has been allocated to People First of Ontario, which had made a request for funding of $6 million.

[43] The Crown, however, submits that $4.8 million of the allocation of Strategic Program Investment funds be distributed to the projects to which it does not object and then the balance of approximately $2.7 million should be allocated to People First of Ontario, which would thus receive $2,975,000.

[44] It is the Crown's position that more funds ought to be allocated to People First of Ontario, because funding this organization will provide a meaningful opportunity for individuals to express themselves, speak for themselves, empower themselves, and advocate for themselves and this allocation conforms with the directives of Schedule "D" of the settlement agreements.

[45] As an alternative to People First of Ontario, the Crown submits that the proposal received jointly from the University of Toronto and McMaster University, with involvement from CAMH, Bethesda Services and Surrey Place Centre, best fulfils the purpose of the Strategic Program Investment funds. The purpose of this application is to expand the tools to be used by medical educators to better serve individuals with disabilities and to provide individuals with developmental disabilities with a direct voice in the manner in which they receive health services. Under the proposed project, 19 to 34 individuals with developmental disabilities would be hired to create programs to be used to train medical professionals on how to best serve individuals with developmental disabilities. They trainees would be directly involved in the design of the training materials to determine what tools are most meaningful to their peers and the trainees would become educators to deliver training to both healthcare educators and other individuals with a disability. The applicants had requested $934,696.13 for a three-year program, but Class Counsel and the Representative Plaintiffs approved $161,723. (The difference is $772,973.13.)

[46] In addition to privileging the application of People First of Ontario or McMaster University, the Crown has raised four concerns or objections to the distribution scheme proposed by Class Counsel and the Representative Plaintiffs in the three actions.

[47] First, the Crown submits that several of the applicants are not organizations or legal entities known to law and that they lack accountability structures that will ensure that the Strategic Program Investment funds will be properly used.

[48] Second, the Crown is concerned that too many of the approved applications; i.e. ten

applications with a value of $2 million, seem to have involved the support or patronage of the two Representative Plaintiffs in the *Huronia* action, their litigation guardians, the Dolmages, or a family member of the litigation guardians; that is, the Crown is concerned about the applications of: Huronia Speakers Bureau; Recounting Huronia; Authors for Justice; Project Creative Users; McMaster University; YWCA Muskoka Book; White Pine Pictures; Tear It Down Collective; and Remember Every Name. The Crown does not oppose four of these applications, which total $770,805, but it submits that the extent of the funding sought for the balance of the applications raises concerns.

[49] Third, the Crown objects that four of the applications totaling $381,780 contemplate the use of Strategic Program Investment funds for the direct benefit of individual Class Members; visualize: (1) the DAFRS application for $35,408 is to be used to provide supports and services to a single former Huronia resident; (2) $90,000 of the $221,650 Limestone Family Support Group application is earmarked for a single person; (3) $7,920 of the $69,300 application of Community Living Upper Ottawa is earmarked for rent supplements for two Rideau Class Members over a three-year period; and (4) $248,452 of the $441,100 application of Community Involvement Legacy Homes is to provide individualized support services to five Class Members.

[50] Fourth, the Crown opposes four of the applications totaling $1,423,010 designed to fund proposals from filmmakers or other artists; i.e., the Crown opposes that: (1) $62,900 be allocated to Ximena Griscti for 30 photographic studio portraits of former Huronia, Rideau, and Southwestern residents accompanied by one paragraph of text; (2) $500,000 be allocated to White Pine Pictures, a film production company to produce a film based on the filmmaker's experience of having had family members at Huronia; (3) $482,200 be allocated to Tear It Down Collective, an arts organization to create various works; and (4) $377,910 be allocated to Annabelle Chvostek, a musician, to create music with some involvement of some Class Members.

[51] The Crown submits that these projects do not fit within the criteria of Schedule "D" and to the extent that these projects appear to contemplate some individual Class Members relating their experiences at the facilities, the Crown has already agreed to allocations of funds to organizations that offer support to Class Members to directly tell, convey and document their stories, from their perspectives. While the Crown agrees that there is value in projects that permit Class Members to tell and document their stories, it is the Crown's position that it would be inappropriate to allocate a disproportionate share of available funds to projects of this type. It submits that there are already $2,529,660 worth of projects that involve storytelling and the sharing of Class Members' experiences.

3. Discussion

[52] I can begin the discussion by addressing the Crown's first concern, about the absence of accountability structures for four applicants that it did not oppose and of two applicants that it did oppose.

[53] I disagree with the Crown that several applicants are not legal entities or organizations encompassed by the settlement agreements. Legal entities include for-profit and non-profit organizations, but sole proprietorships and partnerships are also encompassed by the settlement agreements, and these entities are capable of having accountability structures.

[54] The Crown suggested that its concern about accountability structures could be addressed

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by the impugned applicant partnering with an organization that did have an accountability structure. I, however, have an alternative approach that adequately addresses the Crown's concerns.

[55] I direct the already in place Administrator of the settlements, Crawford Class Action Services, to release the Strategic Program Investment funds only in accordance with the distribution scheme approved by the court and that any funds that cannot or that are not released within one year of the date of these Reasons for Decision be added to the sums to be paid to People First of Ontario.

[56] This direction will ensure accountability, and it will address any problems that may arise if a project cannot be implemented. For example, Remember Every Name's funding is to be used to erect art on the cemetery at Huronia but necessary permissions may not be forthcoming for this project. Other projects may have similar problems arising from the facts that the institutions have closed and property has been sold to new owners. The Administrator, however, can address these problems before releasing funds and determine whether funds can be properly released to the applicant and whether other preconditions, including indemnities and insurance, have been satisfied.

[57] I further direct that the content of notification letters and other communications to recipients of Strategic Program Investment funds shall be agreed upon between the parties or directed by this court and such communications shall be delivered by Crawford Class Action Services.

[58] I further direct that if, after the proper distribution of Strategic Program Investment funds and the payment of counsel fees and the administrator fees and expenses, there are any remaining funds, then those funds be paid to People First of Ontario.

[59] Turning to the Crown's second concern or objection, I see no cause for concern about the involvement of the Dolmages and the Representative Plaintiffs from the *Huronia* action, which as it happens, has the greater portion of the Strategic Program Investment funds to allocate. The Dolmages have been champions for the Class Members, and their exemplary and commendable involvement has simply continued into the process for the distribution of the Strategic Program Investment funds.

[60] As for the Crown's third concern or objection that four of the applications, totaling $381,780, contemplate the use of Strategic Program Investment funds for the direct benefit of individual Class Members, commendable and as useful as this allocation may be to address hardships and individual cases of genuine need, I agree with the Crown that these allocations cannot be approved.

[61] This is not a matter of correcting an unfairness to other Class Members. I suspect that the other Class Members do not or would not object to these allocations, but *cy-près* awards are not meant to benefit individual class members or to treat some class members differently than others. *Cy-près* awards are designed for a collective purpose and to deal with a general problem that arises after the compensatory part of a distribution scheme has run its course.

[62] If there are surplus funds that are not to be returned to the defendant, then the parties are free to negotiate top up payments to individuals or additional compensatory allocation scheme as a part of the general distribution scheme, but if they negotiate a *cy-près* award, then it is a collective purpose that governs, not individualized compensation awards.

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[63] I, therefore, do not approve of these particular allocations, and I direct that the $381,780 be added to the existing allocation ($161,723) being made to People First of Ontario.

[64] Turning to the fourth and last of the Crown's concerns, the Crown opposes several of the applications totaling $1,423,010 designed to fund proposals from filmmakers or other artists.

[65] I agree with the Crown that having regard to other allocations that address storytelling and capturing the shameful history of Huronia, Rideau, and Southwestern, it is not fair, reasonable or in the best interests of the class as a whole to allocate these funds as proposed by Class Counsel and the Representative Plaintiffs. In my opinion, it would be in the best interests of the class and better reflect the terms of the settlement agreements to allocate $772,973.13 of these funds to the McMaster University project and to allocate the balance of $650,036.87 to People First of Ontario.

D. Conclusion

[66] Orders accordingly.

[67] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Class Counsel and the Representative Plaintiffs within 20 days of the release of these Reasons for Decision followed by the Crown's submissions within a further 20 days.

_____

Perell, J.

Released: July 7, 2017

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CITATION: Slark v. Ontario, 2017 ONSC 4178
COURT FILE NO.: CV-09-376927CP
COURT FILE NO.: CV-10-411191CP
COURT FILE NO.: CV-10-417343CP
DATE: 20170707

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MARILYN DOLMAGE AS LITIGATION GUARDIAN OF MARIE SLARK and JIM DOLMAGE AS LITIGATION GUARDIAN OF PATRICIA SETHE

Plaintiffs

– and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

AND BETWEEN:

DAVID McKILLOP BY HIS LITIGATION GUARDIAN CHRISTINE VICTORIA GRACE CLARKE

Plaintiff

– and –

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant

AND BETWEEN:

MICHAEL SHARRON AS LITIGATION GUARDIAN OF MARY ELLEN FOX

Plaintiff

– and –

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant

REASONS FOR DECISION

PERELL J.

Released: July 7, 2017

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TAB 14

See paras. 25-30

CITATION: Sorenson v. easyhome Ltd., 2013 ONSC 4017
COURT FILE NO.: 10-CV-412963CP
DATE: June 10, 2013

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ANDREW SORENSON	)	*Daniel E.H. Bach* for the Plaintiff
Plaintiff	)	
– and –	)	
EASYHOME LTD., DAVID INGRAM, STEVE GOERTZ and CHRIS FREGREN	)	*Ronald Slaght, Q.C.* for the Defendants
Defendants	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD:** June 10 2013,

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Andrew Sorenson, the Representative Plaintiff in a certified class action under the *Class Proceedings Act, 1992*, S.O. 1992, brings a motion for the approval of a settlement and for approval of Class Counsel's fee. The motion is on consent save for one element, the identity of the *cy près* beneficiary. The Defendants, easyhome Ltd., David Ingram, Steve Goertz, and Chris Fregren, make a late arriving challenge to Mr. Sorenson's choice of Canadian Foundation for Advancement of Investor Rights/ fondation canadienne pour l'avancement des droits des investisseurs ("FAIR Canada") as the beneficiary.

[2] For the reasons that follow, subject to the court approving a different beneficiary, I approve the settlement, the counsel fee, and the modest honorarium for Mr. Sorenson.

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B. FACTUAL BACKGROUND

[3] easyhome, whose business is to rent consumer goods, is a corporation with common shares listed for trading on the Toronto Stock Exchange ("TSX"). It is a reporting issuer under the Ontario *Securities Act*, RSO 1990, c S5. Messrs. Ingram, Goertz, and Fregren are senior officers or directors of easyhome.

[4] Mr. Sorenson, who, on September 20, 2010, purchased 800 common shares of easyhome at a price of $11.90 per share, alleges that between April 8, 2008 and October 14, 2010, easyhome's public disclosures contained material misrepresentations and omissions of material facts due to a significant employee fraud at one of its kiosks, with the result that its share price was artificially inflated to the detriment of the Class.

[5] On October 25, 2010, Mr. Sorenson commenced a proposed class action. Before commencing his action, he signed a contingency fee retainer agreement that provided that Class Counsel's compensation should be 25% of the total recovery available to Class Members obtained in the Action, plus disbursements and taxes.

[6] In November 2011, settlement discussion were unsuccessful

[7] On March 26, 2012, on consent, this Court certified the action as a class action and granted leave pursuant to Part XXIII.1 of the *Securities Act*. The Defendants consented to that relief. Siskinds was appointed Class Counsel.

[8] After the consent certification, the action advanced in an adversarial way as a contest on its merits. easyhome advanced several defences. First, it denied that there were any misrepresentations. Second, it asserted that it caused or conducted reasonable investigations with respect to the accuracy of its financial statements and therefore was released from liability by virtue of the reasonable investigation defence under s. 138.4(6) of the *Securities Act*. Third, it denied that the Class Members sustained damages. Fourth, it argued that the claims advanced in respect of its public filings for the year 2007 and the first quarter of 2008 were statute-barred.

[9] Settlement discussions resumed in September, 2012, and on November 6, 2012, the parties reached an agreement in principle. In the following months, the parties negotiated the Settlement Agreement, which was finalized and dated for February 19, 2013.

[10] Before the settlement negotiations, Siskinds received a preliminary damages estimate from Paul Mulholland, a forensic accountant. Based on Mr. Mulholland's opinion, Siskinds estimated that the damages of secondary market purchasers encompassed within the certified class could be as high as $4.6 million, depending on a number of factors, including the method of calculating inflation and the effect of a volatile stock price on the Part XXIII.1 damages formula.

[11] The key terms of the Settlement Agreement are as follows:

- easyhome agreed to cause its insurers to pay $2,250,000.00, into the Escrow Account for the benefit of the Class.

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- There is no right of reversion of the Settlement Amount unless the Settlement Agreement is terminated.
- The Defendants may terminate the Settlement Agreement in the event that an Opt-Out Threshold is exceeded.
- The Settlement Amount will be distributed, after payment of any administration costs and legal fees and expenses as awarded by the Court, among all Class Members who timely submit valid Claim Forms to the Administrator.
- In exchange for payment of the Settlement Amount, Defendants receive a full and final release from all Class Members.
- The Short Form Notice of Settlement will be published: (a) in the English language in the business/legal section of the national editions of the *National Post* and *The Globe and Mail*; (b) in the French language in the business section of *La Presse*; and (c) in the French and English languages across *Marketwire*, a major business newswire in Canada.
- The Long Form Notice of Settlement will be published: (a) in both the French and English languages on www.classaction.ca; (b) in both the French and English languages on the Administrator's website; and (c) mailed or emailed, along with the Claim Form and the Opt-Out Form, directly to persons that have contacted Class Counsel regarding this Action and have provided Siskinds with their contact information.
- The Long Form Notice of Settlement, the Claim Form, and the Opt-Out Form will be sent by the Administrator: (a) directly to persons identified as Class Members by way of a computer-generated list provided by easyhome to Class Counsel and the Administrator; and (b) to the brokerage firms in the Administrator's proprietary databases, requesting that these firms either send a copy of the materials to all individuals and entities identified as Class Members, or to send the names and addresses of all such individuals and entities to the Administrator, who will mail these materials to the individuals and entities so identified.
- The Administrator will execute the Plan of Notice. The estimated cost of implementing the Plan of Notice, including the notice that has already been published, is $50,000.
- A Plan of Allocation governs how the proceeds of the Settlement Amount, after payment of Administration Expenses and Class Counsel Fees will be distributed among Class Members who timely submit valid Claim Forms.
- The Plan of Allocation calculates Class Members' entitlements in a manner analogous to the damages provisions in s.138.5 of the *Securities Act*, which sets out three damage formulae for application to the sale of affected shares; namely: (1) a formula for shares disposed of on or before the tenth trading day following the alleged corrective disclosure, in this case, October 28, 2010; (2) a formula

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for shares disposed of after the tenth trading day following the alleged corrective disclosure; and (c) a formula for shares that have not been disposed of, or are otherwise still held by the Claimant.

- Ultimately, the amount of each Class Member's actual compensation from the Net Settlement Amount will depend upon: (a) the number and price of easyhome securities purchased by the Class Member during the Class Period; and (b) the total number and value of all claims for compensation filed with the Administrator.
- If there are funds left following the distribution to the class members, these funds will be donated, *cy près*.
- Subject to Court approval, Canadian Foundation for Advancement of Investor Rights / fondation canadienne pour l'avancement des droits des investisseurs ("FAIR Canada") is designated as the receipt of the *cy près* distribution.

[12] As may be noted, the settlement envisions what may be a very modest *cy près* distribution. Recently, easyhome learned that Siskinds and FAIR Canada have linkages that were not known to the Defendants before the settlement. The linkages are that: (1) FAIR Canada has been a *pro bono* client of the firm; and (2) it and the law firm have been allies in making responses to the Ontario Securities Commission. More precisely, FAIR Canada took a similar position to Siskinds in submissions to the Ontario Securities Commission with regard to OSC Staff Notice 15-704, which related to so-called "no-contest settlements." The Defendants submit that these linkages are such that the Court should consider requiring the parties to name a new *cy près* beneficiary.

[13] Mr. Sorenson submits that none of the linkages rise to the level that would invalidate FAIR Canada as a *cy près* beneficiary. He submits that the most that can be said is that FAIR Canada seeks to protect investors, and thus from time-to-time takes a similar view as Class Counsel, which practices investor protection litigation. He submits that in the absence of any pecuniary or personnel connection, FAIR Canada is an appropriate beneficiary.

[14] On April 12, 2013, the court approved a notice plan to give notice of the Settlement Approval Hearing, and pursuant to the court's order, the Notice of Settlement Approval Hearing was posted on Class Counsel's website, and was published in *The Globe and Mail*, the *National Post*, and *La Presse* on April 19, 2013.

[15] There have been no objections to the proposed settlement.

[16] Class Counsel's opinion is that the settlement terms and conditions are fair and reasonable and represent a significant recovery for Class Members. Class Counsel recommends approval of the Settlement Agreement.

[17] Siskinds seeks approval of legal fees plus disbursements and applicable taxes in the amount of $661,547.94, broken down as follows: (a) legal fees, $562,500.00; (b) H.S.T. $73,125.00; and (c) disbursements (incl. taxes as applicable), $25,922.94.

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[18] Siskinds LLP docketed time is in excess of $183,403.00 and disbursements are in excess of $23,019.93, plus taxes.

[19] Mr. Sorensen supports Class Counsel's legal fee request.

C. SETTLEMENT APPROVAL

[20] Section 29(2) of the *Class Proceedings Act, 1992* provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.), at para. 43.

[21] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and, (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada, supra* at para 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.), at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre, supra,* at para. 45.

[22] With one exception, in my opinion, having regard to the various criteria set out above, the outcome of this class action is fair, reasonable, and in the best interests of the Class Members. The exception concerns the choice of FAIR Canada as the beneficiary of any *cy près* distribution of the residue.

[23] Borrowing an idea from equity's regulation of trusts and charities, the *Class Proceedings Act, 1992*, permits the distribution of a judgment or of settlement funds to be made *cy près* ("as close as practically possible"): *Gilbert v. Canadian Imperial Bank of Commerce,* [2004] O.J. No. 4260 (S.C.J.) at paras. 14-15; *Cassano v Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (S.C.J.) at para. 14.

[24] Although not specifically referred to in the Act, *cy près* awards have been approved pursuant to s. 26 of the Ontario *Class Proceedings Act, 1992* to distribute money "whether or not all of the class members can be identified, or the exact share of each can be determined, and notwithstanding the fact that persons other than class members may incidentally benefit."

[25] The Act contemplates that the *cy près* distribution will indirectly benefit the class. This is an important, indeed vital, point. The Ontario Law Reform Commission in its *Report on Class Actions*, said the purpose of a *cy près* distribution was compensation for class members through a benefit that "approaches as nearly as possible some form of

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recompense for injured class members:" Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982) vol. 2 at p. 572.

[26] Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members, the court will approve a *cy près* distribution to credible organizations or institutions that will benefit class members: *Sutherland v Boots Pharmaceutical plc* (2002), 21 CPC (5th) 196 (Ont. SCJ) at para. 16; *Alfresh Beverages Canada Corp v Hoechst AG* (2002), 16 CPC (5th) 301 (Ont. SCJ).

[27] As a general rule, *cy près* distributions should not be approved where direct compensation to class members is practicable: *Cassano v Toronto Dominion Bank* (2009), 98 OR (3d) 543 (SCJ) at para. 17. However, where the expense of any distribution among the class members individually would be prohibitive in view of the limited funds available and the problems of identifying them and verifying their status as members, a *cy près* distribution of the settlement proceeds is appropriate: *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at para. 27*; Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 at para. 11; *Serhan v Johnson & Johnson*, 2011 ONSC 128 at paras. 57-59.

[28] By benefiting the class, at least indirectly, the *cy près* distribution provides access to justice, and the expenditure at the expense of the defendant may provide some behaviour modification.

[29] The court should have regard to the objectives of access to justice for class members and behaviour modification of the defendant as factors in considering whether or not to approve a particular *cy près* distribution: *Cassano v Toronto Dominion Bank* (2009), 98 OR (3d) 543 (SCJ) at paras. 14-49. In *Managing Class Action Litigation: A Pocket Guide for Judges* (3rd ed.) (Federal Judicial Center, 2010) at p.19, B.J. Rothstein & Thomas E. Willging have the following suggestions for judges considering approval of a *cy près* distribution:

> *Cy près* relief must come as close as possible to the objective of the case and the interests of the class members. Question whether the class members might feasibly obtain a personal benefit. Look for evidence that proof of individual claims would be burdensome or that distribution of damages would be costly. If individual recoveries do not seem feasible, examine the proximity or distance between the *cy près* recipient's interests or activities and the particular interests and claims of the class members. When *cy près* relief consists of distributing products to charitable organizations or others, press for information about whether the products in question have retained their face value or might be out-of-date, duplicative, or of marginal value.

[30] *Cy près* relief should attempt to serve the objectives of the particular case and the interests of the class members. It should not be forgotten that the class action was brought on behalf of the class members and a *cy près* distribution is meant to be an indirect benefit for the class members and an approximation of remedial compensation for them. However well meaning, the prospect of a *cy près* distribution should not be used by Class Counsel, defence counsel, the defendant, or a judge as an opportunity to

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benefit charities with which they may be associated or which they may favour. To maintain the integrity of the class action regime, the indirect benefits of the class action should be exclusively for the class members.

[31] In the case at bar, I accept that since the class members were seeking to enforce shareholders' rights that exist under Canadian securities law, the class members may obtain an indirect benefit by donating a portion of the settlement proceeds to an association that is dedicated to advancing investors' rights, which I accept is a commendable project.

[32] However, in the case at bar, if Fair Canada is the *cy près* recipient, then Class Counsel also obtains an indirect benefit because they can take credit for the class members' contribution to Fair Canada, another client of the firm. Further, for those that are cynically minded, there is the optics or appearance of a business development synergy in Class Counsel's supporting FAIR Canada's mission and this synergy would be another indirect benefit to Class Counsel.

[33] In my opinion, however well meaning, it is inappropriate for Class Counsel to indirectly benefit from a *cy près* distribution and it is inappropriate for Class Counsel to have any direct connection with a recipient of a *cy près* distribution. I think that it is undesirable for courts to have to determine whether the connection rises to any particular level. Given that there are many other worthy recipients of *cy près* distributions, in my opinion, in the circumstances of the case at bar, it is not in the best interests of class members to have a *cy près* distribution to FAIR Canada, and I do not approve this aspect of the proposed settlement.

[34] However, I do approve the settlement with another *cy près* recipient to be approved by motion in writing within 60 days. At the hearing of this motion, the parties agreed to this approach.

[35] Therefore, with the court to approve a different *cy près* recipient, the settlement is fair, reasonable, and in the best interests of class members, and it is approved.

D. FEE APPROVAL

[36] Turning to the matter of Class Counsel's fee request, the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para 13; *Smith v. National Money Mart*, [2010] O.J. No. 873 (S.C.J.), at paragraphs 19-20; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.), at para 25.

[37] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence

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demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement: *Smith v. National Money Mart, supra*, at paragraphs. 19-20; *Fischer v. I.G. Investment Management Ltd., supra*, at para 28.

[38] Having regard to the above criteria, I am satisfied that the fee request is fair and reasonable and it should be approved.

E. CONCLUSION

[39] Orders accordingly.

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Perell, J.

Released: June 10, 2013

2013 ONSC 4017 (CanLII)

CITATION: Sorenson v. easyhome Ltd., 2013 ONSC 4017
COURT FILE NO.: 10-CV-412963CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ANDREW SORENSON

Plaintiff

- and -

EASYHOME LTD., DAVID INGRAM, STEVE GOERTZ and CHRIS FREGREN

Defendants

REASONS FOR DECISION

Perell, J.

Released: June 10, 2013.

2013 ONSC 4017 (CanLII)

TAB 15

See paras. 25, 26

Sun-Rype Products Ltd. and Wendy Weberg *Appellants/Respondents on cross-appeal*

v.

Archer Daniels Midland Company, Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company, Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., ADM Agri-Industries Company, Cargill Limited, Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America *Respondents/Appellants on cross-appeal*

and

Attorney General of Canada and Canadian Chamber of Commerce *Interveners*

Sun-Rype Products Ltd. et Wendy Weberg *Appelantes/Intimées au pourvoi incident*

c.

Archer Daniels Midland Company, Cargill, Incorporated, Cerestar USA, Inc., auparavant connue sous le nom d'American Maize-Products Company, Corn Products International, Inc., Bestfoods, Inc., auparavant connue sous le nom de CPC International, Inc., ADM Agri-Industries Company, Cargill Limitée, Casco Inc. et Unilever PLC faisant affaire sous la dénomination d'Unilever Bestfoods North America *Intimées/Appelantes au pourvoi incident*

et

Procureur général du Canada et Chambre de commerce du Canada *Intervenants*

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2013 SCC 58 (CanLII)

Indexed as: Sun-Rype Products Ltd. *v.* Archer Daniels Midland Company

2013 SCC 58

File No.: 34283.

2012: October 17; 2013: October 31.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Répertorié : Sun-Rype Products Ltd. *c.* Archer Daniels Midland Company

2013 CSC 58

N° du greffe : 34283.

2012 : 17 octobre; 2013 : 31 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Class actions — Certification — Direct and indirect purchasers — Plaintiffs allege that defendants fixed price of high-fructose corn syrup and overcharged direct purchasers and overcharge was passed on to indirect purchasers — Whether indirect purchasers have right to bring action against alleged overcharger — Whether inclusion of indirect and direct

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Recours collectifs — Certification — Acheteurs directs et indirects — Allégations des demanderesses selon lesquelles le prix du sirop de maïs à haute teneur en fructose aurait été fixé par les défenderesses, qui auraient vendu cet édulcorant aux acheteurs directs à un prix majoré, et la majoration aurait été transférée aux acheteurs indirects — Les

purchasers in proposed class warrants dismissing action — Whether case meets certification requirement of having an identifiable class of indirect purchasers — Whether direct purchasers have cause of action in constructive trust — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(1).

The appellants, direct and indirect purchasers, brought a class action alleging that the respondents engaged in an illegal conspiracy to fix the price of high-fructose corn syrup ("HFCS") resulting in harm to manufacturers, wholesalers, retailers and consumers. HFCS is a sweetener used in various food products, including soft drinks and baked goods. The respondents are the leading producers of HFCS in North America. On the application for certification, it was determined that the pleadings disclosed causes of action for the direct purchasers in constructive trust and for the indirect purchasers under s. 36 of the *Competition Act*, in tort and in restitution. The action was certified. On appeal, the majority of the court allowed the appeal with respect to the indirect purchasers and held that it was "plain and obvious" that indirect purchasers did not have a cause of action. The appeal with respect to direct purchasers was dismissed. The matter was remitted to the British Columbia Supreme Court to reconsider the certification of the action of the direct purchasers alone. In this Court, the appellants challenge the decision that the indirect purchasers have no cause of action. On cross-appeal, the respondents request dismissal of the direct purchasers' claim in constructive trust.

Held (Cromwell and Karakatsanis JJ. dissenting on the appeal): The appeal should be dismissed and the cross-appeal allowed.

Per McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Moldaver and Wagner JJ.: Having decided in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, that indirect purchasers have the right to bring an action, a question in this case is whether the additional challenges that arise where the class is made up of indirect and direct purchasers are sufficient to warrant dismissing the action. The inclusion of indirect and direct purchasers in the proposed class does not

acheteurs indirects ont-ils un droit de recours contre l'auteur présumé de la majoration? — La composition du groupe proposé, formé à la fois d'acheteurs directs et d'acheteurs indirects, justifie-t-elle le rejet du recours? — Est-il satisfait en l'espèce au critère de certification relatif à l'existence d'un groupe identifiable d'acheteurs indirects? — Les acheteurs directs ont-ils un droit de recours en imposition d'une fiducie par interprétation? — Class Proceedings Act, R.S.B.C. 1996, ch. 50, art. 4(1).

Les appelantes, des acheteurs directs et indirects, ont intenté un recours collectif, faisant valoir que les intimées ont participé à un complot illégal pour fixer le prix du sirop de maïs à haute teneur en fructose (« SMHTF »), ce qui a porté préjudice à des fabricants, grossistes, détaillants et consommateurs. Cet édulcorant entre dans la confection de diverses denrées alimentaires, dont les boissons gazeuses et les produits de boulangerie. Les intimées sont les principaux fabricants de SMHTF en Amérique du Nord. Il a été décidé à l'instruction de la demande de certification que les actes de procédure révèlent des causes d'action, pour les acheteurs directs, en imposition d'une fiducie par interprétation, et, pour les acheteurs indirects, en vertu de l'art. 36 de la *Loi sur la concurrence*, en responsabilité délictuelle et en restitution. Le recours collectif a été certifié. Les juges majoritaires de la Cour d'appel ont accueilli l'appel en ce qui concerne les acheteurs indirects et conclu qu'il était « manifeste » que ces derniers n'avaient aucune cause d'action. L'appel a été rejeté en ce qui concerne les acheteurs directs. L'affaire a été renvoyée à la Cour suprême de la Colombie-Britannique pour qu'elle réexamine seulement la certification du recours collectif des acheteurs directs. Les appelantes contestent en l'espèce la décision de ne reconnaître aux acheteurs indirects aucune cause d'action. Dans l'appel incident, les intimées sollicitent le rejet de la demande des acheteurs directs visant l'imposition d'une fiducie par interprétation.

Arrêt (les juges Cromwell et Karakatsanis sont dissidents quant au pourvoi) : Le pourvoi est rejeté et le pourvoi incident est accueilli.

La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Moldaver et Wagner : Puisque la Cour a décidé dans *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, que les acheteurs indirects ont le droit de se pourvoir en justice, la question à trancher est celle de savoir si les défis supplémentaires que pose un groupe composé à la fois d'acheteurs indirects et d'acheteurs directs sont suffisants pour justifier le rejet du recours. Ce n'est pas le cas.

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produce difficulties that would warrant dismissing the action. Where indirect and direct purchasers are included in the same class and the evidence of the experts at the trial of the common issues will determine the aggregate amount of the overcharge, there will be no double or multiple recovery. The court also possesses the power to modify settlement and damage awards in accordance with awards already received in other jurisdictions if the respondents are able to satisfy it that double recovery may occur.

Assuming all facts pleaded to be true, a plaintiff satisfies the requirement that the pleadings disclose a cause of action unless it is plain and obvious that the claim cannot succeed. In relation to the causes of action in restitution for the indirect purchasers, the requirement that there be a direct relationship between the defendant and the plaintiff for a claim in unjust enrichment is not settled. Case law does not appear to necessarily foreclose a claim where the relationship between the parties is indirect. It is not plain and obvious that a claim in unjust enrichment should fail at the certification stage on this ground alone. As to the recognition of passed-on losses — the injury suffered by indirect purchasers is recognized at law as is their right to bring actions to recover for those losses. No insurmountable problem is created by allowing the claims in restitution to be brought. Nor is it plain and obvious that a cause of action for the indirect purchasers under s. 36 of the *Competition Act* cannot succeed and this cause of action should therefore not be struck out.

A court must certify a proceeding if, among other requirements, there is an identifiable class of two or more persons. The difficulty lies where there is insufficient evidence to show some basis in fact that two or more persons will be able to determine if they are in fact a member of the class. Allowing a class proceeding to go forward without identifying two or more persons who will be able to demonstrate that they have suffered a loss at the hands of the alleged overchargers subverts the purpose of class proceedings, which is to provide a more efficient means of recovery for plaintiffs who have suffered harm but for whom it would be impractical or unaffordable to bring a claim individually. Here, there is no basis in fact to demonstrate that the information necessary to determine class membership is possessed by any of the putative class members. The appellants have not introduced evidence to establish some basis in fact that at least two class members could prove they purchased a product actually containing HFCS during the

Lorsque le groupe est composé d'acheteurs indirects et directs et que la preuve des experts lors de l'examen au fond des questions communes permet d'établir le montant global de la majoration, il n'y a pas de recouvrement double ou multiple. En outre, les tribunaux disposent du pouvoir de modifier un règlement et les dommages-intérêts octroyés en fonction de ceux déjà obtenus dans d'autres ressorts si les intimés réussissent à les convaincre qu'il y a risque de recouvrement double.

À supposer que tous les faits invoqués soient vrais, il est satisfait à l'exigence selon laquelle les actes de procédure doivent révéler une cause d'action à moins qu'il ne soit manifeste que la demande ne peut être accueillie. Quant aux causes d'action en restitution des acheteurs indirects, il n'est pas établi qu'un lien direct entre le défendeur et le demandeur constitue une condition préalable à une action pour enrichissement injustifié. La jurisprudence ne semble pas exclure nécessairement une action opposant des parties unies par un lien indirect. Il n'est pas manifeste qu'une action pour enrichissement injustifié doit être rejetée à l'étape de la certification pour ce seul motif. Quant au transfert de la perte, le préjudice subi par les acheteurs indirects est reconnu en droit, tout comme leur droit d'exercer des recours pour recouvrer le montant de ces pertes. Le fait de permettre la présentation de la demande en restitution ne pose aucun obstacle insurmontable. Il n'est pas manifeste non plus que la cause d'action des acheteurs indirects fondée sur l'art. 36 de la *Loi sur la concurrence* est vouée à l'échec et, par conséquent, elle ne doit pas être radiée.

Le tribunal doit certifier qu'il s'agit d'un recours collectif s'il existe, notamment, un groupe identifiable de deux personnes ou plus. Or, lorsque la preuve ne permet pas de conclure qu'un certain fondement factuel établit qu'au moins deux personnes sauront si elles appartiennent ou non au groupe, c'est là où le bât blesse. Certifier un recours collectif sans connaître au moins deux personnes qui seront en mesure de prouver les pertes que leur ont fait subir les auteurs présumés de la majoration contrecarre l'objectif des recours collectifs, qui est d'offrir une voie de recours plus efficace aux demandeurs ayant subi un préjudice mais pour qui il serait irréaliste d'exercer un recours individuel ou qui n'ont pas les moyens de le faire. En espèce, aucun fondement factuel ne permet d'établir qu'un seul des membres du groupe proposé dispose des renseignements nécessaires pour déterminer s'il appartient ou non au groupe. Les appelantes n'ont pas établi qu'un certain fondement factuel permet de conclure qu'au moins deux

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class period and were therefore identifiable members of the class. The problem in this case lies in the fact that indirect purchasers, even knowing the names of the products affected, will not be able to know whether the particular item that they purchased did in fact contain HFCS. While there may have been indirect purchasers who were harmed by the alleged price-fixing, they cannot self-identify using the proposed definition. The foundation upon which an individual action could be built must be equally present in the class action setting. That foundation is lacking here. In the end, given the finding that an identifiable class cannot be established for the indirect purchasers, the class action as it relates to the indirect purchasers cannot be certified.

With respect to the one cause of action remaining to the direct purchasers, it is determined that the cause of action in constructive trust should fail. Neither the requirement of a proprietary nexus nor the requirement that the constructive trust be imposed only where a monetary remedy was found to be inadequate were met in this case and as such it is plain and obvious that the direct purchaser claim in constructive trust has no chance of succeeding.

Per Cromwell and Karakatsanis JJ. (dissenting on the appeal): In this case, there is some basis in fact to find an identifiable class of two or more persons that includes indirect purchasers.

The requirement that the class be identifiable does not include the requirement that individual members be capable of proving individual loss. The *Class Proceedings Act* ("*CPA*") is designed to permit a means of recovery for the benefit of the class as a whole, without proof of individual loss, even where it is difficult to establish class membership. Thus, if no individual seeks an individual remedy, it will not be necessary to prove individual loss. Such class actions permit the disgorgement of unlawful gains and serve not only the purposes of enhanced access to justice and judicial economy, but also the broader purpose of behaviour modification. Further, the aggregate damages provisions in the *CPA* are tools which are intended to permit access to justice and behaviour modification in cases where liability to the class has been proven but individual membership in the class is difficult or impossible to determine. The legislation explicitly contemplates difficulties or, in some cases, impossibility in self-identification. Such difficulties have not been

membres pourraient démontrer l'achat au cours de la période visée par le recours d'un produit contenant bel et bien du SMHTF, et par le fait même leur appartenance à un groupe identifiable. Le problème en l'espèce tient au fait que les acheteurs indirects ne seront pas en mesure de savoir si l'article qu'ils ont acheté contenait ou non du SMHTF même s'ils connaissent le nom des produits en cause. Bien que la fixation des prix reprochée ait peut-être porté préjudice à des acheteurs indirects, ils ne peuvent démontrer qu'ils font partie du groupe à la lumière de la définition proposée. Le fondement sur lequel reposerait le recours individuel doit pouvoir se transposer au recours collectif. Or, ce fondement fait défaut en l'espèce. En définitive, puisqu'il est conclu à l'impossibilité d'établir l'existence d'un groupe identifiable composé des acheteurs indirects, le recours collectif dans leur cas ne peut être certifié.

Quant aux acheteurs directs, la seule cause d'action qui leur est reconnue, en imposition d'une fiducie par interprétation, doit être rejetée. Il n'est pas satisfait en l'espèce à la condition d'un lien avec un bien, ni à celle voulant que la fiducie par interprétation soit imposée uniquement si une réparation pécuniaire est jugée inadéquate. Il est donc manifeste que la demande des acheteurs directs visant l'imposition de ce type de fiducie est vouée à l'échec.

Les juges Cromwell et Karakatsanis (dissidents quant au pourvoi) : En l'espèce, un certain fondement factuel permet de conclure à l'existence d'un groupe identifiable de deux personnes ou plus auquel appartiennent les acheteurs indirects.

Pour qu'il y ait un groupe identifiable, il ne faut pas que chacun des membres du groupe soit en mesure d'établir une perte individuelle. La *Class Proceedings Act* (la « *CPA* ») est conçue de manière à donner un recours au groupe dans son ensemble, sans qu'il soit nécessaire de prouver une perte individuelle, même s'il est difficile d'établir l'appartenance au groupe. En conséquence, si personne ne cherche à obtenir une réparation individuelle, il ne sera pas nécessaire de prouver une perte individuelle. De tels recours collectifs permettent la restitution de gains provenant d'activités illégales et répondent non seulement aux objectifs d'accès à la justice et d'économie des ressources judiciaires, mais aussi à l'objectif général de modification des comportements. En outre, les dispositions autorisant l'octroi de dommages-intérêts globaux prévues à la *CPA* favorisent l'accès à la justice et la modification des comportements dans les cas où la responsabilité envers le groupe a été démontrée, mais où l'appartenance au groupe est difficile ou impossible

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considered fatal to authorizations under the *CPA* provided that there is some basis in fact that the class exists. The criteria for membership must be clearly defined — not the ability of a given individual to prove that they meet the criteria. Whether claimants can prove their claim for an individual remedy is a separate issue that need not be resolved at the certification stage.

Here, the record contained an evidentiary basis to establish the existence of the class and to show that the members of the class suffered harm. It may never be necessary or legally required to identify individual class members. The *CPA*, while primarily a procedural statute, also creates a remedy that recognizes that damages to the class as a whole can be proven, even when proof of individual members' damages is impractical, and that is available even if those who are not members of the class can benefit. The statute should be construed generously to give life to its purpose of encouraging judicial economy and access to justice and modifying the behaviour of wrongdoers.

Even though it is not necessary at the certification stage to show that individual class members could stand alone as plaintiffs, this record contains a sufficient evidentiary basis to establish the existence of an identifiable class of two or more persons. Direct purchasers of HFCS used it extensively in products that were sold widely to retailers and to consumers. Given the nature of a price-fixing case, loss flows directly from the purchase of HFCS, or in the case of indirect purchasers, products containing HFCS. Claimants will not have to prove definitively that they purchased a particular product that contained HFCS. It will be sufficient if the trial judge is satisfied, upon expert or other evidence, that an individual claimant probably purchased a product containing it. The requirement that there be an evidentiary foundation — or some basis in fact — to support the certification criteria does not include a preliminary merits test and does not require the plaintiffs to indicate the evidence upon which they will prove these claims. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action. The appellants in this case have tendered evidence which establishes some basis in fact to show that the proposed class is identifiable and that individual class members may be able to establish individual loss on a balance of

à établir. La loi prévoit expressément la possibilité qu'il soit difficile, voire impossible, pour certaines personnes de s'estimer visées. De telles difficultés n'ont pas été jugées fatales à la certification sous le régime de la *CPA* dans la mesure où l'existence d'un groupe repose sur un certain fondement factuel. Les critères d'appartenance au groupe doivent être clairement définis — et non la faculté d'une personne donnée de prouver qu'elle y satisfait. Que les demandeurs puissent ou non établir le bien-fondé de leur demande de réparation individuelle est une question distincte n'ayant pas à être tranchée à l'étape de la certification.

Le dossier permet de conclure que le groupe existe et que les membres du groupe ont subi un préjudice. Il ne sera peut-être jamais nécessaire ni impératif en droit que les membres individuels du groupe soient connus. La *CPA*, une loi à caractère principalement procédural, crée également une réparation qui reconnaît que les préjudices causés au groupe dans son ensemble peuvent être prouvés, même si la preuve des préjudices individuels est irréaliste, et qui peut être ordonnée même si elle est susceptible de profiter à des non-membres. Cette loi doit être interprétée libéralement pour donner effet à l'objectif du législateur, à savoir favoriser l'économie des ressources judiciaires, l'accès à la justice et la modification du comportement des malfaiteurs.

Même s'il n'est pas nécessaire à l'étape de la certification d'établir que chacun des membres du groupe aurait la capacité pour agir seul, le dossier en l'espèce étaye suffisamment l'existence d'un groupe identifiable de deux personnes ou plus. Les acheteurs directs de SMHTF ont utilisé largement cet édulcorant dans la confection de produits qui ont été vendus à grande échelle aux détaillants et consommateurs. En matière de fixation des prix, la perte découle directement de l'achat du SMHTF, ou dans le cas des acheteurs indirects, de produits en contenant. Les demandeurs n'auront pas à démontrer, preuves à l'appui, avoir acheté un certain produit contenant du SMHTF. Il suffira que le juge de première instance soit convaincu, à la lumière de la preuve, notamment d'expert, qu'un demandeur donné a probablement acheté un produit contenant l'édulcorant en question. L'exigence que chacun des critères de certification repose sur un certain fondement factuel n'emporte pas d'examen sommaire au fond du recours et n'exige pas l'énumération des éléments à l'appui de la demande. La question à cette étape n'est pas s'il est vraisemblable que la demande aboutisse, mais s'il convient de procéder par recours collectif. En l'espèce, les appelantes ont établi un certain fondement factuel permettant de conclure que le groupe

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probabilities. Individual claimants, including indirect purchasers, would be able to self-identify as potential plaintiffs based on knowledge of the products in which HFCS is known to have been commonly used.

Cases Cited

By Rothstein J.

Applied: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, rev'g 2011 BCCA 186, 304 B.C.A.C. 90; **referred to:** *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272; *Option consommateurs v. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), aff'd 2013 SCC 59, [2013] 3 S.C.R. 600; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Tracy (Guardian ad litem of) v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; *VitaPharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.* (2002), 20 C.P.C. (5th) 351; *Fairhurst v. Anglo American PLC*, 2012 BCCA 257, 35 B.C.L.R. (5th) 45; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172; *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774; *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379.

By Karakatsanis J. (dissenting on the appeal)

Western Canadian Shopping Centres Inc. v. Dutton, 2001 SCC 46, [2001] 2 S.C.R. 534; *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477; *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, 14 B.C.L.R. (5th) 271; *Risorto v. State Farm Mutual Automobile Insurance Co.* (2007), 38

proposé est identifiable et que chacun des membres du groupe pourrait être en mesure d'établir, suivant la prépondérance des probabilités, une perte individuelle. Des demandeurs, dont des acheteurs indirects, pourraient s'estimer membres éventuels s'ils savaient les produits dans la composition desquels il a été reconnu qu'entrait régulièrement du SMHTF.

Jurisprudence

Citée par le juge Rothstein

Arrêt appliqué : *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, inf. 2011 BCCA 186, 304 B.C.A.C. 90; **arrêts mentionnés :** *Pro-Sys Consultants Ltd. c. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272; *Option consommateurs c. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), conf. par 2013 CSC 59, [2013] 3 R.C.S. 600; *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3; *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959; *Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261; *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158; *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762; *Tracy (Guardian ad litem of) c. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577; *Kerr c. Baranow*, 2011 CSC 10, [2011] 1 R.C.S. 269; *Club Resorts Ltd. c. Van Breda*, 2012 CSC 17, [2012] 1 R.C.S. 572; *VitaPharm Canada Ltd. c. F. Hoffmann-LaRoche Ltd.* (2002), 20 C.P.C. (5th) 351; *Fairhurst c. Anglo American PLC*, 2012 BCCA 257, 35 B.C.L.R. (5th) 45; *British Columbia c. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263; *Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534; *Lau c. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301; *Bywater c. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172; *Sauer c. Canada (Agriculture)*, 2008 CanLII 43774; *Taub c. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379.

Citée par la juge Karakatsanis (dissidente quant au pourvoi)

Western Canadian Shopping Centres Inc. c. Dutton, 2001 CSC 46, [2001] 2 R.C.S. 534; *Lau c. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301; *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158; *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477; *Steele c. Toyota Canada Inc.*, 2011 BCCA 98, 14 B.C.L.R. (5th) 271; *Risorto c. State Farm Mutual Automobile Insurance Co.* (2007),

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C.P.C. (6th) 373; *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774; *Gilbert v. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35; *Cassano v. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758; *Alfresh Beverages Canada Corp. v. Hoechst AG* (2002), 16 C.P.C. (5th) 301; *MacKinnon v. National Money Mart Co.*, 2006 BCCA 148, 265 D.L.R. (4th) 214.

Statutes and Regulations Cited

Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 4(1), 29, 31(1), 34.
Competition Act, R.S.C. 1985, c. C-34, ss. 36, Part VI.

Authors Cited

Blynn, Daniel. "Cy Pres Distributions: Ethics & Reform" (2012), 25 *Geo. J. Legal Ethics* 435.
Eizenga, Michael A., et al. *Class Actions Law and Practice*, 2nd ed. Markham, Ont.: LexisNexis, 2009 (loose-leaf updated May 2013, release 22).
Maddaugh, Peter D., and John D. McCamus. *The Law of Restitution*, vol. I. Toronto: Canada Law Book, 2013 (loose-leaf updated May 2013, release 10).

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Lowry and Frankel JJ.A.), 2011 BCCA 187, 305 B.C.A.C. 55, 515 W.A.C. 55, 331 D.L.R. (4th) 631, [2011] B.C.J. No. 689 (QL), 2011 CarswellBC 931, setting aside a decision of Rice J., 2010 BCSC 922, [2010] B.C.J. No. 1308 (QL), 2010 CarswellBC 1749. Appeal dismissed, Cromwell and Karakatsanis JJ. dissenting. Cross-appeal allowed.

J. J. Camp, *Q.C.*, *Reidar Mogerman*, *Melina Buckley* and *Michael Sobkin*, for the appellants/respondents on cross-appeal.

D. Michael Brown, *Gregory J. Nash* and *David K. Yule*, for the respondents/appellants on cross-appeal Archer Daniels Midland Company and ADM Agri-Industries Company.

J. Kenneth McEwan, *Q.C.*, and *Eileen M. Patel*, for the respondents/appellants on cross-appeal Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company and Cargill Limited.

38 C.P.C. (6th) 373; *Sauer c. Canada (Agriculture)*, 2008 CanLII 43774; *Gilbert c. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35; *Cassano c. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543; *Ford c. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758; *Alfresh Beverages Canada Corp. c. Hoechst AG* (2002), 16 C.P.C. (5th) 301; *MacKinnon c. National Money Mart Co.*, 2006 BCCA 148, 265 D.L.R. (4th) 214.

Lois et règlements cités

Class Proceedings Act, R.S.B.C. 1996, ch. 50, art. 4(1), 29, 31(1), 34.
Loi sur la concurrence, L.R.C. 1985, ch. C-34, art. 36, partie VI.

Doctrine et autres documents cités

Blynn, Daniel. « Cy Pres Distributions : Ethics & Reform » (2012), 25 *Geo. J. Legal Ethics* 435.
Eizenga, Michael A., et al. *Class Actions Law and Practice*, 2nd ed. Markham, Ont. : LexisNexis, 2009 (loose-leaf updated May 2013, release 22).
Maddaugh, Peter D., and John D. McCamus. *The Law of Restitution*, vol. I. Toronto : Canada Law Book, 2013 (loose-leaf updated May 2013, release 10).

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Donald, Lowry et Frankel), 2011 BCCA 187, 305 B.C.A.C. 55, 515 W.A.C. 55, 331 D.L.R. (4th) 631, [2011] B.C.J. No. 689 (QL), 2011 CarswellBC 931, qui a infirmé une décision du juge Rice, 2010 BCSC 922, [2010] B.C.J. No. 1308 (QL), 2010 CarswellBC 1749. Pourvoi rejeté, les juges Cromwell et Karakatsanis sont dissidents. Pourvoi incident accueilli.

J. J. Camp, *c.r.*, *Reidar Mogerman*, *Melina Buckley* et *Michael Sobkin*, pour les appelantes/intimées au pourvoi incident.

D. Michael Brown, *Gregory J. Nash* et *David K. Yule*, pour les intimées/appelantes au pourvoi incident Archer Daniels Midland Company et ADM Agri-Industries Company.

J. Kenneth McEwan, *c.r.*, et *Eileen M. Patel*, pour les intimées/appelantes au pourvoi incident Cargill, Incorporated, Cerestar USA, Inc., auparavant connue sous le nom d'American Maize-Products Company et Cargill Limitée.

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Stephen R. Schachter, *Q.C.*, *Geoffrey B. Gomery*, *Q.C.*, and *Peter R. Senkpiel*, for the respondents/appellants on cross-appeal Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America.

John S. Tyhurst, for the intervener the Attorney General of Canada.

Davit D. Akman and *Adam Fanaki,* for the intervener the Canadian Chamber of Commerce.

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John S. Tyhurst, pour l'intervenant le procureur général du Canada.

Davit D. Akman et *Adam Fanaki*, pour l'intervenante la Chambre de commerce du Canada.

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Reasons of Karakatsanis J.

The judgment of McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Moldaver and Wagner JJ. was delivered by

ROTHSTEIN J. —

I. Introduction

[1] In price-fixing cases, indirect purchasers are customers who did not purchase a product directly from the alleged price-fixers/overchargers but who purchased it indirectly from a party further down the chain of distribution. Those who say indirect purchasers should not be able to bring actions against their alleged overchargers cite complexities in tracing the overcharge, risks of

Motifs de la juge Karakatsanis

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Fish, Abella, Rothstein, Moldaver et Wagner rendu par

LE JUGE ROTHSTEIN —

I. Introduction

[1] Dans les affaires de fixation des prix, l'acheteur indirect est celui qui s'est procuré un produit, non pas directement auprès de la personne à qui on reproche d'en avoir fixé le prix (l'auteur de la majoration), mais auprès d'une partie intervenant à une autre étape de la chaîne de distribution. Les personnes qui préconisent l'irrecevabilité au Canada des recours des acheteurs indirects contre l'auteur

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double or multiple recovery and failure to deter anti-competitive behaviour as reasons why they should not be permitted in Canada. These were some of the issues before the Court in the companion case of *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 ("*Pro-Sys*"). In that case, a proposed indirect purchaser class action, those arguments were found to be insufficient bases upon which to deny indirect purchasers the right to bring an action against the alleged overcharger.

[2] In this case, both the indirect and direct purchasers are class members. Having decided in *Pro-Sys* that indirect purchasers have the right to bring an action, a question in this case is whether the additional challenges that arise where the class is made up of indirect and direct purchasers are sufficient to warrant dismissing the action. If the Court finds that the action may proceed, it must then consider whether the class action should have been certified by the applications judge.

[3] For the reasons that follow, I would find that the inclusion of indirect and direct purchasers in the proposed class does not produce difficulties that would warrant dismissing the action. However, I find this case cannot meet the certification requirements because there is not an identifiable class of indirect purchasers as required for certification under the British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"). I would dismiss the appeal on that basis. The case of the direct purchasers, which is restricted to constructive trust, is dismissed as I find there is no cause of action. The cross-appeal is therefore allowed.

II. Background

[4] Sun-Rype Products Ltd., a juice manufacturer, is the direct purchaser representative plaintiff and Wendy Bredin (formerly Wendy Weberg) is the indirect purchaser representative plaintiff in

de la majoration invoquent la difficulté de suivre la majoration d'un maillon à l'autre de cette chaîne, le risque de recouvrement double ou multiple et l'omission de décourager le comportement anticoncurrentiel comme autant de raisons justifiant leur argument. Il s'agit de certaines des questions dont est saisie la Cour dans l'affaire connexe *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477 (« *Pro-Sys* »). Dans cette dernière, un recours collectif projeté formé par des acheteurs indirects, les arguments mentionnés précédemment ont été jugés insuffisants pour refuser à ces acheteurs le droit de poursuivre en justice l'auteur présumé de la majoration.

[2] En l'espèce, le groupe est formé à la fois des acheteurs indirects et des acheteurs directs. Puisque la Cour a décidé dans *Pro-Sys* que les acheteurs indirects ont le droit de se pourvoir en justice, la question à trancher est celle de savoir si les défis supplémentaires que pose un groupe composé à la fois d'acheteurs indirects et d'acheteurs directs sont suffisants pour justifier le rejet du recours. Si la Cour conclut que le recours collectif peut suivre son cours, elle doit alors se demander si le juge saisi de la demande aurait dû le certifier ou non.

[3] Pour les motifs exposés ci-après, j'estime que la composition du groupe projeté — formé d'acheteurs indirects et directs — n'engendre pas de difficultés justifiant le rejet du recours collectif. Par contre, je conclus que la présente instance ne respecte pas les critères de certification prévus à la *Class Proceedings Act*, R.S.B.C. 1996, ch. 50 (la « *CPA* »), de la Colombie-Britannique, vu l'absence de groupe identifiable d'acheteurs indirects. Je suis d'avis de rejeter le pourvoi pour cette raison. L'unique action des acheteurs directs, en imposition d'une fiducie par interprétation, est rejetée, faute de cause d'action. Par conséquent, l'appel incident est accueilli.

II. Contexte

[4] Sun-Rype Products Ltd., un fabricant de jus, est la demanderesse-représentante des acheteurs directs, et Wendy Bredin (auparavant Weberg) remplit le même rôle au nom des acheteurs indirects en

this action. The representative plaintiffs (referred to collectively as the "appellants"), brought the class action pursuant to the *CPA*. They allege that Archer Daniels Midland Company and ADM Agri-Industries Company (the "ADM respondents"), Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company, and Cargill Limited (the "Cargill respondents"), and Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America (the "Casco respondents") (collectively, the "respondents"), engaged in an illegal conspiracy to fix the price of high-fructose corn syrup ("HFCS") resulting in harm to manufacturers, wholesalers, retailers and consumers.

[5] HFCS is a sweetener used in various food products, including soft drinks and baked goods. The respondents are the leading producers of HFCS in North America. The appellants claim that between January 1, 1988 and June 30, 1995, the respondents engaged in an "intentional, secret and illegal conspiracy to fix the price of HFCS", which allowed them to charge the class members more for HFCS than they would have charged but for the alleged illegal conduct (A.F., at paras. 9 and 11).

III. Summary of the Proceedings Below

A. *Commencement of the Action*

[6] The appellants commenced this class action in June 2005 on behalf of "all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products containing HFCS manufactured by the [respondents] (collectively, the 'class') from January 1, 1988 to June 30, 1995 (the 'Class Period')" (2010 BCSC 922 (CanLII), at para. 2). It alleged the following causes of action (*ibid.*, at para. 27):

l'espèce. Les demanderesses-représentantes (collectivement les « appelantes ») ont intenté le recours collectif en vertu de la *CPA*. Selon elles, Archer Daniels Midland Company et ADM Agri-Industries Company (les « intimées ADM »), Cargill, Incorporated, Cerestar USA, Inc., auparavant connue sous le nom d'American Maize-Products Company et Cargill Limitée (les « intimées Cargill ») ainsi que Corn Products International, Inc., Bestfoods, Inc., auparavant connue sous le nom de CPC International, Inc., Casco Inc. et Unilever PLC, faisant affaire sous la dénomination d'Unilever Bestfoods North America (les « intimées Casco ») (collectivement les « intimées »), ont participé à un complot illégal pour fixer le prix du sirop de maïs à haute teneur en fructose (« SMHTF »), ce qui a porté préjudice à des fabricants, grossistes, détaillants et consommateurs.

[5] Le SMHTF est un édulcorant utilisé dans la fabrication de diverses denrées alimentaires, dont les boissons gazeuses et les produits de boulangerie. Les intimées sont les principaux fabricants de SMHTF en Amérique du Nord. Les appelantes prétendent que, du 1er janvier 1988 au 30 juin 1995, les intimées ont participé à un [TRADUCTION] « complot intentionnel, secret et illégal en vue de fixer le prix du SMHTF », ce qui leur a permis de faire payer aux membres du groupe un prix plus élevé pour le SMHTF que celui qu'elles auraient établi, n'eussent été les actes illégaux qu'on leur reproche (m.a., par. 9 et 11).

III. Résumé des instances devant les juridictions inférieures

A. *Genèse de l'instance*

[6] Les appelantes ont intenté le recours collectif en juin 2005 au nom de [TRADUCTION] « tous les résidants de la Colombie-Britannique et d'ailleurs au Canada qui ont acheté du SMHTF fabriqué par les [intimées] ou des produits en contenant (collectivement le "groupe") entre le 1er janvier 1988 et le 30 juin 1995 (la "période visée par le recours") » (2010 BCSC 922 (CanLII), par. 2). Le groupe a fait valoir les causes d'action suivantes (*ibid.*, par. 27) :

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a) contravention of s. 45(1) of Part VI of the *Competition Act* giving rise to a right of damages under s. 36(1) of that Act;

b) tortious conspiracy and intentional interference with economic interests;

c) unjust enrichment, waiver of tort and constructive trust; and

d) punitive damages.

B. *Pre-certification Motion to Strike*

[7] The respondents brought a pre-certification motion to strike the appellants' claims on the basis that they were statute-barred. In an order dated May 10, 2007, the motions judge only allowed the claim for a remedial constructive trust because it was subject to a longer (10-year) limitation period than the other claims (2007 BCSC 640, 72 B.C.L.R. (4th) 163). The respondents appealed the order to the British Columbia Court of Appeal ("B.C.C.A.") and the appellants cross-appealed (2008 BCCA 278, 81 B.C.L.R. (4th) 199). The result was that the B.C.C.A. found that the direct purchaser representative plaintiff, Sun-Rype, could maintain only its cause of action in remedial constructive trust and that all of its claims for damages, including damages under the *Competition Act*, R.S.C. 1985, c. C-34, were statute-barred. As to the indirect purchaser representative plaintiff, Wendy Bredin, the B.C.C.A. found that she could maintain all of her causes of action because the limitation period on her claims did not begin until "she received the telephone call from her lawyer advising her of the proposed class action" (para. 138).

a) infraction au par. 45(1) de la partie VI de la *Loi sur la concurrence* ouvrant droit à des dommages-intérêts au titre du par. 36(1) de cette loi;

b) délit civil de complot et atteinte intentionnelle à des intérêts financiers;

c) enrichissement injustifié, renonciation à un recours délictuel et fiducie par interprétation;

d) dommages-intérêts punitifs.

B. *Requête en radiation présentée avant la certification du recours collectif*

[7] Avant la certification du recours collectif, les intimées ont présenté une requête en radiation des demandes des appelantes pour cause de prescription. Par ordonnance datée du 10 mai 2007, le juge des requêtes a accueilli uniquement la demande relative à l'imposition d'une fiducie par interprétation à titre de réparation parce qu'elle était assujettie à un délai de prescription plus long (10 ans) que les autres (2007 BCSC 640, 72 B.C.L.R. (4th) 163). Les intimées ont interjeté appel de l'ordonnance à la Cour d'appel de la Colombie-Britannique (« C.A.C.-B. »), et les appelantes ont formé un appel incident (2008 BCCA 278, 81 B.C.L.R. (4th) 199). La Cour d'appel a conclu que la demanderesse-représentante des acheteurs directs, Sun-Rype, pouvait maintenir uniquement sa demande en imposition d'une fiducie par interprétation à titre de réparation, et que ses demandes en dommages-intérêts, notamment celles présentées en vertu de la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34, étaient prescrites. Quant à la demanderesse-représentante des acheteurs indirects, Wendy Bredin, la Cour d'appel a conclu qu'elle pouvait continuer à faire valoir toutes ses causes d'action parce que le délai de prescription applicable à ses demandes n'avait commencé à courir qu'au moment où [TRADUCTION] « elle a reçu l'appel de son avocat qui l'a avisée de l'existence du recours collectif projeté » (par. 138).

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C. *Certification Proceedings in the British Columbia Supreme Court, 2010 BCSC 922 (CanLII)*

[8] The British Columbia Supreme Court ("B.C.S.C.") dealt with the appellants' application for certification by its decision dated June 30, 2010. As to the issue of whether indirect purchasers could bring actions against their alleged overchargers, Rice J. found that it was "not plain and obvious" that indirect purchaser claims were unavailable as a matter of law in Canada (para. 58).

[9] Rice J. then addressed the requirement under s. 4(1)(a) of the *CPA* that the pleadings disclose a cause of action. Excluding the portions of the claim struck by the pre-certification decision on the limitation periods, Rice J. found that the pleadings disclosed causes of action for the direct purchasers in constructive trust and for the indirect purchasers under s. 36 of the *Competition Act*, in tort and in restitution. Rice J. also found that the remaining certification requirements, namely (i) whether there were common issues; (ii) whether there was an identifiable class; (iii) whether the class action was the preferable procedure; and (iv) whether Sun-Rype and Wendy Bredin could adequately represent the class, were met. He certified the action identifying common issues relating to the indirect purchasers' claims seeking statutory, common law and equitable damages and restitution based on allegations that the respondents engaged in an international and unlawful conspiracy to fix the price of HFCS during the class period. The common issues certified by Rice J. are listed in the appendix to these reasons.

D. *Appeal of the Certification to the British Columbia Court of Appeal, 2011 BCCA 187, 305 B.C.A.C. 55*

[10] The majority of the B.C.C.A. (*per* Lowry J.A., Frankel J.A. concurring) held that it was "plain and obvious" that indirect purchasers did not have

C. *Procédure de certification devant la Cour suprême de la Colombie-Britannique, 2010 BCSC 922 (CanLII)*

[8] La Cour suprême de la Colombie-Britannique (« C.S.C.-B. ») tranche la demande des appelantes visant la certification d'un recours collectif le 30 juin 2010. Pour ce qui est de savoir si les acheteurs indirects peuvent poursuivre l'auteur présumé de la majoration, le juge Rice conclut qu'il [TRADUCTION] « n'est pas manifeste » que les demandes d'acheteurs indirects sont irrecevables en droit au Canada (par. 58).

[9] Le juge Rice analyse ensuite la condition prévue à l'al. 4(1)(a) de la *CPA* voulant que les actes de procédure révèlent une cause d'action. Faisant fi des éléments de l'action radiés par suite de la décision sur les délais de prescription rendue avant la certification du recours collectif, le juge Rice arrive à la conclusion que les actes de procédure révèlent des causes d'action, pour les acheteurs directs, en imposition d'une fiducie par interprétation, et pour les acheteurs indirects, en vertu de l'art. 36 de la *Loi sur la concurrence*, en responsabilité délictuelle et en restitution. Selon lui, les autres conditions de certification d'un recours collectif sont réunies, à savoir i) l'existence d'une question commune; ii) l'existence d'un groupe identifiable; iii) le recours collectif est la meilleure procédure; iv) Sun-Rype et Wendy Bredin peuvent représenter le groupe de manière appropriée. Il certifie le recours collectif, sur la foi d'allégations de complot international et illégal par les intimées en vue de fixer le prix du SMHTF au cours de la période visée par le recours, et détermine les questions communes des acheteurs indirects intéressant leurs demandes en restitution et en dommages-intérêts légaux, de common law et d'equity. Les questions communes certifiées par le juge Rice sont énumérées à l'annexe.

D. *Appel de la certification à la Cour d'appel de la Colombie-Britannique, 2011 BCCA 187, 305 B.C.A.C. 55*

[10] Les juges majoritaires de la C.A.C.-B. (le juge Lowry, avec l'accord du juge Frankel) concluent qu'il est [TRADUCTION] « manifeste » que les

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a cause of action (para. 97). The majority reached this conclusion for the same reasons as in its decision in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2011 BCCA 186, 304 B.C.A.C. 90: it held that the rejection of the passing-on defence in Canada carried as its necessary corollary a corresponding rejection of the offensive use of passing on in the form of an indirect purchaser action. The majority found Canadian law "to be consistent with American federal law as established by the Supreme Court of the United States in *Hanover Shoe* . . . and *Illinois Brick*" (*Pro-Sys* (C.A.), at para. 74).

[11] With respect to the indirect purchasers, the majority allowed the appeal and found that the pleadings did not disclose a cause of action on their part (para. 98). However, with respect to direct purchasers, the majority found that the appeal should be dismissed (para. 74). The B.C.C.A. set aside the certification order of Rice J. and remitted the matter to the B.C.S.C. to reconsider the certification of the action of the direct purchasers alone.

[12] Donald J.A., dissenting, as he did in *Pro-Sys*, would have found that indirect purchaser actions were permitted as a matter of law in Canada and would have certified the action for both direct and indirect purchasers, finding that all of the requirements in s. 4(1) of the *CPA* were met.

IV. Analysis

[13] This appeal was brought concurrently with the appeal in the companion case of *Pro-Sys*. Counsel for the appellants are the same in both cases, and the appellants in this case rely heavily on the appellants' submissions in *Pro-Sys* to support their arguments. In view of the significant overlap in issues, these reasons will frequently refer to the reasons in *Pro-Sys*.

[14] In this Court, the three groups of respondents filed separate factums. However, each adopts the pleadings of the others in the appeal and the cross-appeal. In the appeal, the respondents argue first

acheteurs indirects n'ont aucune cause d'action (par. 97). Ils parviennent à cette conclusion pour les mêmes motifs que dans leur arrêt *Pro-Sys Consultants Ltd. c. Microsoft Corp.*, 2011 BCCA 186, 304 B.C.A.C. 90 : selon eux, le rejet de la défense de transfert de la perte au Canada emporte nécessairement le rejet du transfert de la perte comme cause d'action, c'est-à-dire de l'action intentée par les acheteurs indirects. Les juges majoritaires estiment que le droit canadien [TRADUCTION] « s'accorde avec le droit fédéral américain, tel qu'il a été établi par la Cour suprême des États-Unis dans *Hanover Shoe* [. . .] et *Illinois Brick* » (*Pro-Sys* (C.A.), par. 74).

[11] Quant aux acheteurs indirects, les juges majoritaires accueillent l'appel et concluent que les actes de procédure ne révèlent aucune cause d'action (par. 98). Quant aux acheteurs directs cependant, les juges majoritaires sont d'avis de rejeter l'appel (par. 74). Ils annulent l'ordonnance de certification du juge Rice et renvoient l'affaire à la C.S.C.-B. pour qu'elle réexamine seulement la certification du recours collectif des acheteurs directs.

[12] Le juge Donald, dissident en l'espèce tout comme il l'est dans *Pro-Sys*, estime que les recours des acheteurs indirects sont recevables en droit au Canada, et il est d'avis de certifier le recours collectif des acheteurs directs et des acheteurs indirects, estimant que toutes les conditions prévues au par. 4(1) de la *CPA* sont réunies.

IV. Analyse

[13] Le présent pourvoi a été interjeté en même temps que celui dans l'affaire connexe *Pro-Sys*. Les avocats des appelants sont les mêmes dans ces deux dossiers, et les appelantes en l'espèce fondent en bonne partie leurs arguments sur ceux des appelants dans *Pro-Sys*. Vu l'important chevauchement des questions, les présents motifs renvoient souvent à ceux de l'arrêt *Pro-Sys*.

[14] Les trois groupes d'intimées ont déposé des mémoires distincts à la Cour, mais chacun de ces groupes fait siens les actes de procédure des autres dans l'appel et l'appel incident. En appel,

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and foremost that indirect purchasers do not have a cause of action. They also argue that the class action should be decertified in respect of the indirect purchasers because the class is not identifiable as required by s. 4(1)(b) of the *CPA*. On the cross-appeal, the respondents request dismissal of the direct purchasers' claim in constructive trust on the grounds that the elements required to establish a constructive trust are not present. They also seek decertification of the class action on the basis that Rice J. applied the wrong standard of proof in his analysis of the certification requirements.

les intimées soutiennent d'abord et avant tout que les acheteurs indirects sont dépourvus de cause d'action. Elles ajoutent qu'il faut annuler la certification du recours collectif à l'égard des acheteurs indirects parce qu'ils ne forment pas un groupe identifiable, comme l'exige l'al. 4(1)(b) de la *CPA*. Dans l'appel incident, elles sollicitent le rejet de la demande des acheteurs directs visant l'imposition d'une fiducie par interprétation, plaidant l'absence des éléments requis pour l'établir. Elles sollicitent également l'annulation de la certification du recours collectif parce que le juge Rice aurait appliqué la mauvaise norme de preuve dans son analyse des conditions de certification.

[15] As indicated, I am unable to find an identifiable class as it relates to the indirect purchasers and would dismiss the appeal on that basis. Nonetheless, for completeness, the various arguments presented in this case are assessed below. I turn first to the indirect purchaser question and then consider the arguments pertaining to the certification of the class action.

[15] Comme je le mentionne précédemment, selon moi les acheteurs indirects ne forment pas un groupe identifiable, et je suis d'avis de rejeter le pourvoi pour cette raison. Néanmoins, par souci d'exhaustivité, j'analyse les divers arguments avancés dans la présente affaire. Je me penche sur la question des acheteurs indirects avant d'examiner les arguments relatifs à la certification du recours collectif.

A. *Indirect Purchaser Actions (the "Passing On" Issue)*

A. *Recours collectif intenté par les acheteurs indirects (la question du « transfert de la perte »)*

[16] The appellants largely adopt the submissions of Pro-Sys Consultants Ltd. on the passing-on issue. As the offensive use of passing on has been analysed in the reasons in *Pro-Sys*, it is unnecessary to repeat it in its entirety here. I add only the following to address the differences that arise with regard to passing on where indirect purchasers and direct purchasers are part of the same class.

[16] Les appelantes souscrivent en bonne partie aux arguments de Pro-Sys Consultants Ltd. sur la question du transfert de la perte. Vu que le transfert de la perte comme cause d'action a été analysé dans les motifs de l'arrêt *Pro-Sys*, point n'est besoin de refaire toute cette analyse. Je n'ajoute les remarques suivantes que dans la mesure où elles sont nécessaires pour traiter des distinctions engendrées lorsque le groupe est composé à la fois d'acheteurs indirects et directs.

(1) Double or Multiple Recovery as Between Indirect and Direct Purchasers

(1) Recouvrement double ou multiple par les acheteurs indirects et les acheteurs directs

[17] The respondents argue that the "fundamental difficulty with the case of the indirect purchasers is that they seek recovery of amounts to which the direct purchasers have a valid claim, such that,

[17] Les intimées font valoir que la [TRADUCTION] « difficulté fondamentale que présente le dossier des acheteurs indirects tient à ce qu'ils cherchent à obtenir le recouvrement de sommes d'argent que

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to recognize the claim of the indirect purchasers would be to recognize an overlapping claim to the same amount and the prospect of double recovery" (Cargill factum, at para. 54). They argue that, because the passing-on defence has been rejected in Canada, the direct purchasers are entitled to 100 percent of the amount of the overcharge. Consequently they say that indirect purchasers "make a duplicative and overlapping claim to an overcharge to which the direct purchasers are entitled based on settled principles" (para. 61).

[18] For the reasons given in the *Pro-Sys* appeal, this argument is insufficient to deny indirect purchasers the right to be included in the class action. I agree with Rice J. that, by including both direct and indirect purchasers in the class and by using economic methodologies to ascertain the aggregate amount of the loss, there will be no over-recovery from the respondents (B.C.S.C., at para. 53).

[19] In this case, the appellants seek recovery of a defined sum equal to the aggregate of the overcharge. Where indirect and direct purchasers are included in the same class and the evidence of the experts at the trial of the common issues will determine the aggregate amount of the overcharge, there will be no double or multiple recovery. Recovery is limited to that aggregate amount, no matter how it is ultimately shared by the direct and indirect purchasers. This was the view of the B.C.C.A. in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), at para. 78, and of the Quebec Court of Appeal in *Option consommateurs v. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), at para. 114. The appeal of the latter decision was heard together with *Pro-Sys* and this case. See *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600.

les acheteurs directs peuvent valablement réclamer. Ainsi, en reconnaissant le droit d'action des acheteurs indirects, on reconnaît un autre droit d'action sur une somme d'argent unique et la possibilité d'un recouvrement double » (mémoire de Cargill, par. 54). Selon elles, comme la défense de transfert de la perte a été écartée au Canada, les acheteurs directs ont le droit de recouvrer la totalité de la majoration. Elles disent donc que la demande des acheteurs indirects en recouvrement du montant de la majoration « télescope celle des acheteurs directs, qui y ont droit en vertu de principes établis » (par. 61).

[18] Pour les motifs exposés dans *Pro-Sys*, cet argument ne suffit pas à refuser aux acheteurs indirects le droit de participer au recours collectif. Je conviens avec le juge Rice que si le groupe est formé des acheteurs directs et des acheteurs indirects et si des méthodes économiques servent à établir le montant global de la perte, les intimées ne seront pas tenues de verser une indemnité supérieure au montant global de la majoration (C.S.C.-B., par. 53).

[19] Dans la présente affaire, les appelantes demandent le recouvrement d'une somme précise équivalente au montant global de la majoration. Lorsque le groupe est composé d'acheteurs indirects et directs et que le témoignage des experts lors de l'examen au procès des questions communes permet d'établir le montant global de la majoration, il n'y a pas de recouvrement double ou multiple. Le recouvrement intégral est limité à cette somme, peu importe comment elle sera finalement répartie entre les acheteurs directs et les acheteurs indirects. C'est l'avis exprimé par la C.A.C.-B. dans *Pro-Sys Consultants Ltd. c. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 (« *Infineon* »), par. 78, et par la Cour d'appel du Québec dans *Option consommateurs c. Infineon Technologies AG*, 2011 QCCA 2116 (CanLII), par. 114. L'appel dans cette dernière affaire a été entendu en même temps que celui dans l'affaire *Pro-Sys* et le présent pourvoi. Voir *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59, [2013] 3 R.C.S. 600.

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[20] To the extent that there is conflict between the class members as to how the aggregate amount is to be distributed upon the awarding of a settlement or upon a successful action, this is not a concern of the respondents and is not a basis for denying indirect purchasers the right to be included in the class action.

(2) Over-Recovery as Between Jurisdictions

[21] In addition to concern of double recovery as between indirect and direct purchasers, the respondents also express concerns of over-recovery arising from actions in the U.S. Specifically, the respondents state that in the U.S., direct purchasers of HFCS have already reached a settlement with the respondents for the entire overcharge. They claim that if the rights of the indirect purchasers to bring an action are recognized in Canada, this will create "overlapping claims to the same loss between direct purchasers in the U.S. and indirect purchasers in British Columbia" (Cargill factum, at para. 71). As stated in the *Pro-Sys* reasons, the court is equipped to deal with these risks. The court possesses the power to modify settlement and damage awards in accordance with awards already received by plaintiffs in other jurisdictions if the respondents are able to satisfy it that double recovery may occur. If the respondents adduce relevant evidence, the court will be able to ensure that double recovery does not occur.

(3) Restitutionary Law Principles

[22] The majority of the B.C.C.A. rejected the offensive use of passing on based on the theory that once the passing-on *defence* is rejected, the direct purchasers would be entitled to the whole amount by which they were overcharged:

. . . I am unable to see why the [direct purchasers] would not as a matter of law be entitled to the whole of the amount they overpaid regardless of any amount that may

[20] Même si les membres du groupe ne s'entendaient pas sur la répartition de la somme globale dans l'éventualité d'un règlement ou d'un gain de cause, ce problème ne regarde pas les intimées et ne justifie pas que l'on refuse aux acheteurs indirects le droit de participer au recours collectif.

(2) Trop-perçu découlant de recours exercés dans plusieurs ressorts

[21] En plus du recouvrement double par les acheteurs indirects d'une part et les acheteurs directs d'autre part, les intimées disent craindre un trop-perçu résultant de la combinaison du présent recours et de ceux exercés aux États-Unis. Plus précisément, les intimées affirment que les acheteurs directs américains ont déjà conclu un règlement avec elles à propos du montant intégral de la majoration. Elles prétendent que, si le droit des acheteurs indirects d'exercer un recours est reconnu au Canada, [TRADUCTION] « les demandes des acheteurs indirects de la Colombie-Britannique télescoperont celles des acheteurs directs américains à l'égard de la même perte » (mémoire de Cargill, par. 71). Comme il est mentionné dans les motifs de l'arrêt *Pro-Sys*, les tribunaux peuvent gérer ces risques. Ils disposent du pouvoir de modifier un règlement et les dommages-intérêts octroyés en fonction de ceux déjà obtenus par les demandeurs dans d'autres ressorts si les intimés réussissent à leur prouver qu'il y a risque de recouvrement double. Si les intimés présentent des éléments de preuve pertinents à cet égard, le tribunal sera en mesure de leur éviter pareille situation.

(3) Principes du droit de la restitution

[22] Les juges majoritaires de la C.A.C.-B. ont refusé le transfert de la perte comme cause d'action suivant le principe que dès lors que cette *défense* est rejetée, les acheteurs directs ont droit au recouvrement intégral du montant de la majoration :

[TRADUCTION] . . . je n'arrive pas à voir pourquoi en droit les [acheteurs directs] ne pourraient pas recouvrer l'intégralité du montant de la majoration, peu importe

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have been passed on to the [indirect purchasers] in the same way they would if they were the only plaintiffs in the action. Anything less would serve to disadvantage them because of the nature of the proceedings such that they would be deprived of what they would legally be entitled to recover. [para. 84]

[23] I would agree that absent an action by indirect purchasers or absent the inclusion of indirect purchasers in the action, the direct purchasers would be able to recover the entire amount of the overcharge because the overcharger would be unable to invoke the passing-on defence. However, this is not the same as saying the direct purchasers are *entitled* to the entire amount of the overcharge. The disgorgement of amounts obtained through wrongdoing is one of the fundamental principles of restitutionary law (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), vol. I, at p. 3-1). Restitutionary law is "a tool of corrective justice" that seeks to take money away from the party who has unjustly taken it and return it to the party who unjustly lost it (*Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, at paras. 32 and 47). While a defendant cannot invoke the passing-on defence, the direct purchasers cannot deny that they have passed on the overcharge to the indirect purchasers. Where indirect purchasers are able to demonstrate that overcharges were passed on to them, they are entitled to claim those overcharges.

(4) Deterrence and Compensation

[24] As part of their argument that indirect purchaser actions should not be allowed, the respondents make much of the fact that in many other price-fixing cases in Canada, awards to indirect purchasers have been disbursed in the form of *cy-près* payments because the amounts in question were so small as to make identification of and distribution to each individual class member impractical. They claim that *cy-près* distributions do not advance the deterrence objective of the Canadian competition laws because any deterrence function could be achieved to an equal extent by a claim made solely by direct purchasers. They also argue

le surcoût potentiellement transféré aux [acheteurs indirects], comme s'ils étaient les seuls demandeurs. Leur accorder moins les défavoriserait compte tenu de la nature de l'instance, de sorte qu'ils seraient privés de ce qu'ils sont en droit de recouvrer. [par. 84]

[23] Je conviens que, si les acheteurs indirects n'exercent aucun recours, seuls ou avec les acheteurs directs, ces derniers seraient à même de recouvrer le montant intégral de la majoration vu l'impossibilité pour l'auteur de cette dernière d'invoquer le transfert de la perte en défense. Or, cela ne revient pas à dire que les acheteurs directs ont *droit* à l'intégralité de cette somme d'argent. La remise des biens mal acquis constitue l'une des pierres angulaires du droit de la restitution (P. D. Maddaugh et J. D. McCamus, *The Law of Restitution* (éd. à feuilles mobiles), vol. I, p. 3-1). Le droit de la restitution constitue « un outil de la justice corrective » qui cherche à reprendre à la partie qui a acquis injustement des fonds pour les rendre à celle qui les a perdus injustement (*Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3, par. 32 et 47). Si un défendeur ne peut invoquer le transfert de la perte en défense, les acheteurs directs ne peuvent nier avoir refilé la majoration aux acheteurs indirects. Dans les cas où les acheteurs indirects peuvent le démontrer, ils ont le droit de demander le remboursement du montant de la majoration.

(4) Dissuasion et indemnisation

[24] À l'appui de leur argument selon lequel le recours des acheteurs indirects doit être rejeté, les intimées font tout particulièrement valoir que, dans nombre d'autres affaires de fixation des prix au Canada, l'indemnité accordée à ce type d'acheteurs a été versée suivant le principe de l'aussi-près (*cy-près doctrine*) parce que le montant de l'indemnité individuelle adjugée était si faible qu'il aurait été irréaliste de dénicher tous les membres du groupe pour la leur verser. Toujours selon les intimées, une indemnité versée suivant ce principe ne sert pas l'objectif de dissuasion des lois canadiennes sur la concurrence parce qu'une

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that because the award would be distributed to a not-for-profit entity in place of the class members, the compensation goal of the Canadian competition laws is also frustrated.

[25] There is merit to these arguments; however, the precedent for *cy-près* distribution is well established (see M. A. Eizenga et al., *Class Actions Law and Practice* (loose-leaf), at § 9.19). While *cy-près* distributions may not appeal to some on a policy basis, this method of distributing settlement proceeds or damage awards is contemplated by the *CPA*, at s. 34(1):

34 (1) The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even though the order does not provide for monetary relief to individual class or subclass members.

[26] It is also a method the courts have used in indirect purchaser price-fixing cases, as demonstrated by the respondents' summary of nine cases in which distribution of the settlement funds was made on a *cy-près* basis. And, while its very name, meaning "as near as possible", implies that it is not the ideal mode of distribution, it allows the court to disburse the money to an appropriate substitute for the class members themselves (see D. Blynn, "Cy Pres Distributions: Ethics & Reform" (2012), 25 *Geo. J. Legal Ethics* 435, at p. 435).

[27] As such, while the compensation objective is not furthered by a *cy-près* distribution, it cannot be said that deterrence is reduced by the possibility that a settlement will eventually be distributed in that manner. These factors do not preclude indirect purchasers from bringing an action or from being included in the class.

demande présentée uniquement par les acheteurs directs serait tout aussi dissuasive. Elles ajoutent qu'elle ne sert pas non plus l'objectif d'indemnisation, car elle serait versée à un organisme à but non lucratif plutôt qu'aux membres du groupe.

[25] Ces arguments sont valables, mais la jurisprudence en matière de versement suivant le principe de l'aussi-près est bien établie (voir M. A. Eizenga et autres, *Class Actions Law and Practice* (feuilles mobiles), § 9.19). Bien qu'il puisse ne pas plaire à certains pour des raisons de principe, ce mode de distribution de l'indemnité accordée par suite d'un règlement ou des dommages-intérêts adjugés est prévu au par. 34(1) de la *CPA* :

[TRADUCTION]

34 (1) Le tribunal peut ordonner que la totalité ou une partie du montant adjugé en vertu de la présente section qui n'a pas été répartie dans le délai qu'il a fixé soit affectée d'une façon dont il est raisonnable de s'attendre qu'elle profite aux membres du groupe ou du sous-groupe même si l'ordonnance ne prévoit pas de mesures de redressement pécuniaire pour les membres du groupe ou du sous-groupe.

[26] Ce mode de distribution a également été employé par les tribunaux dans les affaires de fixation des prix intéressant des acheteurs indirects, comme le démontre le résumé que les intimées ont présenté de neuf affaires où il avait été ordonné. Et, bien qu'il ressorte de son propre nom, dérivé de l'expression [TRADUCTION] « aussi près que possible », qu'il ne s'agit pas du mode de distribution idéal, il permet au tribunal de verser l'argent à un substitut convenable du groupe (voir D. Blynn, « Cy Pres Distributions : Ethics & Reform » (2012), 25 *Geo. J. Legal Ethics* 435, p. 435).

[27] Par conséquent, même si le versement suivant le principe de l'aussi-près de l'indemnité accordée par suite d'un règlement ne sert pas l'objectif d'indemnisation, on ne saurait dire qu'il desserve l'objectif de dissuasion. Ces considérations n'empêchent pas les acheteurs indirects d'exercer un recours ou de faire partie du groupe.

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B. *The Certification of the Class Action*

[28] Having determined that indirect purchasers may pursue actions against their alleged overchargers, the issue is now whether this action should be certified. The analysis of the certification requirements was carried out by the applications judge, Rice J., but was not addressed by the majority of the B.C.C.A. The majority of the B.C.C.A. disposed of the action based solely on its finding that passing on could not be used offensively to allow indirect purchasers to bring an action.

[29] The requirements for certification under the *CPA* are set forth in s. 4(1):

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

B. *La certification du recours collectif*

[28] Ayant conclu que les acheteurs indirects ont un droit de recours contre l'auteur présumé de la majoration, je dois maintenant décider s'il y a lieu de certifier le présent recours collectif. Les conditions de certification ont été analysées par le juge saisi de la demande, le juge Rice, mais les juges majoritaires de la C.A.C.-B. n'en ont pas traité. Ils ont tranché le recours uniquement sur le fondement de leur conclusion que le transfert de la perte ne constitue pas une cause d'action, de sorte que les acheteurs indirects se trouvent privés de recours.

[29] Les conditions de certification prévues à la *CPA* sont énoncées en son par. 4(1) :

[TRADUCTION]

4 (1) Le tribunal saisi d'une demande visée à l'article 2 ou 3 certifie une instance à titre de recours collectif lorsque les conditions suivantes sont réunies :

(a) les actes de procédure révèlent une cause d'action;

(b) il existe un groupe identifiable de 2 personnes ou plus;

(c) les demandes des membres du groupe soulèvent une question commune, que celle-ci l'emporte ou non sur les questions qui touchent uniquement les membres individuels;

(d) le recours collectif serait la meilleure procédure pour régler la question commune de manière juste et efficace;

(e) un demandeur-représentant :

(i) défendrait de manière juste et appropriée les intérêts du groupe,

(ii) a présenté, pour le recours collectif, un plan qui établit une méthode praticable de faire progresser l'instance au nom du groupe et d'aviser les membres du groupe de l'existence du recours collectif,

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(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[30] The respondents contest only three of the certification criteria. The first is whether the pleadings disclose a cause of action as required under s. 4(1)(a). They argue that the remaining cause of action of the direct purchasers in constructive trust should be struck and that the indirect purchaser causes of action in restitution and under s. 36 of the *Competition Act* should fail. They do not contest the indirect purchasers' causes of action in tort. Second, they say that the requirement under s. 4(1)(c) that the claims raise common issues is not met. Third, they argue that the class is not identifiable as it relates to the indirect purchasers as required under s. 4(1)(b).

(1) Do the Pleadings Disclose a Cause of Action?

[31] Section 4(1)(a) of the *CPA* requires that the pleadings disclose a cause of action. This requirement is judged on the standard of proof applied in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980, namely that a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 ("*Alberta Elders*"), at para. 20; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25).

[32] I first consider the respondents' arguments in relation to the causes of action in restitution for both the indirect and direct purchasers (remedial constructive trust) and then turn to the arguments against the cause of action of the indirect purchasers under s. 36 of the *Competition Act*.

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les questions communes.

[30] Les intimées font valoir qu'il n'est pas satisfait à trois des conditions de certification. Premièrement, les actes de procédure révèlent-ils une cause d'action, comme l'exige l'al. 4(1)(a)? Elles soutiennent qu'il faut radier la cause d'action restante des acheteurs directs en imposition d'une fiducie par interprétation et rejeter la cause d'action des acheteurs indirects en restitution et celle fondée sur l'art. 36 de la *Loi sur la concurrence*. Elles ne contestent pas les causes d'action des acheteurs indirects en responsabilité délictuelle. Deuxièmement, elles affirment qu'il n'est pas satisfait à la condition prévue à l'al. 4(1)(c) voulant que les demandes soulèvent une question commune. Troisièmement, elles font valoir que le groupe n'est pas identifiable au sens où il faut l'entendre pour l'application de l'al. 4(1)(b) dans la mesure où il est formé d'acheteurs indirects.

(1) Les actes de procédure révèlent-ils une cause d'action?

[31] L'alinéa 4(1)(a) de la *CPA* exige que les actes de procédure révèlent une cause d'action. Cette analyse s'effectue selon la norme de preuve appliquée dans *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, p. 980, à savoir que le demandeur répond à l'exigence à moins qu'il ne soit manifeste que sa demande ne peut être accueillie, à supposer que tous les faits invoqués soient vrais (*Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261 (« *Alberta Elders* »), par. 20; *Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, par. 25).

[32] Je vais d'abord examiner les arguments des intimées relatifs aux causes d'action en restitution des acheteurs indirects et des acheteurs directs (imposition d'une fiducie par interprétation à titre de réparation) avant de me pencher sur les arguments qu'elles invoquent à l'encontre de la cause d'action des acheteurs indirects fondée sur l'art. 36 de la *Loi sur la concurrence.*

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(a) *Restitution — Indirect Purchasers*

[33] In the alternative, the appellants claim that the respondents have been unjustly enriched as a result of the alleged overcharge on the sale of HFCS and that the class members have suffered a deprivation in the amount of the overcharge attributable to the sale of HFCS in B.C. and in Canada. They plead that this overcharge resulted from wrongful or unlawful acts and that there can thus be no juristic reasons for the enrichment. The appellants seek the disgorgement of the alleged overcharge paid to the respondents by the class members.

[34] The respondents argue that "both the benefit conferred and deprivation (or loss) suffered was that of the direct purchasers alone" and as such, it is the direct purchasers alone who can bring a claim for restitution for wrongful conduct. They submit that no benefit was conferred directly by the indirect purchaser to the overcharger and that the deprivation in question was suffered by the direct purchasers and *not* the indirect purchasers, because the passing on of losses is not recognized at law (Cargill factum, at para. 30).

[35] I understand the respondents to be making two separate points: one, that a direct relationship between a plaintiff and a defendant is needed to ground a claim in unjust enrichment; and two, that because indirect purchasers cannot base a claim on passed-on losses, they have no cause of action in unjust enrichment. Both of these arguments have been addressed in the reasons in *Pro-Sys*.

[36] The requirement that there be a direct relationship between the defendant and the plaintiff for a claim in unjust enrichment is not settled. As indicated in the *Pro-Sys* reasons, *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, states only that "[t]he cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant" (p. 797 (emphasis added)). *Peel* requires only that a claim in unjust enrichment must

a) *Restitution — Acheteurs indirects*

[33] Subsidiairement, les appelantes prétendent que les intimées se sont injustement enrichies, car elles auraient majoré le prix du SMHTF, et que les membres du groupe ont subi un appauvrissement correspondant au montant du surcoût découlant de la vente du SMHTF en C.-B. et ailleurs au Canada. Selon elles, cette majoration est imputable à des actes fautifs ou illicites et aucun motif juridique ne saurait donc justifier l'enrichissement. Les appelantes réclament la restitution du surcoût que les membres du groupe auraient payé aux intimées.

[34] Les intimées affirment que [TRADUCTION] « tant l'avantage conféré que l'appauvrissement subi (la perte) touche exclusivement les acheteurs directs » et ainsi ils sont les seuls à pouvoir présenter une demande en restitution pour des actes fautifs. Elles prétendent que l'acheteur indirect n'a conféré directement aucun avantage à l'auteur de la majoration et que l'appauvrissement en question a été subi par les acheteurs directs, et *non* par les acheteurs indirects, vu que le transfert de la perte n'est pas reconnu en droit (mémoire de Cargill, par. 30).

[35] Je crois comprendre que les intimées avancent deux arguments distincts : premièrement, pour fonder une action pour enrichissement injustifié, il doit y avoir un lien direct entre le demandeur et le défendeur; deuxièmement, puisque les acheteurs indirects ne peuvent invoquer le transfert de la perte en demande, ils n'ont aucune cause d'action pour enrichissement injustifié. Ces deux arguments sont examinés dans les motifs de l'arrêt *Pro-Sys*.

[36] Il n'est pas établi qu'un lien direct entre le défendeur et le demandeur constitue une condition préalable à une action pour enrichissement injustifié. Comme il est indiqué dans les motifs de l'arrêt *Pro-Sys*, la Cour affirme seulement dans *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, que « [l]es affaires dans lesquelles l'enrichissement sans cause a été établi concernent généralement des avantages conférés directement et expressément au défendeur » (p. 797 (je souligne)).

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be based on "more than an incidental blow-by" and that "[a] secondary collateral benefit will not suffice" (p. 797). These words would appear not to necessarily foreclose a claim where the relationship between the parties is indirect. However, as in *Pro-Sys*, this does not resolve the issue. First, it is not apparent here that the benefit received by the respondents was mere "incidental blow-by" or "collateral benefit". Second, the appellants in *Pro-Sys* argue that *Alberta Elders* is an example of a case where an unjust enrichment was found absent a direct relationship, calling the requirement into question. Accordingly, it cannot be said that it is plain and obvious that a claim in unjust enrichment should fail at the certification stage on this ground alone.

Peel vient établir uniquement que le fondement d'une action pour enrichissement sans cause ne doit pas revêtir « qu'un caractère purement incident » et qu'« [u]n avantage secondaire et accessoire ne suffit pas » (p. 797). Ces propos ne semblent pas exclure nécessairement une action opposant des parties unies par un lien indirect. Toutefois, tout comme dans l'affaire *Pro-Sys*, cela ne règle pas la question. Premièrement, il n'est pas évident en l'espèce que l'avantage obtenu par les intimées ne revêtait qu'un « caractère purement incident » ou n'était que « secondaire ». Deuxièmement, les appelants dans l'affaire *Pro-Sys* soutiennent qu'*Alberta Elders* est un exemple d'arrêt où la Cour a conclu à l'enrichissement injustifié malgré l'absence d'un lien direct, ce qui soulève un doute sur le caractère impératif de cette condition. On ne saurait donc dire qu'il est manifeste qu'une action pour enrichissement injustifié doit être rejetée à l'étape de la certification pour ce seul motif.

[37] As to the recognition of passed-on losses, that question has been answered conclusively: the injury suffered by indirect purchasers is recognized at law as is their right to bring actions to recover for those losses. For the reasons previously explained, no insurmountable problem is created by allowing the claims in restitution to be brought by a class comprised of both direct and indirect purchasers. Unjustly obtained amounts are recoverable on the basis that they have been extracted at the plaintiffs' expense (Maddaugh and McCamus, at p. 3-9). That is what is alleged to have occurred in this case. The appellants allege that the respondents committed wrongful acts that were directed at both the direct *and the indirect purchasers* and as such both groups should be able to recover their losses.

[37] Quant au transfert de la perte, la Cour répond de façon concluante à cette question : le préjudice subi par les acheteurs indirects est reconnu en droit, tout comme leur droit d'exercer des recours pour recouvrer le montant de ces pertes. Pour les motifs énoncés précédemment, le fait de permettre à un groupe formé à la fois d'acheteurs directs et d'acheteurs indirects de présenter une demande en restitution ne pose aucun obstacle insurmontable. Il est possible de recouvrer les fonds mal acquis parce qu'ils l'ont été au détriment des demandeurs (Maddaugh et McCamus, p. 3-9). C'est ce qui serait arrivé en l'espèce. Les appelantes prétendent que les intimées ont commis des actes fautifs à l'endroit des acheteurs directs *et des acheteurs indirects* et soutiennent que les deux groupes devraient avoir le droit de recouvrer le montant de leurs pertes.

[38] It is true that, absent indirect purchasers, the rejection of the passing-on defence entitles direct purchasers to 100 percent of the amount of the overcharge. However, this entitlement is altered when indirect purchasers are included in the action. As explained above, this does not mean, as the respondents suggest, that to allow indirect purchasers to join the action would be "to admit of the possibility that a plaintiff could recover twice

[38] Certes, s'il est fait abstraction des acheteurs indirects, l'impossibilité d'invoquer en défense le transfert de la perte se traduit pour les acheteurs directs par un droit à la totalité de la majoration. Cependant, la participation d'acheteurs indirects au recours altère ce droit. Comme je l'explique précédemment, cela ne signifie pas, tel que les intimées le laissent entendre, que le fait de permettre aux acheteurs indirects de participer au recours

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— once from the person who is the immediate beneficiary of the payment or benefit . . . and again from the person who reaped an incidental benefit" (Cargill factum, at para. 32, citing *Peel*, at p. 797). Rather, it means that the indirect and direct purchasers will share the aggregate amount recovered in the event that the action is successful. To the extent that there are competing claims among the direct and indirect purchasers, I agree with Rice J. that this may be sorted out at a later stage of the proceeding (B.C.S.C., at para. 195). At this stage, both groups share the common interest of maximizing the amount recoverable from the respondents. The indirect purchasers' cause of action in restitution should therefore not be struck out.

(b) *Constructive Trust — Direct Purchasers*

[39] On cross-appeal, with respect to the one cause of action remaining to the direct purchasers, the respondents argue that the cause of action in constructive trust should fail.

[40] The respondents claim that neither the requirement of a "proprietary nexus" nor the requirement that the constructive trust be imposed only where a monetary remedy was found to be inadequate were met in this case. As such it is plain and obvious that the direct purchaser claim in constructive trust has no chance of succeeding (see Casco cross-appeal factum, at para. 28, citing *Tracy (Guardian ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577, for the requirements of a constructive trust). I agree.

[41] In *Pro-Sys*, noting that *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, was the relevant controlling authority, I found that the claim in constructive trust must fail because there was no referential property and no explanation by the appellants why a monetary remedy would be inappropriate or insufficient. For the same reasons,

reviendrait à [TRADUCTION] « admettre la possibilité d'un double recouvrement par le demandeur — d'abord, de la personne qui bénéficie immédiatement du paiement ou de l'avantage [. . .] et ensuite, de la personne qui en a tiré un avantage incident » (mémoire de Cargill, par. 32, citant l'arrêt *Peel*, p. 797). Cela signifie plutôt que les acheteurs indirects et les acheteurs directs se partageront la somme globale recouvrée s'ils ont gain de cause. Dans l'éventualité où les acheteurs directs et les acheteurs indirects présentent des demandes concurrentes, je partage l'avis du juge Rice qu'il est possible de régler ce point plus tard au cours de l'instance (C.S.C.-B., par. 195). À ce stade, les deux groupes ont en commun l'intérêt à récupérer la somme d'argent la plus élevée possible auprès des intimées. En conséquence, il ne faut pas radier la cause d'action en restitution des acheteurs indirects.

b) *Fiducie par interprétation — Acheteurs directs*

[39] Dans l'appel incident, les intimées soutiennent que la seule cause d'action reconnue aux acheteurs directs, en imposition d'une fiducie par interprétation, doit être rejetée.

[40] Les intimées prétendent qu'il n'est pas satisfait en l'espèce à la condition d'un [TRADUCTION] « lien avec un bien », ni à celle voulant que la fiducie par interprétation soit imposée uniquement si une réparation pécuniaire est jugée inadéquate. Il est donc manifeste que la demande des acheteurs directs visant l'imposition de ce type de fiducie est vouée à l'échec (voir mémoire d'appel incident de Casco, par. 28, citant *Tracy (Guardian ad litem of) c. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577, à propos des conditions d'une fiducie par interprétation). Je suis d'accord.

[41] Concluant dans l'arrêt *Pro-Sys* que *Kerr c. Baranow*, 2011 CSC 10, [2011] 1 R.C.S. 269, constitue l'arrêt de principe en la matière, j'estime dans la première que les allégations relatives à l'existence d'une fiducie par interprétation doivent être rejetées étant donné qu'aucun bien n'est en cause et que les appelantes ne précisent pas en quoi une

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I find it plain and obvious that Sun-Rype's claim in constructive trust in this case must fail and should be struck.

(c) *Section 36 of the Competition Act — Indirect Purchasers*

(i) Passed-On Losses Recognized at Law

[42] Section 36 of the *Competition Act* provides a cause of action to "[a]ny person who has suffered loss or damage as a result of (*a*) conduct that is contrary to any provision of Part VI". The respondents, basing their argument on their fundamental position that passed-on losses are not recognized at law, assert that s. 36 was not intended to provide a right of action to indirect purchasers.

[43] For the reasons explained in *Pro-Sys*, this argument is rejected. It is not plain and obvious that a cause of action for the indirect purchasers under s. 36 of the *Competition Act* cannot succeed.

(ii) Jurisdiction Over Extraterritorial Conduct

[44] The respondents argue that "an alleged conspiracy entered into outside Canada, among foreign defendants, to fix prices of products sold to foreign direct purchasers does not constitute an offence under the *Competition Act* giving rise to a right of civil action" (ADM factum, at para. 54). They claim that the jurisdiction of Canadian courts over violations of the *Competition Act* by foreign defendants "will have to be determined by reference to the presumptive connecting factors identified in *Club Resorts*, which determination is beyond the scope of the present appeal" (para. 53) and that conduct cannot be contrary to Part VI of the *Competition Act* "unless there is a real and substantial link between that conduct and Canada" (para. 60).

réparation pécuniaire est inappropriée ou insuffisante. Pour les mêmes motifs, il est manifeste à mon avis que la demande de Sun-Rype visant à faire reconnaître l'existence d'une fiducie par interprétation est vouée à l'échec et doit être radiée.

c) *Article 36 de la Loi sur la concurrence — Acheteurs indirects*

(i) Transfert de la perte reconnu en droit

[42] L'article 36 de la *Loi sur la concurrence* confère une cause d'action à « [t]oute personne qui a subi une perte ou des dommages par suite : *a*) soit d'un comportement allant à l'encontre d'une disposition de la partie VI ». S'appuyant sur leur position fondamentale selon laquelle le transfert de la perte n'est pas reconnu en droit, les intimées affirment que l'objet de l'art. 36 ne saurait être d'accorder un droit d'action aux acheteurs indirects.

[43] Pour les motifs donnés dans *Pro-Sys*, cet argument est rejeté. Il n'est pas manifeste que la cause d'action des acheteurs indirects fondée sur l'art. 36 de la *Loi sur la concurrence* est vouée à l'échec.

(ii) Compétence sur les actes commis à l'étranger

[44] Les intimées soutiennent qu'[TRADUCTION] « un complot prétendument noué à l'extérieur du Canada par des défendeurs étrangers pour fixer le prix de produits vendus à des acheteurs directs étrangers ne constitue pas une infraction prévue par la *Loi sur la concurrence* qui fait naître un droit d'action au civil » (mémoire d'ADM, par. 54). Selon elles, la compétence des tribunaux canadiens à l'égard des infractions à la *Loi sur la concurrence* perpétrées par des défendeurs étrangers « doit être établie à l'aune des facteurs de rattachement créant une présomption qui sont énumérés dans *Club Resorts*, ce qui déborde le cadre du présent pourvoi » (par. 53). Elles font valoir également qu'un comportement ne peut aller à l'encontre de la partie VI de la *Loi sur la concurrence* « à moins qu'il n'existe un lien réel et substantiel entre ce comportement et le Canada » (par. 60).

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[45] I agree with the respondents that the framework proposed in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, will need to be applied in establishing whether there is "real and substantial connection" sufficient to find that Canadian courts have jurisdiction in this case. However, I would question the respondents' characterization of the factual situation.

[46] The conduct in question, while perpetrated by foreign defendants, allegedly involved each respondent's Canadian subsidiary acting as its agent. The sales in question were made in Canada, to Canadian customers and Canadian end-consumers. There is at least some suggestion in the case law that where defendants conduct business in Canada, make sales in Canada and conspire to fix prices on products sold in Canada, Canadian courts have jurisdiction (see *VitaPharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.* (2002), 20 C.P.C. (5th) 351 (Ont. S.C.J.), at paras. 58, 63-86 and 101-2 ("It is arguable that a conspiracy that injures Canadians gives rise to liability in Canada, even if the conspiracy was formed abroad": para. 58); *Fairhurst v. Anglo American PLC*, 2012 BCCA 257, 35 B.C.L.R. (5th) 45, at para. 32 (the B.C.C.A. refusing to deny certification of a class action based on the argument that Canadian courts had no jurisdiction over *Competition Act* violations occurring outside of Canada); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263, at paras. 32-45 ("A conspiracy occurs in British Columbia if the harm is suffered here, regardless of where the 'wrongful conduct' occurred. On that basis, the court has jurisdiction over the *ex juris* defendants who are alleged to be parties to the conspiracy": para. 41)).

[47] The respondents have not demonstrated that it is plain and obvious that Canadian courts have no jurisdiction over the alleged anti-competitive acts committed in this case. The cause of action under s. 36 of the *Competition Act* should not be struck out.

[45] Je partage l'opinion des intimées qu'il faut appliquer le cadre proposé dans *Club Resorts Ltd. c. Van Breda*, 2012 CSC 17, [2012] 1 R.C.S. 572, pour déterminer s'il existe un « lien réel et substantiel » suffisant pour conclure à la compétence des tribunaux canadiens en l'espèce. J'ai toutefois des doutes quant à la perspective des intimées quant aux faits.

[46] Bien qu'ils aient été commis par des défendeurs étrangers, les actes reprochés impliquent la filiale canadienne de chacune des intimées agissant à titre de mandataire de ces dernières. Les ventes ont été réalisées au Canada auprès de clients canadiens et, au dernier maillon de la chaîne de distribution, de consommateurs canadiens. Selon un certain courant jurisprudentiel, les tribunaux canadiens sont compétents à l'égard des instances mettant en cause des défendeurs faisant affaire au Canada, y réalisant des ventes et complotant en vue de fixer les prix de produits vendus au Canada (voir *VitaPharm Canada Ltd. c. F. Hoffmann-LaRoche Ltd.* (2002), 20 C.P.C. (5th) 351 (C.S.J. Ont.), par. 58, 63-86 et 101-102 ([TRADUCTION] « Il est possible de soutenir qu'un complot portant préjudice à des Canadiens engage la responsabilité de ses auteurs au Canada même s'il a été ourdi à l'étranger » (par. 58)); *Fairhurst c. Anglo American PLC*, 2012 BCCA 257, 35 B.C.L.R. (5th) 45, par. 32 (la C.A.C.-B. a refusé d'infirmer la certification d'un recours collectif contestée au motif que les infractions à la *Loi sur la concurrence* perpétrées à l'étranger ne ressortissent pas aux tribunaux canadiens); *British Columbia c. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398, 56 B.C.L.R. (4th) 263, par. 32-45 ([TRADUCTION] « Il y a complot en Colombie-Britannique si le préjudice y est subi, quel que soit l'endroit où l'"acte fautif" a été commis. Par conséquent, la cour a compétence à l'égard des défendeurs d'un autre ressort à qui l'on reproche de participer au complot » (par. 41))).

[47] Les intimées n'ont pas démontré qu'il est manifeste que les agissements anticoncurrentiels qui auraient été commis en l'espèce ne sont pas du ressort des tribunaux canadiens. La cause d'action fondée sur l'art. 36 de la *Loi sur la concurrence* ne doit pas être radiée.

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(2) Are There Common Issues?

[48] Section 4(1)(c) of the *CPA* requires that the claims of the class members raise common issues. The respondents' arguments as to the commonality requirement centre on the standard of proof to be applied to this and the other certification requirements other than the requirement that the pleadings disclose a cause of action. Here, as in *Pro-Sys*, the respondents urge the Court to resolve the remainder of the certification requirements on a balance of probabilities. They say the Court should adopt the U.S. approach of weighing conflicting evidence at the certification stage. For the reasons set out in *Pro-Sys*, the standard to be applied here is "some basis in fact" and not a balance of probabilities.

[49] As to the standard to be applied to the expert evidence, the respondents do not argue that it is insufficient to demonstrate commonality; rather, they submit that Rice J. erred in that he applied the wrong standard of proof to the expert methodologies that he examined.

[50] The reasons in *Pro-Sys* have set out that the standard to be applied to expert evidence is one requiring a credible and plausible methodology capable of proving harm on a class-wide basis.

[51] It is evident that on the certification application, Rice J. analysed the significant amount of expert evidence that was before him and that he applied the correct standard to both the certification requirements ("plain and obvious" for s. 4(1)(a) and "some basis in fact" for s. 4(1)(b) to (e)) and the expert methodology required to establish some basis in fact (whether the expert evidence consisted of a credible and plausible model capable of proving harm on a class-wide basis). There is no basis upon which to interfere with his common issues determination.

(2) Existe-t-il une question commune?

[48] Aux termes de l'al. 4(1)(c) de la *CPA*, les demandes des membres du groupe doivent soulever une question commune. Les arguments des intimées à ce sujet sont axés sur la norme de preuve qu'il convient d'appliquer aux conditions de certification, sauf à celle relative à la cause d'action. Tout comme dans *Pro-Sys*, les intimées en l'espèce exhortent la Cour à statuer sur ces conditions de certification selon la prépondérance des probabilités. Selon elles, la Cour doit suivre l'exemple des tribunaux américains, qui soupèsent les éléments de preuve contradictoires à l'étape de la certification. Pour les motifs exposés dans *Pro-Sys*, la norme de preuve applicable en l'espèce est celle d'un « certain fondement factuel », et non celle de la prépondérance des probabilités.

[49] Quant à la norme applicable à la preuve d'expert, les intimées ne soutiennent pas qu'il ne suffit pas d'établir la communauté. Elles font plutôt valoir que le juge Rice a appliqué la mauvaise norme à la preuve relative aux méthodes d'experts qu'il a examinées.

[50] Dans *Pro-Sys*, il est établi que la norme qui s'applique à la preuve d'expert est celle de la méthode valable et acceptable permettant de prouver le préjudice à l'échelle du groupe.

[51] Il ressort à l'évidence que, lors de l'instruction de la demande visant la certification, le juge Rice a analysé la preuve d'expert volumineuse dont il disposait et qu'il a appliqué la bonne norme tant aux conditions de certification (celle du caractère [TRADUCTION] « manifeste » pour l'al. 4(1)(a) et celle du « certain fondement factuel » pour les al. 4(1)(b) à (e)) qu'à la méthode d'expert employée pour établir l'existence d'un certain fondement factuel (celle de la méthode valable et acceptable permettant de prouver qu'un préjudice a été causé à l'échelle du groupe). Il n'y a aucune raison de modifier sa conclusion sur les questions communes.

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(3) Is There an Identifiable Class?

[52] Section 4(1)(b) of the *CPA* provides that the court must certify a proceeding if, among other requirements, there is an identifiable class of two or more persons. *Hollick* provides that this certification requirement will be satisfied by demonstrating "some basis in fact" to support it (para. 25).

[53] The class definition proposed by the appellants is "all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products containing HFCS manufactured by the defendants (collectively, the 'class') from January 1, 1988 to June 30, 1995 (the 'Class Period')" (B.C.S.C., at para. 2).

[54] The respondents take issue with the inclusion of indirect purchasers in the class. They acknowledge that while impracticability or impossibility in distributing class action proceeds to indirect purchasers does not necessarily preclude finding an "identifiable class", the facts of this particular case are such that the class cannot be found to be "identifiable" to the extent that it includes indirect purchasers (ADM factum, at para. 85). The respondents argue that the inclusion of indirect purchasers in the class in the present case runs contrary to the purpose of the "identifiable class" requirement because indirect purchasers are not able, based on the class definition, to determine if they are members of the class. Relying on *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, the respondents argue that the identifiable class requirement should allow for class membership to be determinable.

[55] They argue that the proposed class definition does not allow for indirect purchasers to determine if they are in fact members of the class as defined. Contrary to the *Infineon* and *Pro-Sys* cases where there was evidence that class membership could likely be determined, here "it is simply impossible to make a determination of the presence, or lack of presence, of HFCS in particular products a

(3) Existe-t-il un groupe identifiable?

[52] L'alinéa 4(1)(b) de la *CPA* prévoit l'une des conditions préalables à la certification d'un recours collectif, à savoir l'existence d'un groupe identifiable de deux personnes ou plus. Il ressort de l'arrêt *Hollick* qu'il est satisfait à cette condition dès lors qu'un « certain fondement factuel » est établi (par. 25).

[53] La définition du groupe proposée par les appelantes est la suivante : [TRADUCTION] « . . . tous les résidants de la Colombie-Britannique et d'ailleurs au Canada qui ont acheté du SMHTF fabriqué par les défenderesses ou des produits en contenant (collectivement le "groupe") entre le 1er janvier 1988 et le 30 juin 1995 (la "période visée par le recours") » (C.S.C.-B., par. 2).

[54] Les intimées contestent l'inclusion des acheteurs indirects dans le groupe. Elles reconnaissent que la distribution impossible ou irréaliste aux acheteurs indirects des indemnités accordées à l'issue du recours collectif n'empêche pas nécessairement de conclure à l'existence d'un « groupe identifiable ». Elles estiment toutefois que, vu les faits de l'espèce, le groupe ne peut être jugé « identifiable » dans la mesure où il comprend les acheteurs indirects (mémoire d'ADM, par. 85). Selon elles, l'appartenance de ces acheteurs au groupe en l'espèce ne respecte pas la condition relative à l'existence d'un « groupe identifiable » parce qu'ils ne sont pas en mesure, d'après la définition du groupe, de déterminer s'ils en font partie ou non. Invoquant *Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534, les intimées soutiennent que, pour qu'il soit satisfait à cette condition, l'appartenance au groupe devrait être déterminable.

[55] De l'avis des intimées, la définition du groupe proposée ne permet pas aux acheteurs indirects d'établir s'ils appartiennent ou non au groupe. À la différence des affaires *Infineon* et *Pro-Sys*, où la preuve montrait que l'appartenance au groupe était vraisemblablement déterminable, la présente affaire est un cas où [TRADUCTION] « il est tout simplement impossible de confirmer la présence ou l'absence de

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consumer in British Columbia may have purchased between 1988 and 1995" (ADM factum, at para. 97). They argue that prominent direct purchasers such as Coke, Pepsi, Vitality Foodservice Canada Inc., Ocean Spray Cranberries and George Weston Limited have used both HFCS and liquid sugar in their products. In many cases, the labels on the products sold in Canada by these direct purchasers did not reflect which sweetener was used. They also point out that on cross-examination on her affidavit, the representative plaintiff Wendy Bredin stated that "she did not know whether any product she purchased during the class period actually contained HFCS" (para. 18). They state that "[i]f the proposed representative Plaintiff in this action is unable to say whether any product she bought in the class period contained HFCS, it is difficult to see how any other potential class member could be aware of this fact" (para. 103).

SMHTF dans les produits qu'un consommateur de la Colombie-Britannique aurait achetés entre 1988 et 1995 » (mémoire d'ADM, par. 97). Elles font valoir que des acheteurs directs importants comme Coke, Pepsi, Vitality Foodservice Canada Inc., Ocean Spray Cranberries et George Weston limitée ont utilisé tantôt du SMHTF tantôt du sucre liquide dans leurs produits. Dans bien des cas, les étiquettes des produits vendus au Canada par ces acheteurs directs n'indiquaient pas l'édulcorant utilisé. Les intimées soulignent également que, lorsqu'elle a été contre-interrogée sur son affidavit, la demanderesse-représentante, Wendy Bredin, a dit « ignorer si elle avait acheté au cours de la période visée par le recours un seul produit contenant du SMHTF » (par. 18). Elles notent que « [s]i la personne disposée à agir à titre de demanderesse-représentante en l'espèce n'est pas en mesure de savoir si elle a acheté un seul produit contenant du SMHTF au cours de cette période, on voit mal comment un autre membre éventuel du groupe le pourrait » (par. 103).

[56] This is not a typical ground on which the "identifiable class" requirement is challenged. Here, there is no question whether the class definition is too narrow or too broad, whether the definition contains subjective criteria or whether the class definition creates a need to consider the merits. However, when the purpose for which there must be a class definition that designates an "identifiable class" is examined, the problems with the appellants' case become evident.

[56] Il ne s'agit pas d'un motif habituellement invoqué pour contester l'existence d'un [TRADUCTION] « groupe identifiable ». Il n'est pas question de déterminer si la définition du groupe est trop étroite ou trop large, si elle repose sur des critères subjectifs ou si elle emporte un examen du bien-fondé du recours. Par contre, les problèmes qui grèvent la cause des appelantes apparaissent clairement dès lors qu'on analyse les objets visés par la condition relative au « groupe identifiable ».

[57] I agree with the courts that have found that the purpose of the class definition is to (i) identify those persons who have a potential claim for relief against the defendants; (ii) define the parameters of the lawsuit so as to identify those persons who are bound by its result; (iii) describe who is entitled to notice of the action (*Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at paras. 26 and 30; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. (Gen. Div.)), at para. 10; Eizenga et al., at § 3.31). *Dutton* states that "[i]t is necessary . . . that any particular person's claim to membership in the class be determinable by stated, objective criteria" (para. 38).

[57] Je suis d'accord avec les tribunaux qui sont arrivés à la conclusion que la définition du groupe a les objets suivants : i) recenser les personnes susceptibles d'avoir un droit de réparation contre les défendeurs; ii) établir les paramètres de la poursuite afin de circonscrire les personnes liées par son issue; iii) déterminer les personnes ayant le droit d'être avisées de l'existence du recours (*Lau c. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (C.S.J. Ont.), par. 26 et 30; *Bywater c. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (C.J. Ont. (Div. gén.)), par. 10; Eizenga et autres, § 3.31). Pour citer l'arrêt *Dutton*, « [i]l est [. . .] nécessaire que l'appartenance d'une personne au groupe

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According to Eizenga et al., "[t]he general principle is that the class must simply be defined in a way that will allow for a later determination of class membership" (§ 3.33).

[58] I do not take issue with the class definition on its face. It uses objective criteria, it does not turn on the merits of the claim, and it cannot be narrowed without excluding members who may have a valid claim. Where the difficulty lies is that there is insufficient evidence to show some basis in fact that two or more persons will be able to determine if they are in fact a member of the class.

[59] The appellants claim that the respondents "attempt to use the complexity inherent in claims arising from a large-scale price-fixing conspiracy to deny those injured by the alleged conduct a legal remedy" and that "courts have found that class definitions similar or identical to that proposed in this case were appropriate" (response factum, at paras. 58 and 61). The appellants rely on the instruction in *Dutton*, at para. 38, that "[i]t is not necessary that every class member be named or known." They cite *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774 (Ont. S.C.J.), in support of the proposition that courts can engage in a "relatively elaborate factual investigation in order to determine class membership" and that "[t]he fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and is not, by itself, a reason for finding that the class is not identifiable" (para. 67, citing *Sauer*, at para. 28).

[60] However, in *Sauer* the passage relied upon pertained to the issue of the objectivity of the criteria used in the class definition. In that case, a class action involving cows infected with bovine spongiform encephalopathy ("BSE") or "mad cow disease", the class was defined to include "all cattle farmers in Canada", except Quebec (para. 11). The representative plaintiff adduced evidence of his

puisse être déterminée sur des critères explicites et objectifs » (par. 38). Selon Eizenga et autres, [TRADUCTION] « [l]e principe général veut que le groupe soit tout simplement défini de manière à permettre de déterminer par la suite qui en fait partie » (§ 3.33).

[58] La définition du groupe ne me pose pas problème a priori. Elle repose sur des critères objectifs, n'est pas fonction du bien-fondé de la demande et ne peut être restreinte sans que soient exclus des membres susceptibles d'avoir un droit de recours valable. Or, la preuve ne permet pas de conclure qu'un certain fondement factuel établit que deux personnes ou plus sauront si elles appartiennent ou non au groupe, et c'est là où le bât blesse.

[59] Les appelantes prétendent que les intimées [TRADUCTION] « tentent d'exciper de la complexité inhérente aux demandes résultant d'un complot de fixation des prix à grande échelle pour priver de recours judiciaire les personnes lésées par les actes reprochés » et que « les tribunaux ont jugé adéquates des définitions de groupe semblables ou identiques à celle proposée en l'espèce » (mémoire en réponse, par. 58 et 61). Les appelantes invoquent la directive donnée dans *Dutton* selon laquelle « [i]l n'est pas nécessaire que tous les membres du groupe soient nommés ou connus » (par. 38). Elles citent *Sauer c. Canada (Agriculture)*, 2008 CanLII 43774 (C.S.J. Ont.), qui dit que les tribunaux peuvent se livrer à une [TRADUCTION] « analyse assez approfondie des faits en vue d'établir l'appartenance au groupe » et qu'« [i]l arrive souvent dans un recours collectif que certaines personnes aient du mal à prouver qu'elles satisfont aux conditions d'appartenance, ce qui ne permet pas en soi de conclure que le groupe n'est pas identifiable » (par. 67, citant *Sauer*, par. 28).

[60] Par contre, l'extrait de la décision *Sauer* invoqué par les appelantes porte sur l'objectivité des critères qui figurent dans la définition du groupe. Dans cette affaire, un recours collectif concernant des vaches atteintes d'encéphalopathie spongiforme bovine (« ESB ») ou « maladie de la vache folle », le groupe s'entendait de [TRADUCTION] « tous les éleveurs de bovins au Canada », outre ceux du

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own personal losses as well as those of others in the community as a result of the BSE crisis. The defendants challenged the term "cattle farmers" as being too broad and creating a problem for those farmers seeking to self-identify. Lax J. of the Ontario Superior Court of Justice held that in such situations the court could engage in a factual investigation to determine class membership.

[61] That is not the situation in this case. Here, there is no basis in fact to demonstrate that the information necessary to determine class membership is possessed by any of the putative class members. The appellants have an obligation at the certification stage to introduce evidence to establish some basis in fact that at least two class members can be identified. Here, they have not met even this relatively low evidentiary standard.

[62] This is not a case of mere difficulty in proving membership in a defined class. That is what distinguishes this case from *Pro-Sys*. In *Pro-Sys*, even if class membership is not immediately evident to potential class members based on the class definition, records of purchase or the presence of the application software or operating systems that form the subject of the appeal on the computers of the putative class members would serve to identify them as part of the identifiable class. Further, in *Pro-Sys*, Sam Leung, president and director of Pro-Sys Consultants Ltd., one of the representative plaintiffs, offered proof that he had purchased the product in question in the form of the invoice for the purchase of the computer. That evidence demonstrated that class membership was determinable and established some basis in fact that there was an identifiable class.

[63] Conversely, in this case, the respondents' evidence is that HFCS and liquid sugar had been used interchangeably by direct purchasers during the class period. They also claim that

Québec (par. 11). Le demandeur-représentant avait produit la preuve des pertes que lui et des confrères avaient essuyées par suite de la crise de l'ESB. Selon les défendeurs, le terme « éleveurs de bovins » était trop large et posait problème aux agriculteurs cherchant à être reconnus comme membres du groupe. La juge Lax, de la Cour supérieure de justice de l'Ontario, a conclu que dans de telles situations, le tribunal peut examiner les faits pour déterminer l'appartenance au groupe.

[61] Or, ce n'est pas le cas en l'espèce. Aucun fondement factuel ne permet d'établir qu'un seul des membres du groupe proposé dispose des renseignements nécessaires pour déterminer s'il appartient ou non au groupe. Les appelantes ont l'obligation, à l'étape de la certification, de démontrer l'existence d'un certain fondement factuel permettant de conclure qu'au moins deux membres pourront être connus. Elles n'ont même pas satisfait à cette norme de preuve relativement peu exigeante.

[62] Il ne s'agit pas en l'espèce d'un cas où il est simplement difficile d'établir l'appartenance à un groupe défini. C'est ce qui différencie la présente affaire de l'affaire *Pro-Sys*. Dans cette dernière, même si l'appartenance au groupe ne paraît pas évidente à première vue aux éventuels membres du groupe à la lumière de la définition de celui-ci, des reçus d'achat ou la présence dans l'ordinateur du membre du groupe proposé du logiciel d'application ou d'un système d'exploitation visé par l'appel permettraient de conclure à l'appartenance au groupe. De plus, dans *Pro-Sys*, Sam Leung, président-directeur de Pro-Sys Consultants Ltd., l'un des demandeurs-représentants, a prouvé qu'il avait acheté le produit en question, en produisant la facture constatant l'achat de l'ordinateur. Cette preuve démontrait qu'il était possible de déterminer l'appartenance au groupe et que l'existence d'un groupe identifiable reposait sur un certain fondement factuel.

[63] À l'inverse, dans la présente affaire, la preuve des intimées montre que les acheteurs directs ont utilisé de façon interchangeable le SMHTF et le sucre liquide au cours de la période visée par le recours. En outre, les intimées prétendent que

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Canadian labelling requirements during the class period were such that food and beverage producers were not required to specify which of the two sweeteners was contained in their products. A generic label indicating "sugar/glucose-fructose" could be used for either liquid sugar or HFCS. The result is that a consumer who purchased such a product during the class period would have had no way of determining whether that product contained HFCS, even if they had bothered to check the label. [ADM factum, at para. 100]

[64] The appellants say only that "hundreds of millions of dollars of HFCS was sold to Canadian direct purchasers during the Class Period" and that this HFCS was used in "products such as soft drinks, baked goods and other food products which are purchased by restaurants, grocery wholesalers, supermarkets, convenience stores, movie theatres and others" (response factum, at para. 69). Their expert offers evidence that the amount of HFCS used and the specific products which contained it are identifiable (para. 69, citing the Leitzinger Report, at paras. 10-11, 18-20 and 27 (A.R., vol. II, at pp. 85-86, 89-91 and 95-96)).

[65] The question, however, is not one of whether the identified products contained HFCS, or even whether the overcharge would have reached the indirect purchaser level (i.e. whether passing on had occurred). The problem in this case lies in the fact that indirect purchasers, even knowing the names of the products affected, will not be able to know whether the particular item that they purchased did in fact contain HFCS. The appellants have not offered evidence that could help to overcome the identification problem created by the fact that HFCS and liquid sugar were used interchangeably.

[66] Even Ms. Bredin testified that she is unable to state whether the products she purchased contained HFCS. This fact will remain unchanged because, as noted above, liquid sugar and HFCS were used interchangeably and a generic label indicating only "sugar/glucose-fructose" could be used for either type of sweetener. Ms. Bredin presented no evidence to show that there is some basis in fact that she would be able to answer this question. On

[TRADUCTION] les règles canadiennes d'étiquetage en vigueur au cours de la période visée par le recours n'obligeaient pas les fabricants d'aliments et de boissons à indiquer lequel des deux édulcorants entrait dans la composition de leurs produits. Elles permettaient que le terme générique « sucre/glucose-fructose » désigne tantôt le sucre liquide, tantôt le SMHTF sur l'étiquette. Il s'ensuit que le consommateur ayant acheté un tel produit au cours de la période visée par le recours n'aurait pu dire s'il contenait du SMHTF même s'il s'était donné la peine de lire l'étiquette. [mémoire d'ADM, par. 100]

[64] Les appelantes affirment seulement que [TRADUCTION] « les ventes de SMHTF aux acheteurs directs canadiens représentaient des centaines de millions de dollars au cours de la période visée par le recours » et que ce SMHTF entrait dans la fabrication de « denrées alimentaires comme les boissons gazeuses et les produits de boulangerie achetées par des restaurants, grossistes, supermarchés, dépanneurs, cinémas et autres établissements » (mémoire en réponse, par. 69). Selon leur expert, il est possible d'établir la quantité de SMHTF utilisé et de déterminer les produits précis qui en contenaient (par. 69, citant le rapport de M. Leitzinger, par. 10-11, 18-20 et 27 (d.a., vol. II, p. 85-86, 89-91 et 95-96)).

[65] Par contre, il ne s'agit pas de déterminer si certains produits contenaient du SMHTF ou encore si la majoration a été refilée aux acheteurs indirects (autrement dit, s'il y a eu transfert de la perte). Le problème en l'espèce tient au fait que les acheteurs indirects ne seront pas en mesure de savoir si l'article qu'ils ont acheté contenait ou non du SMHTF même s'ils connaissent le nom des produits en cause. Les appelantes n'ont pas fourni de preuve susceptible de remédier au problème relatif à l'appartenance que soulève l'interchangeabilité du SMHTF et du sucre liquide.

[66] M^me^ Bredin elle-même a affirmé ne pas être en mesure de dire si les produits qu'elle avait achetés contenaient du SMHTF. Cet état de fait ne changera pas parce que, répétons-le, le sucre liquide et le SMHTF étaient utilisés de façon interchangeable et qu'une étiquette portant seulement le générique « sucre/glucose-fructose » était susceptible d'indiquer la présence de l'un ou l'autre édulcorant. M^me^ Bredin n'a pas démontré qu'un certain

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the evidence presented on the application for certification, it appears impossible to determine class membership.

[67] The appellants claim that "although some class members may not be able to self-identify, class membership is determinable by reference to the nature of the purchases made by each individual and the quantity of HFCS in the products purchased" (response factum, at para. 71). However, this is no answer to the self-identification problem. While there may have been indirect purchasers who were harmed by the alleged price-fixing, they cannot self-identify using the proposed definition. Allowing a class proceeding to go forward without identifying two or more persons who will be able to demonstrate that they have suffered loss at the hands of the alleged overchargers subverts the purpose of class proceedings, which is to provide a more efficient means of recovery for plaintiffs *who have suffered harm* but for whom it would be impractical or unaffordable to bring a claim individually. In this case, class membership is not determinable.

[68] Built into the class certification framework is the requirement that the class representative present sufficient evidence to support certification and to allow the opposing party to respond with its own evidence (*Hollick*, at para. 22). The goal at the certification stage is to ensure that this is an appropriate matter to proceed as a class proceeding (*Pro-Sys*, at para. 104). And while the certification stage is not a preliminary trial of the merits, "the judge must be satisfied of certain basi[c] facts required by [the *Class Proceedings Act, 1992*, S.O. 1992, c. 6] as the basis for a certification order" (*Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), at p. 381).

fondement factuel permet de conclure qu'elle pourra répondre à cette question. Vu la preuve produite dans le cadre de la demande de certification, il paraît impossible de déterminer l'appartenance au groupe.

[67] La prétention des appelantes que, [TRADUCTION] « même s'il est possible que certains membres ne puissent se reconnaître comme tels, l'appartenance au groupe peut s'établir eu égard à la nature des achats réalisés par chaque personne et à la quantité de SMHTF contenue dans les produits achetés » (mémoire en réponse, par. 71). Or, ce n'est pas une solution au problème qu'éprouveront les membres éventuels à se reconnaître comme tels. Bien que la fixation des prix reprochée ait peut-être porté préjudice à des acheteurs indirects, ils ne peuvent démontrer qu'ils font partie du groupe à la lumière de la définition proposée. Certifier un recours collectif sans connaître au moins deux personnes qui seront en mesure de prouver les pertes que leur ont fait subir les auteurs présumés de la majoration contrecarre l'objectif des recours collectifs, qui est d'offrir une voie de recours plus efficace aux demandeurs *ayant subi un préjudice* mais pour qui il serait irréaliste d'exercer un recours individuel ou qui n'ont pas les moyens de le faire. Il est impossible de déterminer l'appartenance au groupe en l'espèce.

[68] Le cadre de certification des recours collectifs oblige le représentant du groupe à présenter une preuve suffisante à l'appui de la certification et permet à la partie adverse de produire à son tour sa propre preuve (*Hollick*, par. 22). À l'étape de la certification, l'objet consiste à vérifier que le litige se prête bien au recours collectif (*Pro-Sys*, par. 104). Et bien que l'instruction de la demande de certification ne constitue pas un procès préliminaire sur le bien-fondé du recours, [TRADUCTION] « le juge doit être convaincu de l'existence de certains faits élémentaires qui, aux termes de [la *Class Proceedings Act, 1992*, L.O. 1992, ch. 6], constituent le fondement obligatoire d'une ordonnance de certification » (*Taub c. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Div. gén.), p. 381).

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[69] In this case, the appellants argue that denying that there is an identifiable class is to confuse the ability to identify a class with the ability to identify each individual member of that class (response factum, at para. 72). I agree that it is not necessary for each individual class member to be identified at the outset of the litigation in order for the class to be certified. However, as set out in the legislation, the matter will only be certified if, *inter alia*, "there is an identifiable class of 2 or more persons" (s. 4(1)(b)). In this case, the problem is that the indirect purchaser plaintiff did not offer any evidence to show some basis in fact that two or more persons could prove they purchased a product actually containing HFCS during the class period and were therefore identifiable members of the class.

[69] En l'espèce, selon les appelantes, refuser de reconnaître l'existence d'un groupe identifiable c'est confondre la possibilité de déterminer le groupe et la possibilité d'en déterminer chacun des membres (mémoire en réponse, par. 72). Je conviens qu'il n'est pas nécessaire que chaque membre soit connu au début de l'instance pour que le recours puisse être certifié. Toutefois, aux termes de la Loi, le tribunal ne certifie le recours que s'il [TRADUCTION] « existe un groupe identifiable de 2 personnes ou plus » (al. 4(1)(b)), entre autres conditions. En l'espèce, le problème est le suivant. La représentante des acheteurs indirects n'a produit aucune preuve qu'un certain fondement factuel sous-tend l'hypothèse selon laquelle deux personnes ou plus pourraient démontrer l'achat au cours de la période visée par le recours d'un produit contenant bel et bien du SMHTF, et démontrer ainsi leur appartenance à un groupe identifiable.

[70] Justice Karakatsanis says that there is some basis in fact to conclude that some indirect purchasers could prove that they probably purchased products containing HFCS (para. 115). With respect, no evidence was provided to establish some basis in fact that any individual indirect purchasers could do so. Allowing the class to be certified in such circumstances would be to lower the evidentiary standard necessary to satisfy the criteria at the certification stage from some basis in fact to mere speculation.

[70] La juge Karakatsanis est d'avis qu'un certain fondement factuel permet de conclure que des acheteurs indirects pourraient prouver avoir probablement acquis des produits contenant du SMHTF (par. 115). Malgré tout le respect que je porte à ma collègue, je constate qu'aucun fondement factuel ne démontre qu'un seul des acheteurs indirects le pourrait. Permettre la certification du recours dans de telles circonstances équivaudrait à substituer à la norme de preuve applicable aux critères de certification, c'est-à-dire celle d'un certain fondement factuel, celle des simples conjectures.

[71] Justice Karakatsanis also states that "expert evidence may provide a credible and plausible method offering a realistic prospect of establishing loss on a class-wide basis" (para. 108). However, even if expert evidence satisfies the certification judge that the class as a whole was harmed, that does not obviate the need for the certification judge to be satisfied that there is some basis in fact indicating that at least two persons can prove they incurred a loss.

[71] Pour reprendre les propos de ma collègue, « la preuve d'expert peut présenter une méthode valable et acceptable offrant une possibilité réaliste d'établir la perte pour l'ensemble du groupe » (par. 108). Cependant, même si le juge saisi de la demande de certification est convaincu, à la lumière de la preuve d'expert, que le groupe en entier a subi le préjudice, cela n'empêche pas qu'il doive être convaincu de même qu'un certain fondement factuel établit qu'au moins deux personnes sont en mesure de prouver la perte.

[72] A key component in any class action is that two or more persons fit within the class definition.

[72] Un élément essentiel de tout recours collectif est la nécessité pour deux personnes ou

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If, as in this case, there is no basis in fact to show that at least someone can prove they fit within the class definition, the class cannot be certified because the criteria of "an identifiable class of 2 or more persons" is not met. No amount of expert evidence establishing that the defendants have harmed the class as a whole does away with this requirement.

[73] This is not to say that an identifiable class could never be found in similar circumstances as appear in this case. An identifiable class could be found if evidence was presented that provided some basis in fact that at least two persons could prove they had suffered individual harm. The problem in this case is that no such evidence was tendered.

[74] Justice Karakatsanis writes that "if no individual seeks an individual remedy, it will not be necessary to prove individual loss" (para. 97), and that the aggregate damages provisions of the *CPA* allow class actions to proceed "where *liability to the class* has been proven but individual membership in the class is difficult or impossible to determine" (para. 102 (emphasis in original)).

[75] As I understand it, Justice Karakatsanis's point is that where liability to the class has been proven, there is no requirement to prove that any person is a member of a class or that any person has suffered individual damage. The necessary implication is that class proceeding legislation alters existing causes of action. For example, s. 36 of the *Competition Act* creates a cause of action for "[a]ny person who has suffered loss or damage". My colleague's approach would suggest a class action claim could proceed under s. 36 of the *Competition Act* without any person establishing that they had suffered loss or damage. However, the *CPA* neither creates a new cause of action nor alters the basis of existing causes of action. Rather, it allows claimants

plus d'être visées par la définition. Si, comme en l'espèce, aucun fondement factuel ne permet de démontrer que c'est le cas, le recours ne peut être certifié puisqu'il n'est pas satisfait au critère relatif à l'existence d'[TRADUCTION] « un groupe identifiable de 2 personnes ou plus ». Aucune preuve d'expert établissant le préjudice causé par les défenderesses au groupe en entier, si abondante soit-elle, ne pourrait faire disparaître cette exigence.

[73] Il ne s'ensuit pas qu'il sera toujours impossible de conclure à l'existence d'un groupe identifiable dans des circonstances semblables à celles de la présente affaire. Un tribunal pourrait déterminer qu'il existe un groupe identifiable au vu de preuves établissant qu'un certain fondement factuel permet de croire qu'au moins deux personnes pourraient démontrer avoir subi un préjudice individuel. Ce qui pose problème en l'espèce, c'est l'absence d'une telle preuve.

[74] Selon ma collègue, « si personne ne cherche à obtenir une réparation individuelle, il ne sera pas nécessaire de prouver une perte individuelle » (par. 97) et les dispositions de la *CPA* autorisant l'octroi de dommages-intérêts globaux permettent que soit intenté un recours collectif dans le cas « où la *responsabilité envers le groupe* a été démontrée, mais où l'appartenance au groupe est difficile ou impossible à établir » (par. 102 (en italique dans l'original)).

[75] Si je comprends bien l'argument de ma collègue, dès lors que la responsabilité envers le groupe est démontrée, il n'est pas nécessaire de démontrer que quiconque appartient au groupe ou a subi un préjudice individuel. Il découlerait nécessairement de ce qui précède que la législation régissant les recours collectifs agit sur la cause d'action. Par exemple, l'art. 36 de la *Loi sur la concurrence* donne un droit de recours à « [t]oute personne qui a subi une perte ou des dommages ». Suivant la thèse de ma collègue, il pourrait y avoir recours collectif fondé sur l'art. 36 sans que qui que ce soit n'établisse avoir subi une perte ou des dommages. Or, la *CPA* n'a pas pour effet de modifier le fondement d'une cause d'action ni d'en créer de nouvelles; elle

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with causes of action to unite and pursue their claims as a class.

[76] The aggregate damages provisions of the *CPA* allow the court to dispense with the need to calculate the quantum of damages for each individual class member and permits distribution of the proceeds on a *cy-près* basis rather than to individual members of the class. However, where the proposed certified causes of action require proof of loss as a component of proving liability, the certification judge must be satisfied that there is some basis in fact that at least two persons can prove they incurred a loss. Establishing that the class as a whole has suffered loss does not obviate this requirement.

(4) Conclusion on Identifiable Class

[77] The goal of the certification stage, as indicated by McLachlin C.J. in *Hollick*, is to determine if, procedurally, the action is best brought in the form of a class action (para. 16). In this case, given that the appellants did not show that there was some basis in fact to believe that at least two persons can establish they are members of the class, I am unable to answer that question in the affirmative.

[78] An advantage of a class proceeding is that it serves judicial economy by allowing similar individual actions to be aggregated (*Hollick*, at para. 15; *Dutton*, at para. 27). In my view, implicit in this objective is that the foundation upon which an individual action could be built must be equally present in the class action setting. That foundation is lacking here.

[79] I do not disagree with Justice Karakatsanis that behaviour modification can be an objective of class proceedings. However, the circumstances here demonstrate that class proceedings are not always the appropriate means of addressing behaviour modification. In cases in which loss or damage due to price-fixing cannot be proven, the appropriate

habilite les demandeurs ayant en commun une cause d'action à s'unir pour la faire valoir collectivement.

[76] Les dispositions de la *CPA* autorisant l'octroi de dommages-intérêts globaux évitent au tribunal le calcul des dommages-intérêts individuels et en permettent le versement suivant le principe de l'aussi-près, plutôt qu'aux membres du groupe. Cependant, dans les cas où les causes d'action proposées assujettissent la preuve de la responsabilité notamment à celle de la perte, le juge saisi de la demande de certification doit être convaincu qu'il existe un certain fondement factuel pour dire qu'au moins deux personnes sont en mesure de démontrer avoir essuyé une perte. Démontrer que le groupe en entier a subi le préjudice ne permet pas d'éliminer pareille exigence.

(4) Conclusion sur la question du groupe identifiable

[77] Comme le mentionne la juge en chef McLachlin dans *Hollick*, l'étape de la certification vise à déterminer si, sur le plan de la forme, il vaut mieux procéder par recours collectif (par. 16). En l'espèce, étant donné que les appelantes n'ont pas établi qu'un certain fondement factuel permettait de croire qu'au moins deux personnes peuvent démontrer qu'elles sont membres du groupe, j'estime ne pas pouvoir répondre à cette question par l'affirmative.

[78] L'un des avantages du recours collectif est qu'il favorise l'économie des ressources judiciaires par le regroupement d'actions individuelles semblables (*Hollick*, par. 15; *Dutton*, par. 27). À mon sens, cet objectif implique que le fondement sur lequel reposerait le recours individuel doit pouvoir se transposer au recours collectif. Or, ce fondement fait défaut en l'espèce.

[79] Je ne suis pas en désaccord avec la juge Karakatsanis selon qui la modification des comportements peut constituer un objectif des recours collectifs. Or, la présente situation démontre qu'il ne convient pas toujours de procéder par recours collectif pour obtenir un tel résultat. S'il se révèle impossible d'établir la perte ou les dommages

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recourse may be for the Commissioner of Competition to charge the defendants under the *Competition Act*. A process commenced by the Commissioner requires only proof of price-fixing. There is no need to prove passing on or that any particular consumer overpaid for a particular product. Whether the Competition Bureau intends to prosecute the respondents in this case is not known. Regardless, it does not change the fact that in a case such as this, where certification criteria cannot be met, such prosecutions may have to be considered if behaviour modification is the objective.

V. Conclusion

[80] Given the finding that an identifiable class cannot be established for the indirect purchasers, the class action as it relates to the indirect purchasers cannot be certified. I would dismiss the appeal with costs. Given the finding that the pleadings do not disclose a cause of action in constructive trust, the claim of the direct purchasers cannot succeed and should be dismissed. The class action as it relates to the direct purchasers cannot be certified. The cross-appeal is allowed with costs.

The reasons of Cromwell and Karakatsanis JJ. were delivered by

Karakatsanis J. (dissenting on the appeal) —

I. Overview

[81] I disagree with my colleague's conclusion that the claim by the indirect purchasers fails to meet the certification requirement under s. 4(1)(b) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (*CPA*). In my view, there is "some basis in fact" to find "an identifiable class of 2 or more persons". Accordingly, I would allow the appeal and remit the matter to the British Columbia Supreme Court for trial.

attribuables à la fixation des prix, il peut être opportun pour le commissaire de la concurrence de porter des accusations contre les défendeurs en vertu de sa loi habilitante. Lorsqu'il intente une poursuite, le commissaire n'a qu'à établir la fixation des prix. Point n'est besoin de démontrer le transfert de la perte ou de prouver qu'un consommateur donné a payé trop cher un certain produit. On ne sait pas si le Bureau de la concurrence poursuivra les intimées en l'espèce. Quoi qu'il en soit, cela ne change rien au fait que, dans un cas comme celui qui nous occupe, où il n'est pas satisfait aux critères de certification, il pourrait falloir envisager de telles poursuites si l'objectif recherché est la modification des comportements.

V. Conclusion

[80] Puisqu'il est conclu à l'impossibilité d'établir l'existence d'un groupe identifiable composé des acheteurs indirects, le recours collectif dans leur cas ne peut être certifié. Je suis d'avis de rejeter le pourvoi avec dépens. Vu ma conclusion que les actes de procédure ne révèlent pas de cause d'action relative à la reconnaissance d'une fiducie par interprétation, la demande des acheteurs directs est vouée à l'échec et doit être rejetée. Le recours collectif, quant aux acheteurs directs, ne peut être certifié. L'appel incident est accueilli avec dépens.

Version française des motifs des juges Cromwell et Karakatsanis rendus par

La juge Karakatsanis (dissidente quant au pourvoi) —

I. Aperçu

[81] Je ne souscris pas à la conclusion de mon collègue selon laquelle le recours des acheteurs indirects ne satisfait pas à la condition de certification prévue à l'al. 4(1)(b) de la *Class Proceedings Act*, R.S.B.C. 1996, ch. 50 (*CPA*). Selon moi, un « certain fondement factuel » permet de conclure à l'existence d'un [traduction] « groupe identifiable de 2 personnes ou plus ». Je suis donc d'avis d'accueillir le pourvoi et de renvoyer l'affaire à la Cour suprême de la Colombie-Britannique pour instruction.

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[82] The appellants' proposed class definition includes "all persons resident in British Columbia and elsewhere in Canada who purchased HFCS or products containing HFCS manufactured by the defendants (collectively, the 'class') from January 1, 1988 to June 30, 1995 (the 'Class Period')" (2010 BCSC 922 (CanLII), at para. 2).

[83] This class includes both the direct and indirect purchasers of high-fructose corn syrup (HFCS) — the subject of alleged price fixing. At issue is the identification of a class which would include indirect purchasers — the retailers and consumers — who purchased products containing HFCS.

[84] Justice Rothstein notes that this definition of the class appears to satisfy the requirements of an identifiable class on its face. It uses objective criteria; it does not turn on the merits of the claim; and it cannot be narrowed without excluding members who may have a valid claim (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38). However, the class of indirect purchasers is challenged on the basis that individuals will be unable to determine whether they purchased a product containing HFCS and thus whether they are a member of the class. The issue of the appropriateness of the representative plaintiff is not before the Court.

[85] Justice Rothstein concludes that there is no basis in fact to identify a class because there is no or insufficient evidence that class members can be identified or can self-identify (paras. 58 and 65-67). He concludes that it is impossible for the indirect purchasers to prove they purchased a product containing HFCS and thus suffered loss.

[86] I have two objections to this conclusion. First, I am not persuaded that the requirement that the class be identifiable includes the requirement that individual members of the class be capable of proving individual loss. Indeed, as discussed below, the *CPA* provides for remedies when the *class* has

[82] La définition du groupe proposée par les appelantes comprend [TRADUCTION] « tous les résidants de la Colombie-Britannique et d'ailleurs au Canada qui ont acheté du SMHTF fabriqué par les défenderesses ou des produits en contenant (collectivement le "groupe") entre le 1er janvier 1988 et le 30 juin 1995 (la "période visée par le recours") » (2010 BCSC 922 (CanLII), par. 2).

[83] Ce groupe comprend à la fois les acheteurs directs et les acheteurs indirects du sirop de maïs à haute teneur en fructose (SMHTF) dont on aurait fixé le prix. Il faut se demander en l'espèce si un groupe qui comprendrait les acheteurs indirects, à savoir les détaillants et les consommateurs ayant acquis des produits contenant du SMHTF, peut être reconnu comme étant identifiable.

[84] Le juge Rothstein fait remarquer que cette définition du groupe semble a priori satisfaire aux exigences d'un groupe identifiable. Elle repose sur des critères objectifs, n'est pas fonction du bien-fondé du recours et ne peut être restreinte sans que soient exclus des membres susceptibles d'avoir un droit de recours valable (*Western Canadian Shopping Centres Inc. c. Dutton*, 2001 CSC 46, [2001] 2 R.C.S. 534, par. 38). Cependant, un groupe incluant les acheteurs indirects est contesté au motif qu'il ne sera possible pour aucun d'eux de déterminer s'il a acheté un produit contenant du SMHTF et s'il est donc membre du groupe. La Cour n'est pas appelée à trancher la question de savoir si le choix de la représentante des demandeurs est convenable.

[85] Selon le juge Rothstein, aucun fondement factuel ne permet de reconnaître l'existence du groupe, parce que la preuve ne montre guère que les membres du groupe pourront être déterminés ou se reconnaître comme tels (par. 58 et 65-67). Il conclut qu'il est impossible pour les acheteurs indirects de prouver qu'ils ont acheté un produit contenant du SMHTF et qu'ils ont donc subi une perte.

[86] Je ne souscris pas à cette conclusion pour deux motifs. Premièrement, je ne suis pas convaincue que pour qu'il y ait un groupe identifiable, il faut que chacun des membres du groupe soit en mesure d'établir une perte individuelle. En fait, comme nous le verrons, la *CPA* prévoit que des mesures de

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suffered harm that are available without proof of individual loss. Such an approach best serves the purposes of class proceedings, which are designed not only to provide enhanced access to justice and judicial economy, but also to motivate behaviour modification.

[87] Second, even if proof of individual loss is necessary to establish an identifiable class under the *CPA*, I do not agree that, on this record, it will be impossible to determine whether an individual is a member of the class.

[88] The application judge, Rice J., held that the appellants satisfied the requirement that there is an identifiable class. The Court of Appeal did not address this issue (2011 BCCA 187, 305 B.C.A.C. 55). For the reasons that follow, I conclude that there is no basis to set aside the decision of the application judge.

II. Class Requirements — General Principles

[89] Section 4(1)(b) of the *CPA* requires that there be "an identifiable class of 2 or more persons".

[90] In *Dutton*, this Court addressed the specific certification requirement that there be an identifiable class (para. 38):

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria . . . .

réparation peuvent être accordées lorsque le *groupe* a subi un préjudice, sans qu'il soit nécessaire d'établir une perte individuelle. C'est là l'approche qui répond le mieux aux objectifs des recours collectifs, lesquels visent à favoriser non seulement l'accès à la justice et l'économie des ressources judiciaires, mais aussi la modification des comportements.

[87] Deuxièmement, même si la preuve d'une perte individuelle était nécessaire pour que soit établie l'existence d'un groupe identifiable sous le régime de la *CPA*, je ne crois pas, au vu du dossier, qu'il sera impossible de déterminer l'appartenance d'une personne donnée au groupe.

[88] Le juge saisi de la demande, le juge Rice, a conclu que les appelantes avaient satisfait à l'exigence relative à l'existence d'un groupe identifiable. La Cour d'appel n'a pas examiné cette question (2011 BCCA 187, 305 B.C.A.C. 55). Pour les motifs qui suivent, j'estime que rien ne permet d'annuler la décision du premier.

II. Conditions préalables à la reconnaissance du groupe — principes généraux

[89] Aux termes de l'al. 4(1)(b) de la *CPA*, il doit y avoir [TRADUCTION] « un groupe identifiable de 2 personnes ou plus ».

[90] Dans l'arrêt *Dutton*, la Cour examine la condition de certification relative à l'existence d'un groupe identifiable (par. 38) :

> Premièrement, le groupe doit pouvoir être clairement défini. La définition du groupe est essentielle parce qu'elle précise qui a droit aux avis, qui a droit à la réparation (si une réparation est accordée), et qui est lié par le jugement. Il est donc primordial que le groupe puisse être clairement défini au début du litige. La définition devrait énoncer des critères objectifs permettant d'identifier les membres du groupe. Les critères devraient avoir un rapport rationnel avec les revendications communes à tous les membres du groupe mais ne devraient pas dépendre de l'issue du litige. Il n'est pas nécessaire que tous les membres du groupe soient nommés ou connus. Il est toutefois nécessaire que l'appartenance d'une personne au groupe puisse être déterminée sur des critères explicites et objectifs . . .

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[91] Obviously, it is not sufficient to make a bald assertion that a class exists. The record must contain a sufficient evidentiary basis to establish the existence of the class (*Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at para. 23). But the evidentiary standard at the certification stage is not onerous: the applicant must establish that there is "some basis in fact" for each of the requirements (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 25). This standard falls below the standard used in the United States and purposefully avoids a trial on the merits at the certification stage. See *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 102.

III. Application to This Case

A. *The Record and Position of the Parties*

[92] The respondents led evidence establishing that prominent direct purchasers such as Coke, Pepsi, Vitality Foodservice Canada Inc., Ocean Spray Cranberries and George Weston Limited have used both HFCS and liquid sugar in their products. At the time, the relevant laws permitted the use of a generic label indicating "sugar/glucose-fructose" for either type of sweetener. In many cases, the labels on the products sold in Canada by these direct purchasers did not reflect which sweetener was used. Indeed, the representative plaintiff stated on cross-examination that she did not know whether any product she purchased during the class period actually contained HFCS.

[93] HFCS was used in "products such as soft drinks, baked goods and other food products which [were] purchased by restaurants, grocery wholesalers, supermarkets, convenience stores, movie theatres and others" (appellants' response factum, at para. 69). The appellants filed expert evidence and proposed methodology to show that the amount of HFCS used and the specific products which contained it are identifiable (*ibid.*, citing the Leitzinger Report, at paras. 10-11, 18-20 and 27). The expert evidence also provides specific industry research confirming that the use of HFCS in the soft-drink

[91] De toute évidence, il ne suffit pas de simplement affirmer qu'un groupe existe. Le dossier doit étayer suffisamment la déclaration (*Lau c. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (C.S.J. Ont.), par. 23). La norme de preuve applicable à l'étape de la certification n'est toutefois pas exigeante : le demandeur doit établir qu'« un certain fondement factuel » sous-tend chacune des conditions (*Hollick c. Toronto (Ville)*, 2001 CSC 68, [2001] 3 R.C.S. 158, par. 25). Cette norme est moins rigoureuse que celle qui s'applique aux États-Unis, et vise expressément à éviter un examen au fond à l'étape de la certification. Voir *Pro-Sys Consultants Ltd. c. Microsoft Corporation*, 2013 CSC 57, [2013] 3 R.C.S. 477, par. 102.

III. Application à la présente affaire

A. *Le dossier et la position des parties*

[92] Les intimées ont produit une preuve établissant que d'importants acheteurs directs comme Coke, Pepsi, Vitality Foodservice Canada Inc., Ocean Spray Cranberries et George Weston limitée ont utilisé tantôt du SMHTF tantôt du sucre liquide dans la confection de leurs produits. À l'époque, les lois applicables permettaient que le terme générique « sucre/glucose-fructose » désigne l'un ou l'autre édulcorant sur l'étiquette. Dans bien des cas, l'étiquette de produits vendus au Canada par ces acheteurs directs n'indiquait pas lequel des deux ingrédients avait été utilisé. En fait, en contre-interrogatoire, la demanderesse-représentante a dit ignorer si elle avait acheté un seul produit qui contenait bel et bien du SMHTF au cours de la période visée par le recours.

[93] Le SMHTF entrait dans la fabrication de [TRADUCTION] « denrées alimentaires comme les boissons gazeuses et les produits de boulangerie achetées par des restaurants, grossistes, supermarchés, dépanneurs, cinémas et autres établissements » (mémoire en réponse des appelantes, par. 69). Les appelantes ont déposé une preuve d'expert et proposé une méthode pour démontrer qu'il est possible d'établir la quantité de SMHTF utilisée et de déterminer les produits précis qui en contenaient (*ibid.*, citant le rapport de M. Leitzinger, par. 10-11, 18-20 et 27). La preuve

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industry was more prevalent as time went on, and largely had replaced liquid sugar as early as two years into the class period (A.R., vol. II, at p. 94; Leitzinger Report, at para. 24).

[94] The respondents' position is that because HFCS was used interchangeably with liquid sugar, and because labeling requirements during the class period did not require food and beverage producers to specify which of the two sweeteners was contained in their products, indirect purchasers (retailers and consumers) would have had no way of determining whether the product contained HFCS, even if they had checked the label (factum of Archer Daniels Midland Company and ADM Agri-Industries Company, at paras. 99-100).

[95] The appellants submit that "although some class members may not be able to self-identify, class membership is determinable by reference to the nature of the purchases made by each individual and the quantity of HFCS in the products purchased" (response factum, at para. 71). Indeed, the industry research data suggests that such information may be more readily available for indirect purchasers who are commercial retailers with more consistent recording practices.

B. *Class Identification Does Not Require That Individual Class Members Can Prove Individual Loss*

[96] Justice Rothstein accepts that the class definition complies on its face with the *Dutton* criteria. However, he concludes that there is insufficient evidence to show that any persons will be able to determine if they bought a product containing HFCS and thus if they are a member of the class. My colleague says that if individuals cannot show they have suffered individual loss, this "subverts the purpose of class proceedings,

d'expert fait également état de travaux de recherche portant sur l'industrie des boissons gazeuses, lesquels confirment que l'utilisation du SMHTF était à la hausse depuis quelques années et que, deux ans après le début de la période visée par le recours, cette substance avait déjà largement remplacé le sucre liquide (d.a., vol. II, p. 94; rapport de M. Leitzinger, par. 24).

[94] Parce que le SMHTF et le sucre liquide étaient utilisés de façon interchangeable et que les règles d'étiquetage en vigueur au cours de la période visée par le recours n'obligeaient pas les fabricants d'aliments et de boissons à indiquer lequel des deux édulcorants entrait dans la confection de leurs produits, les intimées font valoir que les acheteurs indirects (détaillants et consommateurs) n'auraient pu dire s'ils avaient acheté un produit contenant du SMHTF, même s'ils avaient vérifié l'étiquette (mémoire d'Archer Daniels Midland Company et d'ADM Agri-Industries Company, par. 99-100).

[95] Les appelantes soutiennent que [TRADUCTION] « même s'il est possible que certains membres ne puissent se reconnaître comme tels, l'appartenance au groupe peut s'établir eu égard à la nature des achats réalisés par chaque personne et à la quantité de SMHTF contenue dans les produits achetés » (mémoire en réponse, par. 71). En fait, selon des recherches sur cette industrie, ce genre de renseignements pourrait s'obtenir plus facilement pour les acheteurs indirects qui sont des commerçants au détail, habitués de ce fait à une tenue de livres rigoureuse, que pour les autres.

B. *La détermination de l'appartenance au groupe n'exige pas que chacun des membres soit en mesure d'établir une perte individuelle*

[96] Le juge Rothstein reconnaît que la définition du groupe satisfait a priori aux critères établis dans *Dutton*. Il conclut toutefois que la preuve ne suffit pas à démontrer qu'il sera possible pour quiconque de savoir s'il a acheté un produit contenant du SMHTF et s'il appartient donc au groupe. De l'avis de mon collègue, l'impossibilité pour des membres du groupe d'établir une perte individuelle « contrecarre l'objectif des recours collectifs, qui

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which is to provide a more efficient means of recovery for plaintiffs *who have suffered harm* but for whom it would be impractical or unaffordable to bring a claim individually" (para. 67 (emphasis in original)).

[97] This is not the only purpose of class actions. Behaviour modification is an important goal, especially in price-fixing cases. While class proceedings are clearly intended to create a more efficient means of recovery for plaintiffs who have suffered harm, there are strong reasons to conclude that class proceedings are not limited to such actions. As I detail below, the *CPA* is designed to permit a means of recovery for the benefit of the class as a whole, without proof of individual loss, even where it is difficult to establish class membership. Thus, if no individual seeks an individual remedy, it will not be necessary to prove individual loss. Such class actions permit the disgorgement of unlawful gains and serve not only the purposes of enhanced access to justice and judicial economy, but also the broader purpose of behaviour modification. Therefore, I am not persuaded that it is a prerequisite that individual members of the class can ultimately prove individual harm. See, for example, *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, 14 B.C.L.R. (5th) 271.

[98] An identifiable class serves to give individual members notice so that they can exercise their willingness to be a member and to claim relief. Nonetheless, there will often be circumstances where it is difficult for class members to self-identify based on the class definition.

[99] In *Dutton*, at para. 38, McLachlin C.J. held: "It is not necessary that every class member be named or known." In *Risorto v. State Farm Mutual Automobile Insurance Co.* (2007), 38 C.P.C. (6th) 373 (Ont. S.C.J.), Cullity J. held, at para. 31: "The fact that particular persons may have difficulty in proving that they satisfy the conditions for membership is often the case in class proceedings and

est d'offrir une voie de recours plus efficace aux demandeurs *ayant subi un préjudice* mais pour qui il serait irréaliste d'exercer un recours individuel ou qui n'ont pas les moyens de le faire » (par. 67 (en italique dans l'original)).

[97] Il ne s'agit pas là du seul objectif des recours collectifs. La modification des comportements en constitue un objet important, tout particulièrement en matière de fixation des prix. Si ce type d'action vise manifestement à offrir une voie de recours plus efficace aux demandeurs ayant subi un préjudice, il y a des raisons sérieuses de conclure que les recours collectifs ne se limitent pas à de tels effets. Comme nous le verrons en détail, la *CPA* est conçue de manière à donner un recours au groupe dans son ensemble, sans qu'il soit nécessaire de prouver une perte individuelle, même s'il est difficile d'établir l'appartenance au groupe. En conséquence, si personne ne cherche à obtenir une réparation individuelle, il ne sera pas nécessaire de prouver une perte individuelle. De tels recours collectifs permettent la restitution de gains provenant d'activités illégales et répondent non seulement aux objectifs d'accès à la justice et d'économie des ressources judiciaires, mais aussi à l'objectif général de modification des comportements. Je ne suis donc pas convaincue qu'il faut que chaque membre du groupe puisse, à terme, prouver un préjudice individuel. Voir, par exemple, *Steele c. Toyota Canada Inc.*, 2011 BCCA 98, 14 B.C.L.R. (5th) 271.

[98] La condition relative au groupe identifiable a pour objet d'informer les membres éventuels et ainsi leur permettre d'exprimer leur volonté d'appartenir au groupe et de demander réparation. Quoi qu'il en soit, il sera souvent difficile pour certaines personnes de s'estimer membres du groupe à la lumière de cette définition.

[99] Dans l'arrêt *Dutton*, la juge en chef McLachlin tient les propos suivants, au par. 38 : « Il n'est pas nécessaire que tous les membres du groupe soient nommés ou connus. » Dans *Risorto c. State Farm Mutual Automobile Insurance Co.* (2007), 38 C.P.C. (6th) 373 (C.S.J. Ont.), le juge Cullity s'est exprimé en ces termes, au par. 31 : [TRADUCTION] « Il arrive souvent dans un recours collectif que

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is not, by itself, a reason for a finding that the class is not identifiable." See also *Sauer v. Canada (Agriculture)*, 2008 CanLII 43774 (Ont. S.C.J.), at para. 28.

[100] As already noted, the statute provides for aggregate damages and *cy-près* awards that permit recovery and disgorgement of ill-gotten gains, without proof of individual loss and even where individual members cannot be identified. Section 29 of the *CPA* permits "an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members", upon certain conditions, including when:

> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

Section 31(1) of the *CPA* provides:

> **31** (1) If the court makes an order under section 29 [for an aggregate monetary award], the court may further order that all or a part of the aggregate money award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if
>
> (a) it would be impractical or inefficient to
>
> (i) identify the class or subclass members entitled to share in the award . . .

certaines personnes aient du mal à prouver qu'elles satisfont aux conditions d'appartenance et cela ne permet pas en soi de conclure que le groupe n'est pas identifiable. » Voir aussi *Sauer c. Canada (Agriculture)*, 2008 CanLII 43774 (C.S.J. Ont.), par. 28.

[100] Comme nous l'avons vu, la Loi prévoit la possibilité d'accorder des dommages-intérêts globaux et de verser une indemnité suivant le principe de l'aussi-près (*cy-près doctrine*), qui permettent le recouvrement et la restitution de gains mal acquis, sans qu'il soit nécessaire de prouver une perte individuelle et même lorsque l'identité de certains membres ne peut être connue. En effet, suivant l'art. 29 de la *CPA*, [TRADUCTION] « [l]e tribunal peut fixer par ordonnance le montant global des dommages-intérêts quant à la totalité ou à une partie de la responsabilité pécuniaire d'un défendeur envers les membres du groupe, et rendre jugement en conséquence » si certaines conditions sont remplies, et notamment si :

[TRADUCTION]

> (c) la totalité ou une partie de la responsabilité du défendeur envers tous les membres du groupe ou certains d'entre eux peut raisonnablement être établie sans que des membres n'aient à en faire la preuve individuellement.

Le paragraphe 31(1) de la *CPA* prévoit :

[TRADUCTION]

> **31** (1) S'il rend une ordonnance en vertu de l'article 29 [ordonnance fixant le montant global des dommages-intérêts], le tribunal peut également ordonner que la totalité ou une partie du montant global des dommages-intérêts soit affectée de façon que tous les membres du groupe ou du sous-groupe ou certains d'entre eux se partagent les dommages-intérêts selon la règle de la moyenne ou selon celle de la proportionnalité s'il estime à la fois
>
> (a) qu'il serait irréaliste ou inefficace
>
> (i) soit d'identifier les membres du groupe ou du sous-groupe qui ont droit à une part du montant global des dommages-intérêts adjugés . . .

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And s. 34 of the *CPA* provides:

34 . . .

(3) The court may make an order under subsection (1) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.

(4) The court may make an order under subsection (1) even if the order would benefit

(a) persons who are not class or subclass members . . .

[101] Section 34 has been interpreted to authorize *cy-près* awards — awards made to charities in situations where some class members cannot be identified. Interpreting the equivalent Ontario provision, s. 26 of the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6, Winkler J. remarked that this vision of the class determination permitted "a settlement that is entirely *Cy pres*" (*Gilbert v. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35 (Ont. S.C.J.), at para. 15 (emphasis added)). See also *Cassano v. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543 (S.C.J.), at paras. 15 and 17.

[102] And, while aggregate damages provisions are tools which are intended to be resorted to only upon an antecedent finding of liability (see *Pro-Sys*, at para. 131), they nonetheless permit access to justice and behaviour modification in cases where *liability to the class* has been proven but individual membership in the class is difficult or impossible to determine. The aggregate assessment of damages is an important common issue at the heart of the behaviour modification goal of class actions. It is a powerful tool for class actions.

Et l'art. 34 de la *CPA* prévoit :

[TRADUCTION]

34 . . .

(3) Le tribunal peut rendre une ordonnance en vertu du paragraphe (1), que tous les membres du groupe ou du sous-groupe soient identifiables ou non, ou que la part de chacun d'eux puisse être ou non établie exactement.

(4) Le tribunal peut rendre une ordonnance en vertu du paragraphe (1), même si cette ordonnance profiterait

(a) à des personnes qui ne sont pas membres du groupe ou du sous-groupe . . .

[101] Selon l'interprétation qui en a été donnée, l'art. 34 autorise le versement selon le principe de l'aussi-près — c'est-à-dire à des organismes de bienfaisance dans les situations où certains membres du groupe ne peuvent être connus. Le juge Winkler fait remarquer à propos de l'art. 26 de la *Class Proceedings Act, 1992*, L.O. 1992, ch. 6, la disposition équivalente en Ontario, que cette conception du groupe permettait que soit ordonné [TRADUCTION] « un règlement par versement suivant le principe de l'aussi-près exclusivement » (*Gilbert c. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35 (C.S.J. Ont.), par. 15 (je souligne)). Voir aussi *Cassano c. Toronto-Dominion Bank* (2009), 98 O.R. (3d) 543 (C.S.J.), par. 15 et 17.

[102] Et, bien que leur application soit subordonnée à une conclusion préalable de responsabilité (voir *Pro-Sys*, par. 131), les dispositions autorisant l'octroi de dommages-intérêts globaux favorisent néanmoins l'accès à la justice et la modification des comportements dans les cas où la *responsabilité envers le groupe* a été démontrée, mais où l'appartenance au groupe est difficile ou impossible à établir. L'évaluation globale des dommages-intérêts constitue une question commune importante qui touche directement à l'objectif de modification des comportements des recours collectifs. Il s'agit d'un outil puissant en la matière.

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[103] Thus, the legislation explicitly contemplates difficulties or, in some cases, impossibility in self-identification in the class procedural vehicle. Such difficulties have not been considered fatal to authorization under the *CPA* (in B.C. and in its equivalent in Ontario) provided that there is "some basis in fact" that the class exists and there is a rational connection between the class and the common issues. See, for example, *Lau*, at paras. 21-22, and *Steele*.

[104] This Court noted in *Dutton* that "any particular person's claim to membership in the class [should] be determinable by stated, objective criteria" (para. 38). This requirement speaks to the need to clearly define the criteria for membership — not to the ability of a given individual to prove that they meet the criteria. Whether the claimants can prove their claim for an individual remedy is a separate issue that need not be resolved at the certification stage.

[105] Here, the record contains a sufficient evidentiary basis to establish the *existence* of the class (*Lau*, at para. 23). Direct purchasers of HFCS used it extensively in products that were sold widely to retailers and to consumers. Given the nature of a price-fixing case, loss flows directly from the purchase of HFCS, or, in the case of indirect purchasers, products containing HFCS. An individual who purchased such a product during the relevant time period would have the foundation for an individual suit. All indirect purchasers share the same basis for establishing harm. There is a rational connection between the class as defined and the asserted common issues. See *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.), at paras. 22-23; *Alfresh Beverages Canada Corp. v. Hoechst AG* (2002), 16 C.P.C. (5th) 301 (Ont. S.C.J.), at para. 11.

[106] Nor is it seriously disputed that there is some basis in fact to show that indirect purchasers as a class were harmed by the alleged price fixing

[103] En conséquence, la loi prévoit expressément la possibilité qu'il soit difficile, voire impossible, pour certaines personnes de s'estimer visées par le mécanisme procédural du recours collectif. De telles difficultés n'ont pas été jugées fatales à la certification sous le régime de la *CPA* (en C.-B. et en Ontario), dans la mesure où l'existence d'un groupe repose sur un « certain fondement factuel » et où un lien rationnel entre le groupe et les questions communes est établi. Voir, par exemple, *Lau*, par. 21-22, et *Steele*.

[104] La Cour souligne dans *Dutton* que « l'appartenance d'une personne au groupe [devrait pouvoir] être déterminée sur des critères explicites et objectifs » (par. 38). Cette exigence a trait à la nécessité de définir clairement les critères d'appartenance au groupe — et non à la capacité d'une personne donnée de prouver qu'elle y satisfait. Que les demandeurs puissent ou non établir le bien-fondé de leur demande de réparation individuelle est une question distincte n'ayant pas à être tranchée à l'étape de la certification.

[105] Le dossier en l'espèce étaye suffisamment l'*existence* du groupe (*Lau*, par. 23). Les acheteurs directs de SMHTF ont utilisé largement cet édulcorant dans la confection de produits qui ont été vendus à grande échelle aux détaillants et consommateurs. En matière de fixation des prix, la perte découle directement de l'achat du SMHTF, ou, dans le cas des acheteurs indirects, de produits en contenant. La personne ayant acheté un tel produit durant la période pertinente serait fondée à intenter une poursuite en son propre nom. Les acheteurs indirects ont en commun ce fondement pour établir le préjudice. Il existe un lien rationnel entre le groupe tel qu'il est défini et les questions communes énoncées. Voir *Ford c. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (C.S.J.), par. 22-23; *Alfresh Beverages Canada Corp. c. Hoechst AG* (2002), 16 C.P.C. (5th) 301 (C.S.J. Ont.), par. 11.

[106] Il n'est pas non plus contesté sérieusement qu'un certain fondement factuel permet de conclure que la fixation des prix reprochée a porté préjudice

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and thus the members of the class suffered harm. The methodology proposed to establish the harm to the class members purports to ascertain an aggregate amount by which the class members were overcharged. Indeed, as Justice Rothstein finds, it has some basis in fact and there is a high probability that any award stemming from these proceedings would be distributed on a *cy-près* basis. This means that it may never be necessary or legally required to identify individual members of the class.

[107] For these reasons, I am not persuaded that the issue of whether an individual can prove individual loss is a necessary enquiry at certification. In sum, while class actions are a procedural vehicle, they are not *merely* procedural. They make possible claims that are very complex or could not be prosecuted individually, not only because it would be inefficient or unaffordable, but also because it may be extremely difficult to prove individual claims. The *CPA* does have substantive implications: it creates a remedy that recognizes that damages to the class as a whole can be proven, even when proof of individual members' damages is impractical, and that is available even if those who are not members of the class can benefit.

[108] I agree with Justice Rothstein that the aggregate damages provisions relate to the assessment of damages and cannot be used to establish liability. However, where proof of loss or detriment is essential to a finding of liability, for example in a cause of action under s. 36 of the *Competition Act*, or in tort, expert evidence may provide a credible and plausible method offering a realistic prospect of establishing loss on a class-wide basis. See *Pro-Sys*, at paras. 120 and 140. While these provisions do not create new causes of action, they permit individual members of the class to obtain remedies that may not be available to them on an individual suit because of difficulties of proving the extent of their individual loss. The aggregate damage

aux acheteurs indirects collectivement et donc que les membres du groupe ont subi un dommage. La méthode proposée pour démontrer le préjudice causé aux membres du groupe vise à établir le montant global du surcoût. En fait, comme le conclut le juge Rothstein, cette méthode repose sur un certain fondement factuel, et il est fort probable que le versement de toute indemnité ordonnée à l'issue de la présente instance sera effectué suivant le principe de l'aussi-près. Ainsi, il ne sera peut-être jamais nécessaire ni impératif en droit que les membres individuels du groupe soient connus.

[107] Pour ces motifs, je ne suis pas convaincue qu'il faut à l'étape de la certification se demander s'il sera possible de prouver une perte individuelle. En somme, bien qu'ils constituent un mécanisme procédural, les recours collectifs ne ressortissent pas *simplement* à la procédure. Ils rendent possibles des réclamations très complexes ou hors de portée d'un justiciable seul, non seulement parce qu'une telle procédure se révélerait inefficace ou inabordable, mais aussi parce qu'il peut être extrêmement difficile de prouver les réclamations individuelles. La *CPA* a bel et bien des répercussions sur le fond : elle crée une réparation qui reconnaît que les préjudices causés au groupe dans son ensemble peuvent être prouvés, même si la preuve des préjudices individuels est irréaliste, et qui peut être ordonnée même si elle est susceptible de profiter à des non-membres.

[108] Je suis d'accord avec le juge Rothstein pour dire que les dispositions autorisant l'octroi de dommages-intérêts globaux se rapportent à l'évaluation de la réparation et ne peuvent servir à établir la responsabilité. Cependant, lorsque celle-ci est subordonnée à la preuve de la perte ou des dommages, par exemple dans une action fondée sur l'art. 36 de la *Loi sur la concurrence* ou une action en responsabilité délictuelle, la preuve d'expert peut présenter une méthode valable et acceptable offrant une possibilité réaliste d'établir la perte pour l'ensemble du groupe. Voir *Pro-Sys*, par. 120 et 140. Bien qu'elles ne créent pas de nouvelles causes d'action, ces dispositions permettent à chaque membre du groupe d'obtenir des

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provision and *cy-près* awards promote behaviour modification and provide access to justice where it otherwise may be difficult to achieve.

[109] This Court cautioned in *Hollick* that class proceedings legislation should be construed generously and not narrowly to give life to the statute's purpose, namely to encourage judicial economy and access to justice, and to modify the behaviour of wrongdoers (paras. 14-15).[1]

C. *Some Basis in Fact to Show That Individuals Could Prove Personal Loss/Class Members Are Identifiable*

[110] Justice Rothstein accepts the respondents' position and concludes that the appellants fail to provide evidence that would overcome the identification problem created by the fact that HFCS and liquid sugar were used interchangeably during the class period and that labeling at the time did not differentiate between them. He concludes that it appears impossible to show that an indirect purchaser had, in fact, bought a particular product that contained HFCS (para. 66). He found this failure fatal to the certification application.

[111] In my view, the record does not lead to the conclusion that it will be impossible to prove an individual is a member of the class — or that individual members of the group could not stand alone as plaintiffs. As I have explained, I do not agree that this is a necessary inquiry at the certification stage. Even so, I agree with the judge of

1 Although the Court considered Ontario legislation in *Hollick*, similar reasoning has been adopted for British Columbian class action legislation (see, e.g., *MacKinnon v. National Money Mart Co.*, 2006 BCCA 148, 265 D.L.R. (4th) 214, at para. 16).

réparations qui lui seraient éventuellement refusées à l'issue d'une poursuite individuelle en raison des difficultés qu'il aurait à prouver l'étendue de sa propre perte. Les dispositions autorisant l'octroi de dommages-intérêts globaux et les versements suivant le principe de l'aussi-près favorisent la modification des comportements et l'accès à la justice dans les cas où ces objectifs pourraient par ailleurs se révéler difficiles à atteindre.

[109] La Cour souligne dans l'arrêt *Hollick* que les lois sur les recours collectifs doivent être interprétées libéralement, et non restrictivement, pour donner effet à l'objectif du législateur, à savoir favoriser l'économie des ressources judiciaires, l'accès à la justice et la modification du comportement des malfaiteurs (par. 14-15)[1].

C. *Un certain fondement factuel permet d'établir que chacun des membres pourrait prouver une perte individuelle et donc que l'appartenance au groupe est déterminable*

[110] Le juge Rothstein accepte la position des intimées et conclut que les appelantes n'ont pas produit de preuve susceptible de remédier au problème relatif à l'appartenance au groupe découlant de l'interchangeabilité des deux édulcorants pendant la période visée par le recours et du fait que les étiquettes à l'époque ne les distinguaient pas. Selon lui, il paraît impossible d'établir qu'un acheteur indirect avait bel et bien acquis un produit donné contenant du SMHTF (par. 66). Il a conclu que ce problème portait un coup fatal à la demande de certification.

[111] Le dossier ne mène pas à mon avis à la conclusion qu'il sera impossible de prouver l'appartenance au groupe — ou l'impossibilité pour les membres du groupe d'agir individuellement à titre de demandeurs. Comme je l'ai expliqué, je ne crois pas qu'il soit nécessaire de répondre à cette question à l'étape de la certification. Cela étant dit, je

1 Bien que la Cour dans *Hollick* se soit penchée sur la loi ontarienne sur les recours collectifs, un raisonnement semblable a été adopté à l'égard de la loi équivalente de la Colombie-Britannique (voir, p. ex., *MacKinnon c. National Money Mart Co.*, 2006 BCCA 148, 265 D.L.R. (4th) 214, par. 16).

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first instance that there is "some basis in fact" to show that individual loss is capable of being proven.

[112] In effect, Justice Rothstein focuses on the difficulties that individual claimants will have to prove personal loss. Here, he accepts that expert evidence meets the standard of "some basis in fact" and consists of a credible and plausible model capable of proving harm on a class-wide basis. However, he is not satisfied that the evidence provides "some basis in fact" that there will be evidence capable of proving individual loss.

[113] Justice Rothstein's conclusion sets the evidentiary standard too high. In this price-fixing case, personal loss will follow if indirect purchasers can prove that they purchased a product containing HFCS. Even at the merits stage, however, claimants will not have to prove *definitively* that they purchased a *particular* product that contained HFCS. Labeling — if indeed generic labeling was used throughout — is not the only way to prove an individual loss. It will be sufficient if the trial judge is satisfied, upon expert or other evidence, that an individual claimant *probably* purchased a product containing it.

[114] The requirement that there be an evidentiary foundation — or some basis in fact — to support the certification criteria does not include a preliminary merits test and does not require the plaintiffs to indicate the evidence upon which they will rely to prove these claims. "The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action" (see *Hollick*, at paras. 16 and 25).

[115] A claim under s. 36 of the *Competition Act* requires that the fact of loss — rather than the amount of loss — be proven in order to establish liability. As Justice Rothstein accepts, the expert

suis d'accord avec le juge de première instance pour dire qu'[TRADUCTION] « un certain fondement factuel » permet d'établir qu'une perte individuelle peut être prouvée.

[112] En fait, le juge Rothstein met l'accent sur les difficultés qu'auront les demandeurs à faire la preuve d'une perte individuelle. Il convient que la preuve d'expert en l'espèce satisfait à la norme du « certain fondement factuel » et propose une méthode valable et acceptable d'établir qu'un préjudice a été causé à l'échelle du groupe. Il n'est toutefois pas convaincu qu'« un certain fondement factuel » permet d'établir qu'une perte individuelle pourra être prouvée.

[113] Le juge Rothstein établit une norme de preuve trop exigeante. Dans la présente affaire, la perte individuelle sera démontrée si les acheteurs indirects sont en mesure de prouver avoir acquis un produit contenant du SMHTF. Néanmoins, même à l'étape de l'examen au fond, les demandeurs n'auront pas à démontrer, *preuves à l'appui*, avoir acheté un *certain* produit contenant du SMHTF. L'étiquette — si effectivement le terme générique figurait sur l'étiquette au cours de toute la période — n'est pas le seul moyen de prouver qu'une perte individuelle a été subie. Il suffira que le juge de première instance soit convaincu, à la lumière de la preuve, notamment d'expert, qu'un demandeur donné a *probablement* acheté un produit contenant l'édulcorant en question.

[114] L'exigence que chacun des critères de certification repose sur un certain fondement factuel n'emporte pas d'examen sommaire au fond du recours et n'exige pas l'énumération des éléments que les demandeurs présenteront à l'appui de la demande. « La question à cette étape n'est pas s'il est vraisemblable que la demande aboutisse, mais s'il convient de procéder par recours collectif » (voir *Hollick*, par. 16 et 25).

[115] Une demande fondée sur l'art. 36 de la *Loi sur la concurrence* exige la preuve de la perte — et non celle du montant de la perte — pour l'établissement de la responsabilité. Le juge Rothstein

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evidence in this case is capable of proving the fact of loss to the class. Here, the appellants have provided evidence and a framework capable of proving — on a balance of probabilities — that products containing HFCS were purchased. While it may prove challenging, there is "some basis in fact" to conclude that some indirect purchasers could prove that they *probably* purchased products that contained price-fixed HFCS during the relevant period. Evidence of market practices, the prevalence of the product, and the nature of the purchases may provide a sufficient basis for a trial judge to make the necessary findings.

[116] For example, the expert report tendered by the appellants, authored by Dr. Leitzinger, included the following information. The respondents jointly controlled the "vast majority of production" of HFCS and therefore likely possessed monopoly power (A.R., vol. II, at p. 81; Leitzinger Report, at para. 6). Soft drink manufacturers are the leading purchasers of HFCS, and HFCS products are purchased by restaurants, food wholesalers, grocery and convenience stores, cinemas, and others (paras. 10-11). The Canadian soft-drink industry "uses about 20 times as much HFCS as it does sugar as the sweetening agent" (para. 27), and the extent to which HFCS overcharges were passed on to indirect consumers could be analyzed using existing economic modeling techniques (paras. 56-57). Dr. Leitzinger expected that at least some of any overcharge for HFCS would have been passed on to indirect purchasers, and that the extent of the overcharge could be calculated using publicly available information together with discovery data (paras. 58-64 and 75-77).

[117] To take a simple example, since a significant proportion of soft drinks contain HFCS, a trial judge may have no difficulty in finding that wholesalers of soft drinks, grocery stores or even individual persons — all possible indirect purchasers of HFCS — *probably* purchased some products

convient que la preuve d'expert en l'espèce permet d'établir que le groupe a effectivement subi une perte. Les appelantes ont produit des éléments de preuve et un cadre permettant de démontrer — selon la prépondérance des probabilités — l'achat de produits contenant du SMHTF. Bien qu'une telle preuve puisse être difficile à faire, « un certain fondement factuel » permet de conclure que des acheteurs indirects pourraient établir qu'ils ont *probablement* acheté durant la période pertinente des produits contenant du SMHTF dont le prix a été fixé. La preuve des pratiques commerciales, de la forte présence de cet ingrédient et de la nature des achats pourrait suffire au juge de première instance pour tirer les conclusions nécessaires.

[116] À titre d'exemple, le rapport d'expert produit par les appelantes et établi par M. Leitzinger renfermait les renseignements suivants. Les intimées contrôlaient conjointement la [TRADUCTION] « majeure partie de la production » de SMHTF et détenaient donc vraisemblablement un monopole (d.a., vol. II, p. 81; rapport de M. Leitzinger, par. 6). Les fabricants de boissons gazeuses représentent les premiers acheteurs de SMHTF, et les restaurants, grossistes en denrées alimentaires, supermarchés et dépanneurs, cinémas et autres établissements achètent les produits contenant cet édulcorant (par. 10-11). L'industrie canadienne des boissons gazeuses « utilise environ 20 fois plus de SMHTF que de sucre » (par. 27), et la valeur de la majoration du prix du SMHTF transférée aux acheteurs indirects pourrait être évaluée suivant les techniques actuelles de modélisation économique (par. 56-57). Selon M. Leitzinger, au moins une partie de la majoration aura été refilée aux acheteurs indirects, et sa valeur pourrait être calculée à l'aide de données tombées dans le domaine public de même que de celles divulguées à l'enquête préalable (par. 58-64 et 75-77).

[117] Par exemple, puisqu'une proportion appréciable de boissons gazeuses contient du SMHTF, un juge de première instance n'aurait éventuellement aucune difficulté à conclure que des grossistes, des épiceries ou même des particuliers — qui sont tous des acheteurs indirects éventuels de SMHTF — ont

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containing HFCS, and in determining the loss based upon the percentage of the products purchased that contained the substance.

[118] There was debate between the appellants' and the respondents' expert witnesses regarding the existence, extent and determinability of HFCS overcharges and pass-through to indirect consumers. However, the weighing of expert evidence is a matter for the trial on the merits. The point is simply that the appellants have tendered evidence which establishes some basis in fact to show that the proposed class is identifiable and that individual class members may be able to establish individual loss on a balance of probabilities, overcoming the identification problem to which Justice Rothstein refers (para. 65).

[119] And although the representative plaintiff, Wendy Bredin (formerly Weberg), could not state with certainty that she had purchased products containing HFCS, she and other individuals would be able to self-identify as potential plaintiffs based on knowledge of the products in which HFCS is known to have been commonly used. For indirect purchasers, such as wholesalers and grocery stores, the inquiry would likely be simplified, given the likelihood of more extensive record-keeping systems regarding purchases of products that likely contained HFCS.

[120] Thus, in my view, the evidentiary difficulties relied upon by my colleague and the respondents are not fatal to this certification application.

IV. Conclusion

[121] For these reasons, I agree with the application judge, Rice J., that the appellants have established that there is some basis in fact that there is an identifiable class in accordance with s. 4(1)(b) of the *CPA*. As for the other elements of certification discussed by Rothstein J., I agree with the reasons of my colleague.

probablement acheté certains produits contenant du SMHTF et à déterminer la perte subie, compte tenu du pourcentage des produits achetés contenant l'édulcorant en question.

[118] Les témoins experts des appelantes et des intimées ont débattu la réalité, la valeur et l'appréciabilité de la majoration du prix du SMHTF et de son transfert aux acheteurs indirects. Cependant, l'évaluation de la preuve d'expert relève du juge chargé de l'instruction sur le fond. Tout simplement, l'important c'est que les appelantes ont établi un certain fondement factuel permettant de conclure que le groupe proposé est identifiable et que chacun des membres du groupe pourrait être en mesure d'établir, suivant la prépondérance des probabilités, une perte individuelle, ce qui remédierait au problème relatif à l'appartenance dont parle le juge Rothstein (par. 65).

[119] Et bien que la demanderesse-représentante, Wendy Bredin (auparavant Weberg), n'était pas certaine d'avoir acheté des produits contenant du SMHTF, elle et d'autres personnes pourront s'estimer membres éventuels si elles savent les produits dans la composition desquels il a été reconnu qu'entrait régulièrement du SMHTF. Pour les acheteurs indirects comme les grossistes et les supermarchés, l'enquête serait sans doute plus simple encore, leurs livres constatant leurs achats de produits contenant vraisemblablement du SMHTF.

[120] À mon avis, les difficultés de preuve invoquées par mon collègue et les intimées ne portent donc pas un coup fatal à la demande de certification en l'espèce.

IV. Conclusion

[121] Pour ces motifs, je conviens avec le juge Rice, saisi de la demande, que les appelantes ont établi que l'existence d'un groupe identifiable, au sens où il faut entendre ce terme pour l'application de l'al. 4(1)(b) de la *CPA*, repose sur un certain fondement factuel. Quant aux autres critères de certification analysés par le juge Rothstein, je souscris aux motifs de ce dernier.

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[122] I would allow the appeal with costs and remit the matter to the British Columbia Supreme Court for trial. I agree with Justice Rothstein's disposition of the cross-appeal.

APPENDIX: Common Issues Certified by Rice J.

Breach of the *Competition Act*

(a) Did the defendants, or any of them, engage in conduct which is contrary to s. 45 of the *Competition Act*? If yes, what was the duration of such conduct?

(b) What damages, if any, are payable by the non-settling defendants to the Class Members pursuant to s. 36 of the *Competition Act*?

(c) Should the non-settling defendants, or any of them, pay the full costs, or any, of the investigation into this matter pursuant to s. 36 of the *Competition Act*?

Conspiracy

(d) Did the defendants, or any of them, conspire to harm the Class Members?

(e) Did the defendants, or any of them, act in furtherance of the conspiracy?

(f) Was the predominant purpose of the conspiracy to harm the Class Members?

(g) Did the conspiracy involve unlawful acts?

(h) Did the defendants, or any of them, know that the conspiracy would likely cause injury to the Class Members?

(i) Did the Class Members suffer economic loss? If yes, what was the duration of such economic loss?

(j) What damages, if any, are payable by the non-settling defendants, or any of them, to the Class Members?

[122] Je suis d'avis d'accueillir le pourvoi avec dépens et de renvoyer l'affaire à la Cour suprême de la Colombie-Britannique pour instruction. Je souscris au dispositif proposé par le juge Rothstein dans l'appel incident.

ANNEXE : Questions communes certifiées par le juge Rice

Violation de la *Loi sur la concurrence*

a) Les défenderesses, ou l'une d'elles, se sont-elles livrées à un comportement allant à l'encontre de l'art. 45 de la *Loi sur la concurrence*? Dans l'affirmative, pendant combien de temps?

b) À combien s'établit le montant des dommages-intérêts que les défenderesses non parties aux règlements doivent verser, s'il y a lieu, aux membres du groupe en vertu de l'art. 36 de la *Loi sur la concurrence*?

c) Les défenderesses non parties aux règlements, ou l'une d'elles, sont-elles tenues d'assumer le coût en totalité ou en partie de l'enquête relativement à l'affaire aux termes de l'art. 36 de la *Loi sur la concurrence*?

Complot

d) Les défenderesses, ou l'une d'elles, ont-elles participé à un complot visant à causer un préjudice aux membres du groupe?

e) Les défenderesses, ou l'une d'elles, ont-elles agi en vue de la réalisation du complot?

f) Le complot visait-il principalement à causer un préjudice aux membres du groupe?

g) Les auteurs du complot ont-ils eu recours à des actes illégaux?

h) Les défenderesses, ou l'une d'elles, savaient-elles que le complot causerait vraisemblablement un préjudice aux membres du groupe?

i) Les membres du groupe ont-ils subi une perte financière? Dans l'affirmative, pendant combien de temps?

j) Quel est le montant des dommages-intérêts, s'il en est, payables par les défenderesses non parties aux règlements, ou l'une d'elles, aux membres du groupe?

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(k) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Tortious Interference with Economic Interests

(l) Did the defendants, or any of them, intend to injure the Class Members?

(m) Did the defendants, or any of them, interfere with the economic interests of the Class Members by unlawful or illegal means?

(n) Did the Class Members suffer economic loss as a result of the defendants' interference? If yes, what was the duration of such economic loss?

(o) What damages, if any, are payable by the non-settling defendants, or any of them, to the Class Members?

(p) Can the amount of damages be determined on an aggregate basis and if so, in what amount?

Unjust Enrichment, Waiver of Tort and Constructive Trust

(q) Have the non-settling defendants, or any of them, been unjustly enriched by the receipt of overcharges on the sale of HFCS?

(r) Have the Class Members suffered a corresponding deprivation in the amount of the overcharges on the sale of HFCS?

(s) Is there a juridical reason why the non-settling defendants, or any of them, should be entitled to retain the overcharges on the sale of HFCS?

(t) What restitution, if any, is payable by the non-settling defendants, or any of them, to the Class Members based on unjust enrichment?

(u) Should the non-settling defendants, or any of them, be constituted as constructive trustees in favour of the Class Members for all of the overcharges from the sale of HFCS?

(v) What is the quantum of overcharges, if any, that the non-settling defendants, or any of them, hold in trust for the Class Members?

k) Le montant des dommages-intérêts peut-il être établi globalement et, dans l'affirmative, quel est-il?

Atteinte délictuelle à des intérêts financiers

l) Les défenderesses, ou l'une d'elles, ont-elles eu l'intention de nuire aux membres du groupe?

m) Les défenderesses, ou l'une d'elles, ont-elles porté atteinte aux intérêts financiers des membres du groupe par des moyens illégaux?

n) Les membres du groupe ont-ils subi une perte financière par suite de cette atteinte? Dans l'affirmative, pendant combien de temps?

o) Quel est le montant des dommages-intérêts, s'il en est, payables par les défenderesses non parties aux règlements, ou l'une d'elles, aux membres du groupe?

p) Le montant des dommages-intérêts peut-il être établi globalement et, dans l'affirmative, quel est-il?

Enrichissement sans cause, renonciation au recours délictuel et fiducie par interprétation

q) Les défenderesses non parties aux règlements, ou l'une d'elles, se sont-elles enrichies sans cause par suite de la majoration du prix du SMHTF?

r) Les membres du groupe se sont-ils appauvris d'un montant égal à celui de la majoration du prix du SMHTF?

s) Une cause juridique justifie-t-elle les défenderesses non parties aux règlements, ou l'une d'elles, de conserver le fruit de la majoration du prix du SMHTF?

t) Quelle somme les défenderesses non parties au règlement, ou l'une d'elles, doivent-elles restituer aux membres du groupe, le cas échéant, sur le fondement de l'enrichissement sans cause?

u) Les défenderesses non parties aux règlements, ou l'une d'elles, doivent-elles être constituées fiduciaires par interprétation au bénéfice des membres du groupe quant à la totalité de la majoration du prix du SMHTF?

v) À combien se monte la majoration, s'il en est, que les défenderesses non parties aux règlements, ou l'une d'elles, détiennent en fiducie pour les membres du groupe?

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(w) What restitution, if any, is payable by the non-settling defendants to the Class Members based on the doctrine of waiver of tort?

(x) Are the non-settling defendants, or any of them, liable to account to the Class Members for the wrongful profits that they obtained on the sale of HFCS to the Class Members based on the doctrine of waiver of tort?

(y) Can the amount of restitution be determined on an aggregate basis and if so, in what amount?

Punitive Damages

(z) Are the non-settling defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, what amount and to whom?

Interest

(aa) What is the liability, if any, of the non-settling defendants, or any of them, for court order interest?

Availability of Pass-Through Defence

(bb) To what extent, if at all, are the non-settling defendants entitled to assert a pass-through defence to any or all of the Class Members' causes of action?

Distribution of Damages and/or Trust Funds

(cc) What is the appropriate distribution of damages and/or trust funds and interest to the Class Members and who should pay for the cost of that distribution?

(dd) Are the non-settling defendants, or any of them, liable to account to the Class Members for the wrongful profits that they obtained on the sale of HFCS to the Class Members based on the doctrine of waiver of tort?

(ee) Can the amount of restitution be determined on an aggregate basis and if so, in what amount? [A.R., vol. I, at pp. 69-71]

w) Quelle somme, s'il en est, les défenderesses non parties aux règlements doivent-elles restituer aux membres du groupe sur le fondement de la renonciation au recours délictuel?

x) Les défenderesses non parties aux règlements, ou l'une d'elles, sont-elles tenues de comptabiliser à l'intention des membres du groupe les profits illégitimes réalisés par la vente du SMHTF aux membres du groupe sur le fondement de la renonciation au recours délictuel?

y) Le montant de la restitution peut-il être établi globalement et, dans l'affirmative, quel est-il?

Dommages-intérêts punitifs

z) Les défenderesses non parties aux règlements, ou l'une d'elles, sont-elles tenues de verser des dommages-intérêts punitifs ou exemplaires eu égard à la nature de leur comportement et, dans l'affirmative, quel est ce montant et qui en sont les bénéficiaires?

Intérêts

aa) Quelle obligation, s'il en est, les défenderesses non parties aux règlements, ou l'une d'elles, ont-elles de verser l'intérêt dont le paiement est ordonné par le tribunal?

Possibilité d'invoquer le transfert de la perte en défense

bb) Dans quelle mesure, le cas échéant, les défenderesses non parties aux règlements peuvent-elles opposer le transfert de la perte aux causes d'action des membres du groupe?

Distribution des dommages-intérêts ou des fonds détenus en fiducie

cc) Quel est le bon mode de distribution aux membres du groupe des dommages-intérêts ou des fonds détenus en fiducie et de l'intérêt, et qui doit assumer le coût de cette distribution?

dd) Les défenderesses non parties aux règlements, ou l'une d'elles, sont-elles tenues de comptabiliser pour les membres du groupe les profits illégitimes réalisés par la vente du SMHTF aux membres du groupe sur le fondement de la renonciation au recours délictuel?

ee) Le montant de la restitution peut-il être établi globalement et, dans l'affirmative, quel est-il? [d.a., vol. I, p. 69-71]

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Appeal dismissed with costs, CROMWELL *and* KARAKATSANIS JJ. *dissenting. Cross-appeal allowed with costs.*

Solicitors for the appellants/respondents on cross-appeal: Camp Fiorante Matthews Mogerman, Vancouver; Michael Sobkin, Ottawa.

Solicitors for the respondents/appellants on cross-appeal Archer Daniels Midland Company and ADM Agri-Industries Company: Norton Rose Fulbright, Toronto; Nash & Company, Vancouver.

Solicitors for the respondents/appellants on cross-appeal Cargill, Incorporated, Cerestar USA, Inc., formerly known as American Maize-Products Company and Cargill Limited: Hunter Litigation Chambers, Vancouver.

Solicitors for the respondents/appellants on cross-appeal Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., Casco Inc. and Unilever PLC doing business as Unilever Bestfoods North America: Nathanson, Schachter & Thompson, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the Canadian Chamber of Commerce: Davies Ward Phillips & Vineberg, Toronto.

Pourvoi rejeté avec dépens, les juges CROMWELL *et* KARAKATSANIS *sont dissidents. Pourvoi incident accueilli avec dépens.*

Procureurs des appelantes/intimées au pourvoi incident : Camp Fiorante Matthews Mogerman, Vancouver; Michael Sobkin, Ottawa.

Procureurs des intimées/appelantes au pourvoi incident Archer Daniels Midland Company et ADM Agri-Industries Company : Norton Rose Fulbright, Toronto; Nash & Company, Vancouver.

Procureurs des intimées/appelantes au pourvoi incident Cargill, Incorporated, Cerestar USA, Inc., auparavant connue sous le nom d'American Maize-Products Company et Cargill Limitée : Hunter Litigation Chambers, Vancouver.

Procureurs des intimées/appelantes au pourvoi incident Corn Products International, Inc., Bestfoods, Inc., auparavant connue sous le nom de CPC International, Inc., Casco Inc. et Unilever PLC faisant affaire sous la dénomination d'Unilever Bestfoods North America : Nathanson, Schachter & Thompson, Vancouver.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureurs de l'intervenante la Chambre de commerce du Canada : Davies Ward Phillips & Vineberg, Toronto.

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TAB 16

See paras. 9, 14, 16

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COURT FILE NO.: 00-CV-195587
DATE:200204

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
ALEXANDER TESLUK, MAYNARD SUTHERLAND, PATRICIA BAXTER, DALE BOZAK, and GLORIA ROUSSEAU	***Harvin Pitch*** and ***Kevin Sherkin***, for the Plaintiffs
Plaintiffs	
- and -	
BOOTS PHARMACEUTICAL PLC, BOOTS PHARMACEUTICALS, INC., BASF AG, BASF CORP., BASF INC., BASF CANADA INC., KNOLL PHARMACEUTICAL COMPANY, and KNOLL PHARMA INC.	***David Kent*** , for the Defendants ***Paul Harte***, for the Objector, Gloria Rousseau Paul Wizman, Objector, appearing in person
Defendants	
	HEARD: April 3, 2002

PROCEEDING UNDER THE ***CLASS PROCEEDINGS ACT, 1992***

REASONS FOR DECISION

WINKLER J.:

[1] This is a motion by the plaintiffs seeking certification of the action as a class proceeding, approval of the settlement agreement entered into January 21, 2002, approval of the retainer agreement between the plaintiffs and counsel concerning fees and disbursements and the determination of the fees and disbursements payable to counsel. In addition, the plaintiffs ask the court to award compensation to the Representative Plaintiffs and to fix the amount.

[2] The plaintiffs commenced this action under the *Class Proceedings Act, 1992*, S.O.1992 c.6, claiming damages for misrepresentation as a result of the marketing and sale of a pharmaceutical drug known as Synthroid which is prescribed in the treatment of a thyroid condition hypothyroidism. The plaintiff class includes all Canadians who have purchased Synthroid across Canada, other than in the provinces of Quebec and British Columbia, from January 1, 1991 to the date of any order of this court disposing of the claim. The claim has been settled by way of an agreement requiring the Defendants to pay $2.25 million dollars including costs and pre-judgment interest, which is to be paid by way of a Cy-pres distribution, subject to the approval of the court.

[3] The Representative plaintiffs all suffer from hypothyroidism, have purchased Synthroid during the class period and, as such, are members of the proposed class. Gloria Rousseau was a Representative Plaintiff but she withdrew on November 16, 2001. She is an objector in this proceeding having been granted leave to participate in the approval hearing by this court. Paul Wizman appeared in person and was granted objector status for purposes of the approval hearing.

[4] The proposed class includes approximately 520,000 persons as of the year 2002, having grown from about 75,000 in 1991.

[5] The Defendants manufactured and sold Synthroid during the class period. In 1995 the Defendant Knoll Pharmaceutical Company acquired the Defendant Boots Pharmaceutical Inc. and assumed all liabilities associated to the causes of action asserted here. The settling Defendants in this action are BASF Inc., BASF Corporation, BASF Canada Inc., Knoll Pharmaceutical Company and Knoll Pharma Inc. The business has since been divested by the settling defendants.

[6] Hypothyroidism is a disease caused when the thyroid gland does not function properly thus affecting the body's metabolic rate. If left untreated the disease can cause death. The drug prescribed for treatment is chemically known as levothyroxine sodium. The drug manufactured and sold by the Defendants for this purpose goes by the brand name of Synthroid. It, as well as various other brand name and generic drugs, have received the necessary regulatory approvals.

[7] The central allegation of the plaintiffs claim is that the Defendants are liable for supressing a study conducted in the United States by Betty Dong comparing Synthroid with other drugs and indicating that the other drugs were bioequivalent to Synthroid, while at the same time, conducting a marketing campaign stating that Synthroid was superior. The Defendants raise numerous defences to these assertions, including that the alternate products were not available in Canada, but most importantly, that evidence of usage since the publication was made available indicate that the absence or presence of the study had no effect in the marketplace. The period during which publication was denied was short. Finally, the Defendants state that the claims about misleading advertising are belied by the dramatic increase in Synthroid consumers since the Dong study was released.

[8] The Defendants consent to certification contingent upon the settlement being approved by the court. Notwithstanding the consent, I am satisfied that the five elements of the test for certification set out in s. 5 of the CPA are met in these circumstances. There is a cause of action, assuming the facts alleged by the plaintiffs are true and provable. The proposed class is acceptable. There is a common issue, namely, whether or not the Dong Study establishes the bioequivalency of Synthroid and other levothyroxine sodium drugs available in Canada. A class proceeding is the preferable procedure for resolving the common issue. The Representative Plaintiffs, as stated, are members of the class and have no disqualifying conflicts of interest.

[9] On or about January 21, 2002, the Representative Plaintiffs entered into a Settlement Agreement with the Settling Defendants. Pursuant to the terms of the agreement the Settling Defendants shall pay in settlement of the action the sum of $2.25 million, inclusive of the claim, pre-judgment interest and costs, plus certain incidental expenses covering notices and travel. The parties agreed that because of the large size of the class, some 520,000 members, the small dollar per claim damages, and the costs associated with distribution the proper approach was to distribute the aggregate amount of the settlement by way of a Cy-pres distribution to selected recipient organizations, hospitals and universities conducting research into hypothyroidism which will likely serve the interests of the class members. To this effect the agreement provides that after deduction of fees, disbursements and compensation for representative plaintiffs as determined by the court, the balance of the settlement funds shall be distributed, on an agreed formula, among the five recipients: the University Health Network; the Hospital for Sick Children; Dalhousie University and the University of Alberta; the Centre for Research into Women's Health; and the Thyroid Foundation of Canada. The monies are to be used for specific research projects, education and outreach having to do with thyroid disease.

[10] The test to be applied in determining whether a settlement ought to be approved is whether the settlement is, in all the circumstances, fair, reasonable and in the best interests of the class as a whole. The court does not look to the settlement with a view to perfection in every aspect, but rather whether it is in the best interests of the class as a whole as opposed to any individual member of the class. A list of criteria has been developed that the court may have regard to for this purpose, all of which will not necessarily be present in each case. These are guidelines only and not a rigid set of criteria for assessing the reasonableness of the settlement:

- likelihood of recovery
- amount and nature of discovery evidence
- settlement terms and conditions
- recommendation and experience of counsel
- future expenses and duration of the litigation
- recommendation of neutral parties, if any
- number of objectors and nature of objections
- the presence of good faith and the absence of collusion

- the degree and nature of communications with class members during the litigation
- information as to the dynamic of the negotiations of the settlement.

See: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen.Div.); *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. Sup. Ct.).

[11] If this matter were to proceed to trial, the result would be far from certain in spite of the fact that other similar cases have settled in the United States and in Quebec. The evidence of the apparent lack of effect of the Dong Study once released would be very damaging to the plaintiff's case. The evidence is that the use of Synthroid increased rather than decreased after the study was released. Even if liability was established, the evidence is that the actual damages which could be assessed after a successful trial would appear to be in the neighborhood of the amount achieved in this settlement. Moreover, a trial would, given the nature of the case, be hard fought, expensive and lengthy. Thus in light of the risk and cost factors the settlement amount is in the ambit of reasonableness.

[12] There was no statement of defence delivered in the present case, nor examinations for discovery. The defendants raised numerous substantial defences to the claims asserted and shared certain expert reports with the plaintiffs counsel. In addition, class counsel conducted extensive investigative work particularly concerning damages.

[13] The settlement terms are comparable, if not superior to the Quebec settlement which received court approval on November 27, 2001,and from which there were no opt outs.

[14] The Representative Plaintiffs agree with the settlement terms. There are two objectors. Rousseau withdrew as a representative plaintiff and now objects to the settlement. She states that she does not object to the total amount of the settlement She does however, object to the distribution of the settlement, the quantum of legal fees, and compensation for the representative plaintiffs. She wishes the settlement funds to be distributed to the individual class members rather than by way of an aggregate Cy-pres distribution. However, given the amount of the individual claims, estimated to be from $30 to $70, and the class size of 520,000, and having regard for this courts experience with administration costs of class proceedings distributions, individual distribution of this settlement would be impracticable and not in the interests of the class as a whole. Costs would simply dissipate the settlement fund in large measure. The objector Paul Wizman, objects only on the ground that he wants the Cy-pres beneficiaries to include an advocacy association to assist consumers as to alternative drugs available. This would not be practicable nor achievable in the context of this settlement, no matter how desirable, and there is a federal agency within whose mandate this task falls.

[15] There does not appear to have been an overabundance of communication with class members in the present circumstances. The negotiation with the defendants was short and to the point, and was focused by the defendants. These facts are not fatal however, as

the Representative Plaintiffs provided information directed toward focusing the research objectives of the Cy-pres recipients. The fact that it was a short, focused negotiation casts no negative reflection on the quality of the negotiation contrary to the objector Rousseau's submission.

[16] I am satisfied that the settlement is fair, reasonable and in the best interests of the class as a whole. Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a Cy-pres distribution to recognized organizations or institutions which will benefit class members. The CPA specifically contemplates such settlements in s.26(6). The selected recipients to which the settlement funds are directed by the present settlement meets this requirement. I adopt the reasoning of Cumming J. in *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. 79 (Ont. Sup.Ct.) where he stated:

> 15 There are significant problems in identifying possible claimants below the manufacturing level. Hence, the monies allocated to intermediaries such as wholesalers and consumers are to be paid by a cy pres distribution to specified not-for-profit entities, in effect as surrogates for these categories of claimants, for the general, indirect benefit of such class members. The CPA provides the flexibility for this approach: see ss. 24 and 26.
> 16. Such a settlement and payments largely serve the important policy objective of general and specific deterrence of wrongful conduct through price fixing. That is, the private class action litigation bar functions as a regulator in the public interest for public policy objectives.

[17] The Retainer Agreement entered into between counsel and the Representative Plaintiffs provides for fees to be paid on a percentage basis of the total value of the settlement in the amount of 30% of the first $20 million plus disbursements. The CPA mandates in s. 32 that any retainer agreement and any fee or disbursement payable pursuant to such an agreement must receive court approval. The Act also provides in s. 33 that a solicitor and representative plaintiff may enter into an agreement that provides for payment only in the event of success, that is on a contingency basis. This approach is in furtherance of the goals of the Act in that it enables class members to obtain the services of the most experienced counsel who will work diligently on their behalf to obtain the best possible result for the class while at the same time assuming the risks involved in this type of litigation as well as the risk that they may not be paid. The total base fee sought by the counsel team for the plaintiffs is $276,925.50 up to February 28,2002. They estimate another $70,000 will be accrued for work after that date including these proceedings. The total, therefore, is $346,925.50. The CPA provides in s. 33 that class counsel may seek the courts approval for their fees to be increased by a multiplier. Courts have held that this incentive may take the form of a lump sum, percentage fee or a multiplier of the base fee. The total fee claimed is $616,822.00. The equivalates to 27.4% of the total settlement. On a risk-result premium multiplier basis, if the $70,000 yet to be billed is deducted for the purposes of the calculation, the total is 1.97 times the base fee. Total disbursements claimed are $50,000. The objector

Rousseau states that she does not object to the hours worked or hourly rates charged. She does however, object to the premium claimed by class counsel. I cannot accede to this objection. A multiplier of 1.97 is at the low end of the range that has received judicial sanction. The percentage of 27.4 is less than the fee stipulated in the retainer agreement. A higher percentage fee is justified in lower settlements, on the principle that as the amounts increase the percentage which would be justified should be less. The two factors that the court considers generally in determining the appropriate contingent fee are risk assumed and success achieved. See: *Gagne v. Silcorp Limited* (1998), 41 O.R. (3d) 417 (C.A.). Given the risk inherent in this litigation and the result achieved, I am satisfied that the fees are fair and reasonable. Accordingly, I approve the retainer agreement and the fees, disbursements and GST for a total of $710,000.

[18] The Representative Plaintiffs are requesting compensation for their work in completing the settlement. This claim is based primarily upon the work done by them in soliciting and evaluating the research projects to be funded by the Cy-pres payments. The contribution of the four individuals in question came largely after the settlement had been crafted. They carried on a dialogue with the physicians responsible for the proposed research projects to provide them with the patient's perspective on the issues that the researchers consider to be important to their research. This dialogue is intended to be of a continuing nature. The Representative Plaintiffs established a lay advisory panel, referred to as a research advisory panel, to provide input into the process of selecting worthwhile research areas. They met, established individual assignments, and panel objectives to examine, compare notes and provide recommendations to Dr. Daniel Drucker, who will administer the Thyroid Research Centre under the auspices of the University Health Network, comprised of the Toronto General Hospital, Western Hospital and Princess Margaret Hospital.

[19] Each of the four Representative Plaintiffs spent on average 100 hours of time for which they kept detailed records and for which they request $20,000 each based on an hourly rate of $200. The work performed by the Representative Plaintiffs other than that related directly to the research, consisted of meeting with counsel, reviewing options, providing instructions to counsel with respect to proposals and counter proposals and meeting amongst themselves to evaluate their position and develop strategy. These latter tasks are those expected to be undertaken by almost all representative plaintiffs. The vast majority of the work for which they seek to be remunerated has to do with the research based work that they performed.

[20] In *Windisman v. Toronto College Park Ltd.*, (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.) Sharpe J. stated at para. 28:

> In my view, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent. I agree with the American commentators that such awards should not be seen as routine.

[21] In the present circumstances the work of the Representative Plaintiffs was unnecessary to the preparation or presentation of the case. Indeed, their work did not begin until after the settlement had been structured. Their work did not result in any monetary success for the class. If they were to be compensated in the manner requested they would be the only class members to receive any direct monetary compensation. The entire settlement is in the form of a Cy-pres distribution. The Representative Plaintiffs are seeking some $80,000 in total which is to be deducted from the settlement. By way of contrast, in *Windisman*, the representative plaintiff took an active part at all stages of the proceeding, the case would not have been brought except for her initiative, she assumed the risk of costs, and devoted an unusual amount of time communicating with class members and assisting counsel. The class members received a direct monetary benefit due in part to her efforts.

[22] While the work of the Representative Plaintiffs is commendable, to compensate them for their work when the settlement funds for the entire class are being donated to research without a single penny finding its way into the hands of a class member would be contrary to the precept of a Cy-pres distribution in particular and to a class proceeding generally. Compensation for representative plaintiffs must be awarded sparingly. The operative word is that the functions undertaken by the Representative Plaintiffs must be "necessary", such assistance must result in monetary success for the class and in any event, if granted, should not be in excess of an amount that would be purely compensatory on a *quantum meruit* basis. Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. This request is denied.

[23] An order will go certifying the proceeding as a class proceeding, approving the settlement, approving the retainer agreement, and fixing the class counsel fees and disbursements.

WINKLER J.

Released: April 09 , 2002

COURT FILE NO.: 00-CV-195587
DATE:20020408

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ALEXANDER TESLUK, MAYNARD SUTHERLAND, PATRICIA BAXTER, DALE BOZAK, and GLORIA ROUSSEAU

Plaintiffs

- and -

BOOTS PHARMACEUTICAL PLC, BOOTS PHARMACEUTICALS, INC., BASF AG, BASF CORP., BASF INC., BASF CANADA INC., KNOLL PHARMACEUTICAL COMPANY, and KNOLL PHARMA INC.

Defendants

REASONS FOR DECISION

WINKLER J.

RELEASED: APRIL 09, 2002

8p

TAB 17

See paras. 27-29, 34-37, 43

2001 SCC 46 (CanLII)

Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, The Royal Trust Company, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill
Appellants/Respondents on cross-appeal

v.

Western Canadian Shopping Centres Inc. and Muh-Min Lin and Hoi-Wah Wu, representatives of all holders of Class "A", Class "E" and Class "F" Debentures issued by Western Canadian Shopping Centres Inc. *Respondents/Appellants on cross-appeal*

INDEXED AS: WESTERN CANADIAN SHOPPING CENTRES INC. *v.* DUTTON

Neutral citation: 2001 SCC 46.

File No.: 27138.

Hearing and judgment: December 13, 2000.

Reasons delivered: July 13, 2001.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Practice — Class actions — Plaintiffs suing defendants for breach of fiduciary duties and mismanagement of funds — Defendants applying for order to strike plaintiffs' claim to sue in representative capacity — Whether requirements for class action met — If so, whether class action should be allowed — Whether defendants entitled to examination and discovery of each class member — Alberta Rules of Court, Alta. Reg. 390/68, Rule 42.

L and W, together with 229 other investors, became participants in the federal government's Business Immigration Program by purchasing debentures in WCSC,

Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, La Compagnie Trust Royal, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill *Appelants/Intimés au pourvoi incident*

c.

Western Canadian Shopping Centres Inc. et Muh-Min Lin et Hoi-Wah Wu, représentants de tous les porteurs de débentures de catégories « A », « E » et « F » émises par Western Canadian Shopping Centres Inc. *Intimés/Appelants au pourvoi incident*

RÉPERTORIÉ : WESTERN CANADIAN SHOPPING CENTRES INC. *c.* DUTTON

Référence neutre : 2001 CSC 46.

Nº du greffe : 27138.

Audition et jugement : 13 décembre 2000.

Motifs déposés : 13 juillet 2001.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Pratique — Recours collectifs — Action intentée pour manquement à des obligations fiduciaires et mauvaise gestion de fonds — Requête en radiation d'une demande visant à poursuivre en qualité de représentants — Les conditions du recours collectif sont-elles réunies? — Le recours collectif doit-il être autorisé? — Les défendeurs peuvent-ils procéder à l'examen et à l'interrogatoire préalable de chaque membre du groupe? — Alberta Rules of Court, Alta. Reg. 390/68, règle 42.

L et W, ainsi que 229 autres investisseurs, ont participé au Programme fédéral d'immigration des gens d'affaires en achetant des débentures de WCSC qui

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which was incorporated by D, its sole shareholder, for the purpose of helping investor-class immigrants qualify as permanent residents in Canada. WCSC solicited funds through two offerings to invest in income-producing properties. After the investors' funds were deposited, WCSC purchased from CRI, for $5,550,000, the rights to a Crown surface lease and also agreed to commit a further $16.5 million for surface improvements. To finance WCSC's obligations to CRI, D directed that the Series A debentures be issued in an aggregate principal amount of $22,050,000 to some of the investors. D advanced more funds to CRI and corresponding debentures were issued, in particular the Series E and F debentures. Eventually, the debentures were pooled. When CRI announced that it could not pay the interest due on the debentures, L and W, the representative plaintiffs, commenced a class action complaining that D and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging their funds. The defendants applied to the Court of Queen's Bench for a declaration and order striking that portion of the claim in which the individual plaintiffs purport, pursuant to Rule 42 of the *Alberta Rules of Court*, to represent a class of 231 investors. The chambers judge denied the application. The majority of the Court of Appeal upheld that decision but granted the defendants the right to discovery from each of the 231 plaintiffs. The defendants appealed to this Court, and the plaintiffs cross-appealed taking issue with the Court of Appeal's allowance of individualized discovery from each class member.

Held: The appeal should be dismissed and the cross-appeal allowed.

In Alberta, class-action practice is governed by Rule 42 of the *Alberta Rules of Court* but, in the absence of comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them. Class actions should be allowed to proceed under Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of law or fact common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh

avait été constituée en société par D, son unique actionnaire, dans le but de faciliter à des immigrants investisseurs l'obtention du statut de résident permanent au Canada. WCSC a sollicité des fonds dans deux offres d'investissement dans des propriétés de rapport. Après le dépôt des fonds des investisseurs, WCSC a acheté à CRI, pour la somme de 5 550 000 $, les droits sur un bail de surface visant des terres publiques et s'est engagé à verser 16,5 millions de dollars supplémentaires pour des améliorations de surface. Pour financer les obligations de WCSC envers CRI, D a demandé l'émission des débentures de la série A pour un montant total en principal de 22 050 000 $ à certains investisseurs. D a avancé des fonds additionnels à CRI et des débentures correspondantes ont été émises, notamment les débentures des séries E et F. Les débentures ont été regroupées par la suite. Quand CRI a annoncé qu'elle ne pouvait pas payer les intérêts sur les débentures, L et W, les représentants des demandeurs, ont intenté un recours collectif alléguant que D et divers associés et sociétés apparentées de WCSC avaient manqué à leurs obligations fiduciaires envers les investisseurs par une mauvaise gestion de leurs fonds. Les défendeurs ont demandé à la Cour du Banc de la Reine un jugement déclaratoire et une ordonnance radiant la partie de la déclaration dans laquelle les demandeurs disaient représenter, en vertu de la règle 42 des *Alberta Rules of Court* un groupe de 231 investisseurs. Le juge en chambre a rejeté la demande. La majorité en Cour d'appel a maintenu sa décision mais a accordé aux défendeurs le droit de faire l'interrogatoire préalable de chacun des 231 demandeurs. Les défendeurs ont fait appel devant notre Cour et les demandeurs ont fait un appel incident contre la décision de la cour d'appel d'autoriser l'interrogatoire individuel de chaque membre du groupe.

Arrêt : L'appel est rejeté et le pourvoi incident est accueilli.

En Alberta, la procédure des recours collectifs est régie par la règle 42 des *Alberta Rules of Court*, mais en l'absence de législation complète, les tribunaux doivent combler les lacunes en exerçant leur pouvoir inhérent d'établir les règles de pratique et de procédure applicables aux litiges dont ils sont saisis. Les recours collectifs devraient être autorisés en vertu de la règle 42 lorsque les conditions suivantes sont réunies : (1) le groupe peut être clairement défini; (2) des questions de droit ou de fait sont communes à tous les membres du groupe; (3) le succès d'un membre du groupe signifie le succès de tous; et (4) le représentant proposé représente adéquatement les intérêts du groupe. Si ces conditions sont réunies, le tribunal doit également être convaincu, dans

the benefits of allowing the class action to proceed. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness. The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious". On procedural matters, all potential class members should be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out. This should be done before any decision is made that purports to prejudice or otherwise affect the interests of class members. The court also retains discretion to determine how the individual issues should be addressed, once common issues have been resolved. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis in a flexible and liberal manner, seeking a balance between efficiency and fairness.

l'exercice de son pouvoir discrétionnaire, qu'il n'existe pas de considérations défavorables qui l'emportent sur les avantages que comporte l'autorisation d'un recours collectif. Le tribunal devrait prendre en considération les avantages que le recours collectif offre dans les circonstances de l'affaire ainsi que les injustices qu'il peut provoquer. En fin de compte, le tribunal doit concilier efficacité et équité. La nécessité de concilier efficacité et équité démentit l'idée qu'un recours collectif ne devrait être radié que lorsque le vice est « évident et manifeste ». En matière de procédure, tous les participants possibles devraient être informés de l'existence de la poursuite, des questions communes que la poursuite cherche à résoudre ainsi que du droit de chaque membre du groupe de se retirer, et ce avant que ne soit rendue une décision pouvant avoir une incidence, défavorable ou non, sur les intérêts des membres du groupe. Le tribunal conserve le pouvoir discrétionnaire de déterminer comment les questions individuelles devraient être abordées, une fois que les questions communes ont été résolues. Sans législation complète en matière de recours collectif, les tribunaux doivent régler les complications procédurales cas par cas, de manière souple et libérale, en cherchant à concilier efficacité et équité.

In this case, the basic conditions for a class action are met and efficiency and fairness favour permitting it to proceed. The defendants' contentions against the suit were unpersuasive. While differences exist among investors, the fact remains that the investors raise essentially the same claims requiring resolution of the same facts. If material differences emerge, the court can deal with them when the time comes. Further, a class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance to establish breach of fiduciary duty, the court may then consider whether the class action should continue. The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

En l'espèce, les conditions essentielles à l'exercice d'un recours collectif sont réunies et l'efficacité et l'équité militent en faveur de son autorisation. Les arguments des défendeurs contre le recours ne sont pas convaincants. Si des différences existent entre les investisseurs, le fait est qu'ils ont essentiellement les mêmes revendications qui exigent la résolution des mêmes faits. Si des différences importantes surviennent, le tribunal peut régler la question le moment venu. De plus, on ne devrait pas interdire un recours collectif en raison de l'incertitude relative à la résolution de questions communes à tous les membres du groupe. Si on juge que les investisseurs doivent faire la preuve d'un lien de confiance individuel pour établir le manquement aux obligations fiduciaires, le tribunal peut alors décider si le recours collectif doit ou non se poursuivre. Cela s'applique aussi à l'argument selon lequel des défenses différentes seront invoquées envers différents membres du groupe. Cette simple possibilité n'interdit pas le recours collectif. Si différentes défenses sont invoquées, le tribunal peut alors résoudre le problème ou retirer l'autorisation du recours collectif.

Finally, to allow individualized discovery at this stage of the proceedings would be premature. The defendants should be allowed to examine the representative plaintiffs as of right but examination of other class members

Enfin, il serait prématuré d'autoriser l'interrogatoire préalable individuel à cette étape-ci. Les défendeurs devraient être autorisés à interroger les représentants des demandeurs comme ils en ont le droit, mais l'interroga-

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should be available only by order of the court, upon the defendants showing reasonable necessity.

Cases Cited

Distinguished: *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72; **referred to:** *353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd.*, [1989] A.J. No. 652 (QL); *Shaw v. Real Estate Board of Greater Vancouver* (1972), 29 D.L.R. (3d) 774; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337; *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*, [1989] 2 S.C.R. 1069; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Chancey v. May* (1722), Prec. Ch. 592, 24 E.R. 265; *City of London v. Richmond* (1701), 2 Vern. 421, 23 E.R. 870; *Wallworth v. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238; *Duke of Bedford v. Ellis*, [1901] A.C. 1; *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426; *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021; *Bell v. Wood*, [1927] 1 W.W.R. 580; *Langley v. North West Water Authority*, [1991] 3 All E.R. 610, leave denied [1991] 1 W.L.R. 711n; *Newfoundland Association of Public Employees v. Newfoundland* (1995), 132 Nfld. & P.E.I.R. 205; *Ranjoy Sales and Leasing Ltd. v. Deloitte, Haskins and Sells*, [1984] 4 W.W.R. 706; *International Capital Corp. v. Schafer* (1995), 130 Sask. R. 23; *Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée* (1988), 86 N.B.R. (2d) 342; *Lee v. OCCO Developments Ltd.* (1994), 148 N.B.R. (2d) 321; *Van Audenhove v. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294; *Horne v. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R. 109; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172; *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094.

Statutes and Regulations Cited

Alberta Rules of Court, Alta. Reg. 390/68, rr. 42, 129, 187, 201.

Civil Procedure Rules 1998 (U.K.), SI 1998/3132, rr. 19.10-19.15.

Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 4(1), 7, 27.

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1), 6, 25.

toire des autres membres du groupe ne devrait être autorisé que par ordonnance de la cour, si les défendeurs prouvent que cela est raisonnablement nécessaire.

Jurisprudence

Distinction d'avec l'arrêt : *General Motors of Canada Ltd. c. Naken*, [1983] 1 R.C.S. 72; **arrêts mentionnés :** *353850 Alberta Ltd. c. Horne & Pitfield Foods Ltd.*, [1989] A.J. No. 652 (QL); *Shaw c. Real Estate Board of Greater Vancouver* (1972), 29 D.L.R. (3d) 774; *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959; *Korte c. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337; *Bande indienne Oregon Jack Creek c. Compagnie des chemins de fer nationaux du Canada*, [1989] 2 R.C.S. 1069; *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Chancey c. May* (1722), Prec. Ch. 592, 24 E.R. 265; *City of London c. Richmond* (1701), 2 Vern. 421, 23 E.R. 870; *Wallworth c. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238; *Duke of Bedford c. Ellis*, [1901] A.C. 1; *Taff Vale Railway Co. c. Amalgamated Society of Railway Servants*, [1901] A.C. 426; *Markt & Co. c. Knight Steamship Co.*, [1910] 2 K.B. 1021; *Bell c. Wood*, [1927] 1 W.W.R. 580; *Langley c. North West Water Authority*, [1991] 3 All E.R. 610, demande d'autorisation de pourvoi refusée [1991] 1 W.L.R. 711n; *Newfoundland Association of Public Employees c. Newfoundland* (1995), 132 Nfld. & P.E.I.R. 205; *Ranjoy Sales and Leasing Ltd. c. Deloitte, Haskins and Sells*, [1984] 4 W.W.R. 706; *International Capital Corp. c. Schafer* (1995), 130 Sask. R. 23; *Guarantee Co. of North America c. Caisse populaire de Shippagan Ltée* (1988), 86 R.N.-B. (2e) 342; *Lee c. OCCO Developments Ltd.* (1994), 148 R.N.-B. (2e) 321; *Van Audenhove c. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294; *Horne c. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R. 109; *Bywater c. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172; *Drummond-Jackson c. British Medical Association*, [1970] 1 All E.R. 1094.

Lois et règlements cités

Alberta Rules of Court, Alta. Reg. 390/68, règles 42, 129, 187, 201.

Civil Procedure Rules 1998 (R.-U.), SI 1998/3132, règles 19.10-19.15.

Class Proceedings Act, R.S.B.C. 1996, ch. 50, art. 4(1), 7, 27.

Code de procédure civile, L.R.Q., ch. C-25, livre IX, art. 1003, 1039.

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Code of Civil Procedure, R.S.Q., c. C-25, Book IX, arts. 1003, 1039.
Federal Rules of Civil Procedure, 28 U.S.C.A. § 23.
Supreme Court of Judicature Act, 1873 (U.K.), 36 & 37 Vict., c. 66, Sch., r. 10.

Authors Cited

Alberta. Alberta Rules of Court Binder. Practice Note on the Very Long Trial. Practice Note No.7, September 1, 1995.
Alberta Law Reform Institute. Final Report No. 85. *Class Actions.* Edmonton: The Institute, 2000.
Bankier, Jennifer K. "Class Actions for Monetary Relief in Canada: Formalism or Function?" (1984), 4 *Windsor Y.B. Access Just.* 229.
Bispham, George Tucker. *The Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery*, 9th ed. By Joseph D. McCoy. New York: Banks Law Publishing, 1916.
Branch, Ward K. *Class Actions in Canada.* Vancouver: Western Legal Publications, 1998.
Calvert, Frederic. *A Treatise Upon the Law Respecting Parties to Suits in Equity*, 2nd ed. London: W. Benning, 1847.
Chafee, Zechariah, Jr. *Some Problems of Equity*. Ann Arbor: University of Michigan Law School, 1950.
"Developments in the Law — The Paths of Civil Litigation" (2000), 113 *Harv. L. Rev.* 1806.
Eizenga, Michael A., Michael J. Peerless and Charles M. Wright. *Class Actions Law and Practice.* Toronto: Butterworths, 1999.
Friedenthal, Jack H., Mary Kay Kane and Arthur R. Miller. *Civil Procedure*, 2nd ed. St. Paul, Minn.: West Publishing Co., 1993.
Kazanjian, John A. "Class Actions in Canada" (1973), 11 *Osgoode Hall L.J.* 397.
Manitoba. Law Reform Commission. Report #100. *Class Proceedings.* Winnipeg: The Commission, 1999.
Ontario. Law Reform Commission. *Report on Class Actions.* Ontario: Ministry of the Attorney General, 1982.
Roberts, Thomas A. *The Principles of Equity, as Administered in the Supreme Court of Judicature and Other Courts of Equitable Jurisdiction*, 3rd ed. London: Butterworths, 1877.
Rogers, Ruth. "A Uniform Class Actions Statute" in Uniform Law Conference of Canada. *Proceedings of the Seventy-Seventh Annual Meeting*, Appendix O. Ottawa: The Conference, 1995.
Stevenson, William Alexander, and Jean E. Côté. *Civil Procedure Guide, 1996.* Edmonton: Juriliber, 1996.

Federal Rules of Civil Procedure, 28 U.S.C.A. § 23.
Loi de 1992 sur les recours collectifs, L.O. 1992, ch. 6, art. 5(1), 6, 25.
Supreme Court of Judicature Act, 1873 (R.-U.), 36 & 37 Vict., ch. 66, ann., règle 10.

Doctrine citée

Alberta. Alberta Rules of Court Binder. Practice Note on the Very Long Trial. Practice Note No. 7, September 1, 1995.
Alberta Law Reform Institute. Final Report No. 85. *Class Actions.* Edmonton : The Institute, 2000.
Bankier, Jennifer K. « Les recours collectifs au Canada pour obtenir le dégrèvement financier : formalisme ou fonction? » (1984), 4 *Windsor Y.B. Access Just.* 229.
Bispham, George Tucker. *The Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery*, 9th ed. By Joseph D. McCoy. New York : Banks Law Publishing, 1916.
Branch, Ward K. *Class Actions in Canada.* Vancouver : Western Legal Publications, 1998.
Calvert, Frederic. *A Treatise Upon the Law Respecting Parties to Suits in Equity*, 2nd ed. London : W. Benning, 1847.
Chafee, Zechariah, Jr. *Some Problems of Equity*. Ann Arbor : University of Michigan Law School, 1950.
« Developments in the Law — The Paths of Civil Litigation » (2000), 113 *Harv. L. Rev.* 1806.
Eizenga, Michael A., Michael J. Peerless and Charles M. Wright. *Class Actions Law and Practice.* Toronto : Butterworths, 1999.
Friedenthal, Jack H., Mary Kay Kane and Arthur R. Miller. *Civil Procedure*, 2nd ed. St. Paul, Minn. : West Publishing Co., 1993.
Kazanjian, John A. « Class Actions in Canada » (1973), 11 *Osgoode Hall L.J.* 397.
Manitoba. Law Reform Commission. Report #100. *Class Proceedings.* Winnipeg : The Commission, 1999.
Ontario. Law Reform Commission. *Report on Class Actions.* Ontario : Ministry of the Attorney General, 1982.
Roberts, Thomas A. *The Principles of Equity, as Administered in the Supreme Court of Judicature and Other Courts of Equitable Jurisdiction*, 3rd ed. London : Butterworths, 1877.
Rogers, Ruth. « Vers une loi uniforme sur le recours collectif », dans Conférence pour l'harmonisation des lois au Canada. *Compte rendu de la soixante-dix-septième réunion annuelle*, Annexe O. Ottawa : La Conférence, 1995.

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Story, Joseph. *Commentaries on Equity Pleadings and the Incidents Thereof, According to the Practice of the Courts of Equity of England and America*, 10th ed. by John M. Gould. Boston: Little, Brown, 1892.

Wright, Charles Alan, Arthur R. Miller and Mary Kay Kane. *Federal Practice and Procedure*, 2nd ed. St. Paul, Minn.: West Publishing Co., 1986.

Yeazell, Stephen C. "Group Litigation and Social Context: Toward a History of the Class Action" (1977), 77 *Colum. L. Rev.* 866.

Stevenson, William Alexander, and Jean E. Côté. *Civil Procedure Guide, 1996.* Edmonton : Juriliber, 1996.

Story, Joseph. *Commentaries on Equity Pleadings and the Incidents Thereof, According to the Practice of the Courts of Equity of England and America*, 10th ed. by John M. Gould. Boston : Little, Brown, 1892.

Wright, Charles Alan, Arthur R. Miller and Mary Kay Kane. *Federal Practice and Procedure*, 2nd ed. St. Paul, Minn. : West Publishing Co., 1986.

Yeazell, Stephen C. « Group Litigation and Social Context : Toward a History of the Class Action » (1977), 77 *Colum. L. Rev.* 866.

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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (1998), 73 Alta. L.R. (3d) 227, 228 A.R. 188, 188 W.A.C. 188, 30 C.P.C. (4th) 1, [1998] A.J. No.1364 (QL), 1998 ABCA 392, dismissing an appeal from a decision of the Court of Queen's Bench (1996), 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, [1996] A.J. No. 1165 (QL). Appeal dismissed and cross-appeal allowed.

Barry R. Crump, *Brian Beck* and *David C. Bishop*, for the appellants/respondents on cross-appeal.

Hervé H. Durocher and *Eugene J. Erler*, for the respondents/appellants on cross-appeal.

The judgment of the Court was delivered by

THE CHIEF JUSTICE — This appeal requires us to decide when a class action may be brought. While the class action has existed in one form or another for hundreds of years, its importance has increased of late. Particularly in complicated cases implicating the interests of many people, the class action may provide the best means of fair and efficient resolution. Yet absent legislative direction, there remains considerable uncertainty as to the conditions under which a court should permit a class action to be maintained.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (1998), 73 Alta. L.R. (3d) 227, 228 A.R. 188, 188 W.A.C. 188, 30 C.P.C. (4th) 1, [1998] A.J. No. 1364 (QL), 1998 ABCA 392, qui a rejeté un appel d'une décision de la Cour du Banc de la Reine (1996), 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, [1996] A.J. No. 1165 (QL). Pourvoi rejeté et pourvoi incident accueilli.

Barry R. Crump, *Brian Beck* et *David C. Bishop*, pour les appelants/intimés au pourvoi incident.

Hervé H. Durocher et *Eugene J. Erler*, pour les intimés/appelants au pourvoi incident.

Version française du jugement de la Cour rendu par

LE JUGE EN CHEF — Nous sommes appelés en l'espèce à décider dans quels cas un recours collectif peut être exercé. Le recours collectif existe sous une forme ou une autre depuis des siècles, mais son importance s'est accrue récemment. Il peut fournir le meilleur moyen d'aboutir à une solution juste et efficace, en particulier dans des affaires complexes mettant en jeu les intérêts d'un grand nombre de personnes. Cependant, en l'absence de disposition législative, beaucoup d'incertitude demeure quant aux conditions dans lesquelles un tribunal devrait autoriser l'exercice d'un recours collectif. 1

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2 The claimants wanted to immigrate to Canada. To qualify, they invested money in Western Canadian Shopping Centres Inc. ("WCSC"), under the Canadian government's Business Immigration Program. They lost money and brought a class action. The defendants (appellants) claim the class action is inappropriate and ask the Court to strike it out. For the following reasons, I conclude that the claimants may proceed as a class.

Les demandeurs souhaitaient immigrer au Canada. Pour être admissibles, dans le cadre du Programme d'immigration des gens d'affaires établi par le gouvernement canadien, ils ont investi dans la société Western Canadian Shopping Centres Inc. (« WCSC »). Ils ont perdu de l'argent et ont intenté un recours collectif. Les défendeurs (appelants) contestent l'opportunité du recours collectif et demandent à la Cour de le radier. Pour les motifs qui suivent, je conclus que les demandeurs peuvent exercer un recours collectif.

I. Facts

I. Les faits

3 The representative plaintiffs Muh-Min Lin and Hoi-Wah Wu, together with 229 other investors, became participants in the government's Business Immigration Program of Employment and Immigration Canada by purchasing debentures in WCSC. WCSC was incorporated by Joseph Dutton, its sole shareholder, for the purpose of "facilitat[ing] the qualification of the Investors, their spouses, and their never-married children as Canadian permanent residents."

Les demandeurs Muh-Min Lin et Hoi-Wah Wu, ainsi que 229 autres investisseurs, ont participé au Programme d'immigration des gens d'affaires d'Emploi et Immigration Canada en achetant des débentures de WCSC. WCSC a été constituée en société par Joseph Dutton, son unique actionnaire, dans le but de [TRADUCTION] « faciliter pour les investisseurs, leurs conjoints et leurs enfants jamais mariés l'obtention du statut de résident permanent au Canada ».

4 WCSC solicited funds through two offerings "to invest in land located in the Province of Saskatchewan for the purpose of developing commercial, non-residential, income-producing properties". The offering memoranda provided that the subscription proceeds would be deposited with an escrow agent, later designated as The Royal Trust Company ("Royal Trust"), and would be released to WCSC upon conditions, subsequently amended.

WCSC sollicite des fonds dans deux offres [TRADUCTION] « d'investissement dans des terrains situés dans la province de la Saskatchewan en vue de développer des biens productifs à usage commercial, non résidentiel ». Les notices d'offre prévoient que les produits de la souscription seront déposés auprès d'un dépositaire légal, plus tard désigné comme La Compagnie Trust Royal (« Trust Royal »), et seront remis à WCSC sous certaines conditions, modifiées par la suite.

5 The dispute arises from events after the investors' funds had been deposited with Royal Trust. In May 1990, WCSC entered into a Purchase and Development Agreement ("PDA") with Claude Resources Inc. ("Claude") under which WCSC purchased from Claude, for $5,550,000, the rights to a Crown surface lease adjacent to Claude's "Seabee" gold deposits in northern Saskatchewan. WCSC also agreed to commit a further $16.5 million for surface improvements and for the construction of a gold mill, which would be owned by WCSC. A lease agreement executed in tandem with the PDA leased the not-yet-constructed gold

Le litige découle d'événements survenus après le dépôt des fonds des investisseurs auprès de Trust Royal. En mai 1990, WCSC conclut une convention d'achat et de développement (« CAD ») avec Claude Resources Inc. (« CRI »), aux termes de laquelle WCSC achète à CRI, pour la somme de 5 550 000 $, les droits sur un bail de surface visant des terres publiques adjacentes aux gisements d'or « Seabee » de CRI dans le Nord de la Saskatchewan. WCSC accepte également de s'engager à verser 16,5 millions de dollars supplémentaires pour des améliorations de surface et pour la construction d'une usine de traitement de l'or, qui appar-

mill and related facilities, together with the surface lands, back to Claude. The payments required of Claude under that lease agreement matched the semi-annual interest payments required of WCSC with respect to the investors.

tiendra à WCSC. Une convention de bail, signée en même temps que la CAD, prévoit la location à CRI de l'usine de traitement de l'or et des installations connexes qui ne sont pas encore construites, avec les terrains de surface. Les paiements que CRI doit effectuer en vertu de cette convention de bail équivalent aux versements d'intérêts semestriels exigés de WCSC relativement aux investisseurs.

To finance WCSC's obligations under the PDA with Claude, Dutton directed Royal Trust to issue debentures in an aggregate principal amount of $22,050,000 to a subset of the investors who had subscribed by that point. Royal Trust did so by issuing "Series A" debentures to 142 investors. After the debentures were issued, WCSC distributed an update letter to its investors, describing the investment in Claude.

6 Pour financer les obligations de WCSC selon la CAD conclue avec CRI, Dutton demande à Trust Royal d'émettre des débentures pour un montant total en principal de 22 050 000 $ à un sous-ensemble d'investisseurs qui ont déjà contribué à cette étape. Trust Royal émet donc des débentures de « série A » à 142 investisseurs. Après l'émission des débentures, WCSC distribue une lettre d'information à ses investisseurs qui décrit l'investissement dans CRI.

In a separate series of transactions executed around the same time, Dutton and Claude entered into an agreement by which (1) Dutton effectively conveyed to Claude 49 percent of his shares in WCSC; (2) Claude paid Dutton $1.6 million in cash; (3) Claude advanced Dutton a $1.6 million non-recourse loan; (4) Dutton entered into an employment contract with Claude for a salary of $50,000 per year; and (5) Claude and Dutton's management company, J.M.D. Management Ltd., entered into a management contract for $200,000 per year. It appears that WCSC did not distribute an update letter to its investors describing this series of transactions.

7 Dans une série distincte d'opérations effectuées vers la même époque, Dutton et CRI concluent une entente aux termes de laquelle (1) Dutton transfère dans les faits à CRI 49 pour 100 de ses actions dans WCSC; (2) CRI verse à Dutton 1,6 million de dollars comptant; (3) CRI consent à Dutton un prêt sans recours de 1,6 million de dollars; (4) Dutton conclut un contrat de travail avec CRI pour un salaire annuel de 50 000 $; et (5) CRI et la société de gestion de Dutton, J.M.D. Management Ltd., signe un contrat de gestion de 200 000 $ par an. Il semble que WCSC n'ait pas envoyé à ses investisseurs de lettre décrivant cette série d'opérations.

Over the next months, Dutton advanced more funds to Claude and directed Royal Trust to issue corresponding debentures. Of particular relevance to the instant dispute are the Series E debentures issued in December 1990 (aggregate principal of $2.56 million), and the Series F debentures issued in May 1991 (aggregate principal of $9.45 million). When the Series E debentures were issued, the Series A and E debentures were pooled, so that investors in those series became entitled to a *pro rata* claim on the total security pledged with respect to the two series. When the Series F debentures were issued, the security for that series was

8 Au cours des mois suivants, Dutton avance des fonds additionnels à CRI et demande à Trust Royal d'émettre des débentures correspondantes. Les débentures de série E émises en décembre1990 (montant total en principal de 2,56 millions de dollars), et les débentures de série F émises en mai 1991 (montant total en principal de 9,45 millions de dollars) sont particulièrement importantes dans le litige. Quand les débentures de série E sont émises, les débentures de séries A et E sont regroupées, de sorte que les investisseurs de ces séries ont acquis un droit au prorata sur la garantie totale engagée relativement aux deux séries. Quand les

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pooled with the security that had been pledged with respect to the Series A and E debentures. WCSC apparently distributed investor update letters after the issuance of the Series E and F debentures, just as it had done after the issuance of the Series A debentures.

9 In December 1991, Claude announced that it could not pay the interest due on the Series A, E, and F debentures and Muh-Min Lin and Hoi-Wah Wu commenced this action. The gravamen of the complaint is that Dutton and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging or misdirecting their funds.

II. Statutory Provisions

10 *Alberta Rules of Court*, Alta. Reg. 390/68

42 Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that

(a) it discloses no cause of action or defence, as the case may be, or

(b) it is scandalous, frivolous or vexatious, or

(c) it may prejudice, embarrass or delay the fair trial of the action, or

(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

(2) No evidence shall be admissible on an application under clause (a) of subrule (1).

(3) This Rule, so far as applicable, applies to an originating notice and a petition.

débentures de série F sont émises, la garantie pour cette série est regroupée avec la garantie qui a été engagée relativement aux débentures de séries A et E. Il semble qu'après l'émission des séries E et F, WCSC ait distribué aux investisseurs des lettres les en informant, comme elle l'avait fait après l'émission des débentures de série A.

En décembre 1991, CRI annonce qu'elle ne peut pas payer les intérêts échus pour les débentures de séries A, E et F et Muh-Min Lin et Hoi-Wah Wu intentent la présente action. Le fondement de la plainte est que Dutton et divers conseillers et sociétés apparentées de WCSC ont manqué à leurs obligations fiduciaires envers les investisseurs par leur mauvaise gestion et le mauvais placement de leurs fonds.

II. Dispositions législatives

Alberta Rules of Court, Alta. Reg. 390/68

[TRADUCTION]

42 Lorsque de nombreuses personnes ont un intérêt commun dans l'objet de l'action projetée, une ou plusieurs d'entre elles peuvent poursuivre, être poursuivies ou être autorisées par la cour à agir en défense au nom ou pour le compte de toutes.

129(1) À toute étape des procédures, la cour peut ordonner que soit radié ou modifié un acte de procédure dans une action pour le motif

a) qu'il ne révèle aucune cause d'action ou de défense, selon le cas,

b) qu'il est scandaleux, frivole ou vexatoire,

c) qu'il peut nuire à l'instruction équitable de l'action, ou encore la gêner ou la retarder,

d) qu'il constitue par ailleurs un abus de procédure

et elle peut ordonner la suspension ou le rejet de l'action ou rendre un jugement en conséquence.

(2) Aucune preuve n'est admissible à l'égard d'une demande présentée en vertu de l'alinéa (a) du paragraphe (1).

(3) La présente règle, dans la mesure où elle est applicable, s'applique à un avis introductif d'instance et à une requête.

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187 A person for whose benefit an action is prosecuted or defended or the assignor of a chose in action upon which the action is brought, shall be regarded as a party thereto for the purposes of discovery of documents.

201 A member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

III. Decisions

The appellants applied to the Court of Queen's Bench of Alberta (1996), 41 Alta. L.R. (3d) 412 for a declaration and order striking that portion of the Amended Statement of Claim in which the individual plaintiffs purport, pursuant to Rule 42 of the *Alberta Rules of Court*, to represent a class of 231 investors. The chambers judge identified four issues: (1) whether the court had the power under Rule 42 to strike the investors' claim to sue in a representative capacity; (2) whether the court was restricted to considering only the Amended Statement of Claim filed; (3) the standard of proof required to compel the court to exercise its discretion to strike the representative claim; and (4) whether, in this case, this standard was met.

On the first issue, the chambers judge relied on the decision of Master Funduk in *353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd.*, [1989] A.J. No. 652 (QL), to conclude that the court has the power, under Rule 42, to strike a claim made by plaintiffs to sue in a representative capacity.

On the second issue, the chambers judge held that the court need not limit its inquiry to the pleadings, relying on *353850 Alberta*, *supra*, and on the decision of the British Columbia Supreme Court in *Shaw v. Real Estate Board of Greater Vancouver* (1972), 29 D.L.R. (3d) 774. He concluded, however, that resolution of the case before him did not require resort to the affidavit evidence.

On the third issue, the chambers judge concluded that the court should strike a representative claim under Rule 42 only if it is "entirely clear" or

187 La personne pour le compte de qui une action est intentée ou contestée ou le cédant d'un droit d'action qui a donné lieu à l'action sont considérés comme partie à l'action aux fins de la communication de documents.

201 Le membre d'une entreprise qui est une partie et la personne pour le compte de qui une action est intentée ou contestée sont considérés comme partie à l'action aux fins de l'interrogatoire.

III. Décisions

Les appelants demandent à la Cour du Banc de la Reine de l'Alberta (1996), 41 Alta. L.R. (3d) 412, un jugement déclaratoire et une ordonnance radiant la partie de la déclaration modifiée dans laquelle les particuliers demandeurs disent représenter un groupe de 231 investisseurs, en vertu de la règle 42 des *Alberta Rules of Court*. Le juge en chambre formule quatre questions : (1) La cour a-t-elle le pouvoir en vertu de la règle 42 de radier la demande des investisseurs d'intenter une action en qualité de représentants? (2) La cour doit-elle tenir seulement compte de la déclaration modifiée? (3) Quelle est la norme de preuve exigée pour que la cour exerce son pouvoir discrétionnaire de radier la demande de recours collectif? (4) Cette norme est-elle respectée en l'espèce? 11

Sur la première question, le juge en chambre, citant la décision du protonotaire Funduk dans *353850 Alberta Ltd. c. Horne & Pitfield Foods Ltd.*, [1989] A.J. No. 652 (QL), juge que la règle 42 donne à la cour le pouvoir de radier une demande visant à intenter une action en qualité de représentant. 12

Sur la deuxième question, le juge en chambre conclut que la cour n'est pas tenue de limiter son examen aux actes de procédure, se fondant sur la décision *353850 Alberta*, précitée, et sur la décision de la Cour suprême de la Colombie-Britannique dans *Shaw c. Real Estate Board of Greater Vancouver* (1972), 29 D.L.R. (3d) 774. Il conclut toutefois que la résolution du litige dont il est saisi n'exige pas de recourir à la preuve par affidavit. 13

Sur la troisième question, le juge en chambre est d'avis que la cour ne devrait radier un recours collectif aux termes de la règle 42 que s'il est [TRA- 14

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"beyond doubt" or "plain and obvious" that the claim is deficient — the standard applied to applications to strike pleadings for disclosing no reasonable claim: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

15 On the final issue, the chambers judge, applying the "plain and obvious" rule, concluded that the Amended Statement of Claim was not deficient under Rule 42 and met the requirements set out in *Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337 (C.A.): (1) that the class be capable of clear and definite definition; (2) that the principal issues of law and fact be the same; (3) that one plaintiff's success would necessarily mean success for all members of the plaintiff class; and (4) that the resolution of the dispute not require any individual assessment of the claims of individual class members. However, he left the matter open to review by the trial judge.

16 The Alberta Court of Appeal, *per* Russell J.A. (for the majority), dismissed the appeal, Picard J.A., dissenting: (1998), 73 Alta. L.R. (3d) 227. The majority rejected the argument that the chambers judge should have conclusively resolved the Rule 42 issue rather than left it open to the trial judge, citing *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*, [1989] 2 S.C.R. 1069, in which this Court left to the trial judge the issue of whether the plaintiffs were authorized to sue on behalf of a broader class. The majority also rejected the argument that the investors must show individual reliance to succeed. However, it granted the defendants the right to discovery from each of the 231 plaintiffs on the grounds that Rule 201, read with Rule 187, allows discovery from any person for whose benefit an action is prosecuted or defended and that the defendants should not be barred from developing an argument based on actual reliance merely because it was speculative.

DUCTION] « tout à fait clair », « hors de tout doute » ou « évident et manifeste » que la demande est viciée — critère appliqué aux demandes de radiation d'actes de procédure ne révélant aucune demande raisonnable : *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959.

Sur la dernière question, le juge en chambre, appliquant le critère du caractère « évident et manifeste », conclut que la déclaration modifiée n'est pas viciée en regard de la règle 42 et satisfait aux exigences énoncées dans *Korte c. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337 (C.A.) : (1) le groupe peut être défini clairement et précisément; (2) les principales questions de droit et de fait doivent être les mêmes; (3) une issue favorable à un demandeur signifie nécessairement une issue favorable à tous les membres du groupe de demandeurs; et (4) le règlement du litige ne doit pas exiger l'examen individuel des revendications de chaque membre du groupe. Cependant, il laisse au juge de première instance le soin de réexaminer la question.

Le juge Russell au nom de la majorité de la Cour d'appel de l'Alberta rejette l'appel, le juge Picard étant dissidente : (1998), 73 Alta. L.R. (3d) 227. La majorité rejette l'argument selon lequel le juge en chambre aurait dû régler de façon définitive la question de la règle 42 plutôt que d'en laisser décider le juge de première instance, en citant l'arrêt *Bande indienne Oregon Jack Creek c. Compagnie des chemins de fer nationaux du Canada*, [1989] 2 R.C.S. 1069, dans lequel notre Cour a laissé le juge de première instance décider si les demandeurs étaient autorisés à poursuivre pour le compte d'un groupe plus important. La majorité rejette également l'argument selon lequel les investisseurs doivent faire la preuve d'un lien de confiance individuel pour obtenir gain de cause. Elle accorde toutefois aux défendeurs le droit à l'interrogatoire préalable de chacun des 231 demandeurs au motif que la règle 201, interprétée de concert avec la règle 187, autorise l'interrogatoire préalable de toute personne pour le compte de qui l'action est intentée ou contestée et qu'il ne devrait pas être interdit aux défendeurs d'élaborer un argument fondé sur le véritable lien de confiance simplement parce qu'il est spéculatif.

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Picard J.A., would have allowed the appeal. In her view, the Chambers judge erred in deferring the matter to the trial judge because, unlike *Oregon Jack Creek*, the case was narrow and "a great deal of relevant evidence was available to the court to allow it to make a decision" (p. 235). The need to show individual reliance was only one of many problems that the investors would face if allowed to proceed as a class. Citing this Court's decisions in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, she concluded that "[t]he extent of fiduciary duties in a particular case requires a meticulous examination of the facts, particularly of any contract between the parties" (p. 237). She concluded that "[t]his responsibility of proof by the [investors] cannot possibly be met by a representative action nor by giving a right of discovery of the 229 other parties to the action" (p. 237).

Le juge Picard aurait accueilli l'appel. À son avis, le juge en chambre a eu tort de renvoyer la question au juge de première instance parce que, contrairement à *Oregon Jack Creek*, l'affaire est limitée et que [TRADUCTION] « la cour disposait d'une preuve importante qui lui permettait de prendre une décision » (p. 235). Le besoin de faire la preuve d'un lien de confiance individuel est simplement l'un des nombreux problèmes auxquels les investisseurs auront à faire face s'ils sont autorisés à intenter un recours collectif. Citant les arrêts de notre Cour *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, et *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, elle conclut que [TRADUCTION] « [l']étendue de l'obligation fiduciaire dans une affaire donnée exige l'examen rigoureux des faits, en particulier de tout contrat entre les parties » (p. 237). Elle juge que [TRADUCTION] « [l]a responsabilité de la preuve incombant aux investisseurs ne peut pas être assumée par un recours collectif, ni par l'attribution d'un droit à l'interrogatoire préalable des 229 autres parties à l'action » (p. 237).

IV. Issues

1. Did the courts below apply the proper standard in determining whether the investors had satisfied the requirements for a class action under Rule 42?
2. Did the courts below err in denying defendants' motion to strike under Rule 42?
3. If the class action is allowed, should the defendants have the right to full oral and documentary discovery of all class members?

IV. Questions en litige

1. Les tribunaux d'instance inférieure ont-ils appliqué le bon critère pour décider si les investisseurs satisfaisaient aux exigences du recours collectif en vertu de la règle 42?
2. Les tribunaux d'instance inférieure ont-ils fait erreur en rejetant la requête en radiation en vertu de la règle 42?
3. Si le recours collectif est autorisé, les défendeurs devraient-ils avoir droit à l'interrogatoire préalable et à la communication des documents de tous les membres du groupe?

V. Analysis

A. *The History and Functions of Class Actions*

The class action originated in the English courts of equity in the late seventeenth and early eighteenth centuries. The courts of law focussed on individual questions between the plaintiff and the defendant. The courts of equity, by contrast, applied a rule of compulsory joinder, requiring all those interested in the subject matter of the dispute

V. Analyse

A. *L'historique et le rôle des recours collectifs*

Le recours collectif a pris naissance devant les tribunaux anglais d'equity à la fin du XVII^{e} siècle et au début du XVIII^{e}. Les cours de common law s'intéressaient principalement aux litiges individuels entre demandeurs et défendeurs. En revanche, les cours d'equity appliquaient la règle de la jonction obligatoire d'instances qui exigeait que

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to be made parties. The aim of the courts of equity was to render "complete justice" — that is, to "arrang[e] all the rights, which the decision immediately affects": F. Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (2nd ed. 1847), at p. 3; see also C. A. Wright, A. R. Miller and M. K. Kane, *Federal Practice and Procedure* (2nd ed. 1986), at § 1751; J. Story, *Equity Pleadings* (10th ed. 1892), at § 76*a*. The compulsory-joinder rule "allowed the Court to examine every facet of the dispute and thereby ensure that no one was adversely affected by its decision without first having had an opportunity to be heard": J. A. Kazanjian, "Class Actions in Canada" (1973), 11 *Osgoode Hall L.J.* 397, at p. 400. The rule possessed the additional advantage of preventing a multiplicity of duplicative proceedings.

toute personne ayant un intérêt dans l'affaire devienne partie au litige. Le but des cours d'equity était de rendre [TRADUCTION] « justice intégralement » — c'est-à-dire de « statuer sur tous les droits que la décision touche directement » : F. Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (2e éd. 1847), p. 3; voir également C. A. Wright, A. R. Miller et M. K. Kane, *Federal Practice and Procedure* (2e éd. 1986), par. 1751; J. Story, *Equity Pleadings* (10e éd. 1892), par. 76*a*. La règle de la jonction obligatoire d'instances [TRADUCTION] « permettait à la cour d'examiner tous les aspects du litige et donc de s'assurer que nul ne serait lésé par sa décision sans avoir eu la possibilité de se faire entendre » : J. A. Kazanjian, « Class Actions in Canada » (1973), 11 *Osgoode Hall L.J.* 397, p. 400. La règle avait également l'avantage d'éviter la multiplication des procédures.

20 The compulsory-joinder rule eventually proved inadequate. Applied to conflicts between tenants and manorial lords or between parsons and parishioners, it closed the door to the courts where interested parties in such cases were too numerous to be joined. The courts of equity responded by relaxing the compulsory-joinder rule where strict adherence would work injustice. The result was the representative action. For example, in *Chancey v. May* (1722), Prec. Ch. 592, 24 E.R. 265, members of a partnership were permitted to sue on behalf of themselves and some 800 other partners for misapplication and embezzlement of funds by the partnership's former treasurer and manager. The court allowed the action because "it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and so all the rest were in effect parties," and because "it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be made parties" (p. 265); see also Kazanjian, *supra*, at p. 401; G. T. Bispham, *The Principles of Equity* (9th ed. 1916), at para. 415; S. C. Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action" (1977), 77 *Colum. L. Rev.* 866, at pp. 867 and 872; J. K. Bankier, "Class Actions for Mone-

La règle de la jonction obligatoire d'instances s'est finalement avérée inadéquate. Appliquée aux conflits entre tenants et propriétaires terriens ou entre pasteurs et paroissiens, elle fermait la porte des tribunaux à des parties intéressées mais trop nombreuses pour être jointes. Les tribunaux d'equity ont réagi en assouplissant la règle de la jonction obligatoire d'instances lorsque son respect strict donnerait lieu à une injustice. Il en a résulté le recours collectif. Par exemple, dans *Chancey c. May* (1722), Prec. Ch. 592, 24 E.R. 265, des associés ont été autorisés à intenter une action en leur propre nom et au nom de 800 autres associés pour détournement de fonds par d'anciens trésoriers et gestionnaires de la société. La cour a autorisé l'action parce qu'[TRADUCTION] « elle était présentée en leur propre nom, et aux noms de tous les autres propriétaires de la même entreprise, sauf les défendeurs, et donc tous les autres étaient en réalité des parties », et parce qu'« il serait impossible qu'ils soient tous nommément parties, et il y aurait constamment des annulations pour cause de décès ou autres raisons, et que justice ne serait pas rendue si tous étaient parties à l'action » (p. 265); voir également Kazanjian, *loc. cit.*, p. 401; G. T. Bispham, *The Principles of Equity* (9e éd. 1916), par. 415; S. C. Yeazell, « Group Litigation and Social Context : Toward a History of the Class

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tary Relief in Canada: Formalism or Function?" (1984), 4 *Windsor Y.B. Access Just.* 229, at p. 236.

Action » (1977), 77 *Colum. L. Rev.* 866, p. 867 et 872; J. K. Bankier, « Les recours collectifs au Canada pour obtenir le dégrèvement financier : formalisme ou fonction? » (1984), 4 *Windsor Y.B. Access Just.* 229, p. 236.

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The representative or class action proved useful in pre-industrial English commercial litigation. The modern limited-liability company had yet to develop, and collectives of business people had no independent legal existence. Satisfying the compulsory-joinder rule would have required a complainant to bring before the court each member of the collective. The representative action provided the solution to this difficulty: see Kazanjian, *supra*, at p. 401; Yeazell, *supra*, at p. 867; *City of London v. Richmond* (1701), 2 Vern. 421, 23 E.R. 870 (allowing the plaintiff to sue trustees for rent owed, though the beneficiaries of the trust were not joined).

21 Le recours collectif s'est révélé utile dans les litiges commerciaux de l'Angleterre préindustrielle. La société à responsabilité limitée moderne n'existait pas, et les groupes de gens d'affaires n'avaient aucune existence juridique indépendante. Pour satisfaire à la règle de la jonction obligatoire d'instances, il aurait fallu qu'un plaignant traduise devant la cour chaque membre du groupe. Le recours collectif a réglé cette difficulté : voir Kazanjian, *loc. cit.*, p. 401; Yeazell, *loc. cit.*, p. 867; *City of London c. Richmond* (1701), 2 Vern. 421, 23 E.R. 870 (qui a autorisé le demandeur à intenter une action contre des fiduciaires pour des arriérés de loyer sans que les bénéficiaires de la fiducie soient joints comme parties à l'action).

The class action required a common interest between the class members. Many of the early representative actions were brought in the form of "bills of peace", which could be maintained where the interested individuals were numerous, all members of the group possessed a common interest in the question to be adjudicated, and the representatives could be expected fairly to advocate the interests of all members of the group: see Wright, Miller and Kane, *supra*, at § 1751; Z. Chafee, *Some Problems of Equity* (1950), at p. 201, T. A. Roberts, *The Principles of Equity* (3rd ed. 1877), at pp. 389-92; Bispham, *supra*, at para. 417.

22 Le recours collectif exigeait que les membres du groupe aient un intérêt commun. Une grande partie des premiers recours collectifs ont pris la forme d'« actes de conciliation » (*bills of peace*), qui pouvaient être exercés quand les particuliers intéressés étaient nombreux, quand tous les membres du groupe avaient un intérêt commun dans la question à trancher et quand les représentants pouvaient défendre équitablement les intérêts de tous les membres du groupe : voir Wright, Miller et Kane, *op. cit.*, par. 1751; Z. Chafee, *Some Problems of Equity* (1950), p. 201; T. A. Roberts, *The Principles of Equity* (3e éd. 1877), p. 389-392; Bispham, *op. cit.*, par. 417.

The courts of equity applied a liberal and flexible approach to whether a class action could proceed. They "continually sought a proper balance between the interests of fairness and efficiency": Kazanjian, *supra*, at p. 411. As stated in *Wallworth v. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238, at p. 244, "it [is] the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different cir-

23 Les tribunaux d'equity ont adopté une démarche libérale et souple pour décider si un recours collectif pouvait être exercé. Ils ont [TRADUCTION] « toujours recherché un bon équilibre entre équité et efficacité » : Kazanjian, *loc. cit.*, p. 411. Comme le dit *Wallworth c. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238, p. 244, [TRADUCTION] « la cour a le devoir d'adapter sa pratique et sa procédure à l'état actuel de la société, et non pas, en raison d'un respect trop strict de règles et formalités, adoptées

cumstances, to decline to administer justice, and to enforce rights for which there is no other remedy".

dans d'autres circonstances, de refuser de rendre justice, et d'appliquer des droits pour lesquels il n'existe pas d'autres recours ».

24 This flexible and generous approach to class actions prevailed until the fusion of law and equity under the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, and the adoption of Rule 10 of the *Rules of Procedure*:

La démarche souple et libérale envers les recours collectifs a régné jusqu'à la fusion de la common law et de l'equity par la *Supreme Court of Judicature Act, 1873* (R.-U.), 36 & 37 Vict., ch. 66, et l'adoption de la règle 10 des *Rules of Procedure* :

[TRADUCTION]

10. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

10. Lorsque de nombreuses parties ont le même intérêt dans une action, l'une ou plusieurs de ces parties peuvent poursuivre ou être poursuivies en justice, ou peuvent être autorisées par la cour à contester une telle action au nom ou pour le compte de toutes les parties ayant cet intérêt.

While early cases under the new rules maintained a liberal approach to class actions (see, e.g., *Duke of Bedford v. Ellis*, [1901] A.C. 1 (H.L.); *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (H.L.)), later cases sometimes took a restrictive approach (see, e.g., *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021 (C.A.)). This, combined with the widespread use of limited-liability companies, resulted in fewer class actions being brought.

Quoique les premières décisions après l'adoption des nouvelles règles aient maintenu cette démarche libérale envers les recours collectifs (voir, par ex., *Duke of Bedford c. Ellis*, [1901] A.C. 1 (H.L.); *Taff Vale Railway Co. c. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (H.L.)), des décisions postérieures ont parfois suivi une démarche restrictive (voir, par ex., *Markt & Co. c. Knight Steamship Co.*, [1910] 2 K.B. 1021 (C.A.)). Ce fait ajouté à l'usage répandu de la société à responsabilité limitée a eu pour conséquence de faire diminuer le nombre de recours collectifs.

25 The class action did not forever languish, however. Conditions emerged in the latter part of the twentieth century that once again invoked its utility. Mass production and consumption revived the problem that had motivated the development of the class action in the eighteenth century — the problem of many suitors with the same grievance. As in the eighteenth century, insistence on individual representation would often have precluded effective litigation. And, as in the eighteenth century, the class action provided the solution.

Le recours collectif n'a toutefois pas été oublié pour toujours. De nouvelles conditions apparues dans la deuxième moitié du XX^{e} siècle ont une nouvelle fois prouvé son utilité. La production et la consommation de masse ont ravivé le problème qui avait motivé la création du recours collectif au XVIII^{e} siècle — le problème de nombreux poursuivants ayant la même réclamation. Comme au XVIII^{e} siècle, l'exigence d'une représentation individuelle aurait souvent fait obstacle à des poursuites. Et, comme au XVIII^{e} siècle, le recours collectif a fourni la solution.

26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its

Le recours collectif joue un rôle important dans le monde d'aujourd'hui. La montée de la production de masse, la diversification de la propriété commerciale, la venue des conglomérats, et la prise de conscience des fautes environnementales

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growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated *vis-à-vis* the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

ont tous contribué à sa croissance. Un produit défectueux peut être vendu à de nombreux consommateurs. Une mauvaise gestion de société peut occasionner des pertes à d'innombrables actionnaires. Des politiques discriminatoires peuvent toucher des catégories entières d'employés. La pollution peut affecter des citoyens à travers tout le pays. Des conflits comme ceux-ci opposent un important groupe de plaignants à l'auteur présumé du méfait. Il arrive que des plaignants se trouvent dans une situation identique par rapport aux défendeurs. Dans d'autres cas, un aspect important de leur revendication est commun à toutes les plaintes. Le recours collectif fournit un moyen de résoudre efficacement de tels litiges d'une manière équitable pour toutes les parties.

Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W. K. Branch, *Class Actions in Canada* (1998), at para. 3.30; M. A. Eizenga, M. J. Peerless and C. M. Wright, *Class Actions Law and Practice* (1999), at §1.6; Bankier, *supra*, at pp. 230-31; Ontario Law Reform Commission, *Report on Class Actions* (1982), at pp. 118-19.

27 Les recours collectifs procurent trois avantages importants sur une multiplicité de poursuites individuelles. Premièrement, par le regroupement d'actions individuelles semblables, les recours collectifs permettent de faire des économies au plan judiciaire en évitant la duplication inutile de l'appréciation des faits et de l'analyse du droit. Les gains en efficacité ainsi réalisés libèrent des ressources judiciaires qui peuvent être affectées à la résolution d'autres conflits, et peuvent également réduire le coût du litige à la fois pour les demandeurs (qui peuvent partager les frais) et pour les défendeurs (qui contestent les poursuites une seule fois) : voir W. K. Branch, *Class Actions in Canada* (1998), par. 3.30; M. A. Eizenga, M. J. Peerless et C. M. Wright, *Class Actions Law and Practice* (1999), par. 1.6; Bankier, *loc. cit.*, p. 230-231; Commission de réforme du droit de l'Ontario, *Report on Class Actions* (1982), p. 118-119.

Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, *supra*, at para. 3.40; Eizenga, Peerless and Wright, *supra*, at §1.7;

28 Deuxièmement, comme les frais fixes peuvent être divisés entre un grand nombre de demandeurs, les recours collectifs donnent un meilleur accès à la justice en rendant économiques des poursuites qui auraient été trop coûteuses pour être intentées individuellement. Sans les recours collectifs, la justice n'est pas accessible à certains demandeurs, même pour des réclamations solidement fondées. Le partage des frais permet de ne pas laisser certains préjudices sans recours : voir Branch, *op. cit.*,

Bankier, *supra*, at pp. 231-32; Ontario Law Reform Commission, *supra*, at pp. 119-22.

29 Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law — The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 *Harv. L. Rev.* 1806, at pp. 1809-10; see Branch, *supra*, at para. 3.50; Eizenga, Peerless and Wright, *supra*, at §1.8; Bankier, *supra*, at p. 232; Ontario Law Reform Commission, *supra*, at pp. 11 and 140-46.

B. *The Test for Class Actions*

30 In recognition of the modern importance of representative litigation, many jurisdictions have enacted comprehensive class action legislation. In the United States, *Federal Rules of Civil Procedure*, 28 U.S.C.A. § 23 (introduced in 1938 and substantially amended in 1966) addressed aspects of class action practice, including certification of litigant classes, notice, and settlement. The English procedural rules of 1999 include detailed provisions governing "Group Litigation": United Kingdom, *Civil Procedure Rules 1998*, SI 1998/3132, rr. 19.10-19.15. And in Canada, the provinces of British Columbia, Ontario, and Quebec have enacted comprehensive statutory schemes to govern class action practice: see British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50; Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6; Quebec *Code of Civil Procedure*, R.S.Q., c. C-25, Book IX. Yet other Canadian provinces, including Alberta and Manitoba, are considering enacting

par. 3.40; Eizenga, Peerless et Wright, *op. cit.*, par. 1.7; Bankier, *loc. cit.*, p. 231-232; Commission de réforme du droit de l'Ontario, *op. cit.*, p. 119-122.

Troisièmement, les recours collectifs servent l'efficacité et la justice en empêchant des malfaisants éventuels de méconnaître leurs obligations envers le public. Sans recours collectifs, des personnes qui causent des préjudices individuels mineurs mais répandus pourraient négliger le coût total de leur conduite, sachant que, pour un demandeur, les frais d'une poursuite dépasseraient largement la réparation probable. Le partage des frais diminue le coût des recours en justice et dissuade donc les défendeurs éventuels qui pourraient autrement présumer que de petits méfaits ne donneraient pas lieu à un litige : voir « Developments in the Law — The Paths of Civil Litigation : IV. Class Action Reform : An Assessment of Recent Judicial Decisions and Legislative Initiatives » (2000), 113 *Harv. L. Rev.* 1806, p. 1809-1810; voir Branch, *op. cit.*, par. 3.50; Eizenga, Peerless et Wright, *op. cit.*, par. 1.8; Bankier, *loc. cit.*, p. 232; Commission de réforme du droit de l'Ontario, *op. cit.*, p. 11 et 140-146.

B. *Le critère applicable aux recours collectifs*

En reconnaissance de l'importance moderne du recours collectif, nombre d'autorités législatives ont adopté une législation complète en cette matière. Aux États-Unis, la *Federal Rules of Civil Procedure*, 28 U.S.C.A. § 23 (adoptée en 1938 et modifiée de façon importante en 1966), porte sur des aspects de la pratique du recours collectif, y compris l'accréditation des groupes, les avis et les règlements. Les règles de procédure anglaises de 1999 contiennent des dispositions détaillées régissant les litiges de groupe : Royaume-Uni, *Civil Procedure Rules 1998*, SI 1998/3132, règles 19.10-19.15. Au Canada, les provinces du Québec, de l'Ontario et de la Colombie-Britannique ont adopté des régimes législatifs complets sur la pratique du recours collectif : voir pour le Québec, *Code de procédure civile*, L.R.Q., ch. C-25, livre IX; pour l'Ontario, *Loi de 1992 sur les recours collectifs*, L.O. 1992, ch. 6; pour la Colombie-Britannique, *Class Proceedings Act*, R.S.B.C. 1996, ch. 50.

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such legislation: see Manitoba Law Reform Commission, Report #100, *Class Proceedings* (January 1999); Alberta Law Reform Institute, Final Report No. 85, *Class Actions* (December 2000); see also R. Rogers, "A Uniform Class Actions Statute", Appendix O to the Proceedings of the 1995 Meeting of The Uniform Law Conference of Canada.

D'autres provinces canadiennes, dont l'Alberta et le Manitoba, envisagent le même type de lois : voir Commission de réforme du droit du Manitoba, Rapport #100, *Class Proceedings* (janvier 1999); Alberta Law Reform Institute, Final Report No. 85, *Class Actions* (décembre 2000); voir aussi R. Rogers, « Vers une loi uniforme sur le recours collectif », Annexe O du Compte-rendu de la réunion de 1995 de la Conférence pour l'harmonisation des lois au Canada.

Absent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English *Supreme Court of Judicature Act, 1873* govern. This is the case in Alberta, where class action practice is governed by Rule 42 of the *Alberta Rules of Court*:

31 En l'absence de règles de procédure complètes en matière de recours collectif, les règles provinciales fondées sur la règle 10 (annexe) de la *Supreme Court of Judicature Act, 1873* s'appliquent. C'est le cas en Alberta, où la procédure en matière de recours collectif est régie par la règle 42 des *Alberta Rules of Court* :

42 Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

[TRADUCTION]

42 Lorsque de nombreuses personnes ont un intérêt commun dans l'objet de l'action projetée, une ou plusieurs d'entre elles peuvent poursuivre, être poursuivies ou être autorisées par la cour à agir en défense au nom ou pour le compte de toutes.

The intention of the Alberta legislature is clear. Class actions may be brought. Details of class action practice, however, are largely left to the courts.

L'intention du législateur albertain est claire. On peut intenter des recours collectifs mais les modalités de leur exercice sont en grande partie déterminées par les tribunaux.

Alberta's Rule 42 does not specify what is meant by "numerous" or by "common interest". It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit should be conveyed to potential class members, or how a court should deal with the possibility that some potential class members may desire to "opt out" of the class. And it does not provide for costs, or for the distribution of the fund should an action for money damages be successful.

32 La règle 42 de l'Alberta ne précise pas ce qu'on entend par « nombreuses » ni par « intérêt commun ». Elle n'indique pas quand les membres du groupe autres que les représentants peuvent subir un interrogatoire préalable. Elle ne précise pas non plus comment les membres éventuels du groupe sont avisés de l'action ni comment un tribunal devrait réagir à la possibilité que certains membres éventuels du groupe choisissent de s'en exclure. Elle ne prévoit pas non plus les frais ni la répartition des montants accordés en dommages-intérêts s'ils ont gain de cause.

Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies

33 Il serait clairement préférable de disposer d'un cadre législatif sur ces questions. En l'absence de législation complète, les tribunaux sont contraints de s'en remettre en grande partie à la gestion de dossiers judiciaires individuels pour structurer le recours collectif, ce qui est coûteux en termes de

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the parties *ex ante* certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario, and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify *ex post*, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.

ressources judiciaires et ce qui prive les parties de toute certitude avant l'instance quant à leurs droits procéduraux. L'une des plus importantes lacunes du régime albertain actuel est l'absence de disposition d'accréditation préalable. En Colombie-Britannique, en Ontario et au Québec, un recours collectif ne peut être intenté que si le tribunal certifie que le groupe et le représentant satisfont à certaines exigences. En Alberta, par contre, les tribunaux certifient en réalité a posteriori, et seulement après que la partie adverse dépose une requête en annulation. Il serait préférable que l'opportunité d'un recours collectif puisse être déterminée dès le début par des modalités d'accréditation.

34 Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them: *Bell v. Wood*, [1927] 1 W.W.R. 580 (B.C.S.C.), at pp. 581-82; *Langley v. North West Water Authority*, [1991] 3 All E.R. 610 (C.A.), leave denied [1991] 1 W.L.R. 711n (H.L.); *Newfoundland Association of Public Employees v. Newfoundland* (1995), 132 Nfld. & P.E.I.R. 205 (Nfld. S.C.T.D.); W. A. Stevenson and J. E. Côté, *Civil Procedure Guide, 1996*, at p. 4. However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

En l'absence de législation complète, les tribunaux doivent combler ces lacunes en exerçant leur pouvoir inhérent d'établir les règles de pratique et de procédure applicables aux litiges dont ils sont saisis : *Bell c. Wood*, [1927] 1 W.W.R. 580 (C.S.C.-B.), p. 581-582; *Langley c. North West Water Authority*, [1991] 3 All E.R. 610 (C.A.), autorisation d'appel rejetée [1991] 1 W.L.R. 711n (H.L.); *Newfoundland Association of Public Employees c. Newfoundland* (1995), 132 Nfld. & P.E.I.R. 205 (C.S. 1ère inst. T.N.) W. A. Stevenson et J. E. Côté, *Civil Procedure Guide, 1996*, p. 4. Si souhaitable soit-il d'avoir une législation complète en matière d'exercice des recours collectifs, quand cette législation n'existe pas, les tribunaux doivent décider de l'opportunité du recours collectif et des modalités de son exercice.

35 Alberta courts moved to fill the procedural vacuum in *Korte*, *supra*. *Korte* prescribed four conditions for a class action: (1) the class must be capable of clear and definite definition; (2) the principal issues of fact and law must be the same; (3) success for one of the plaintiffs must mean success for all; and (4) no individual assessment of the claims of individual plaintiffs need be made.

Les tribunaux albertains ont entrepris de parer aux lacunes procédurales dans l'arrêt *Korte*, précité, qui prescrit quatre conditions d'exercice du recours collectif : (1) le groupe peut être défini clairement et précisément; (2) les principales questions de fait et de droit doivent être les mêmes; (3) une issue favorable à un demandeur signifie nécessairement une issue favorable à tous; et (4) il n'est pas nécessaire d'examiner individuellement les revendications de chaque demandeur.

36 The *Korte* criteria loosely parallel the criteria applied in other Canadian jurisdictions in which comprehensive class-action legislation has yet to be enacted: see, e.g., *Ranjoy Sales and Leasing Ltd. v. Deloitte, Haskins and Sells*, [1984]

Les critères de l'arrêt *Korte* sont, dans les grandes lignes, assez similaires à ceux qui sont appliqués dans d'autres ressorts canadiens ne disposant pas de législation complète sur les recours collectifs : voir, par ex., *Ranjoy Sales and Leasing*

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4 W.W.R. 706 (Man. Q.B.); *International Capital Corp. v. Schafer* (1995), 130 Sask. R. 23 (Q.B.); *Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée* (1988), 86 N.B.R. (2d) 342 (Q.B.); *Lee v. OCCO Developments Ltd.* (1994), 148 N.B.R. (2d) 321 (Q.B.); *Van Audenhove v. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294 (S.C.), at para. 7; *Horne v. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R. 109 (P.E.I.S.C.), at para. 24.

Ltd. c. Deloitte, Haskins and Sells, [1984] 4 W.W.R. 706 (B.R. Man.); *International Capital Corp. c. Schafer* (1995), 130 Sask. R. 23 (B.R.); *Guarantee Co. of North America c. Caisse populaire de Shippagan Ltée* (1988), 86 R.N.-B. (2e) 342 (B.R.); *Lee c. OCCO Developments Ltd.* (1994), 148 R.N.-B. (2e) 321 (B.R.); *Van Audenhove c. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294 (C.S.), par. 7; *Horne c. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R.109 (C.S.Î.-P.-É), par. 24.

The *Korte* criteria also bear resemblance to the class-certification criteria in the British Columbia, Ontario, and Quebec class action statutes. Under the British Columbia and Ontario statutes, an action will be certified as a class proceeding if (1) the pleadings or the notice of application disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the class representative; (3) the claims or defences of the class members raise common issues (in British Columbia, "whether or not those common issues predominate over issues affecting only individual members"); (4) a class proceeding would be the preferable procedure for the resolution of common issues; and (5) the class representative would fairly represent the interests of the class, has advanced a workable method of advancing the proceeding and notifying class members, and does not have, on the common issues for the class, an interest in conflict with other class members: see Ontario *Class Proceedings Act, 1992*, s. 5(1); British Columbia *Class Proceedings Act*, s. 4(1). Under the Quebec statute, an action will be certified as a class proceeding if (1) the recourses of the class members raise identical, similar, or related questions of law or fact; (2) the alleged facts appear to warrant the conclusions sought; (3) the composition of the group makes joinder impracticable; and (4) the representative is in a position to adequately represent the interests of the class members: see Quebec *Code of Civil Procedure*, art. 1003.

37

Les critères de l'arrêt *Korte* ressemblent également aux critères d'accréditation de groupes prévus dans les lois sur les recours collectifs de la Colombie-Britannique, de l'Ontario et du Québec. Aux termes des lois de la Colombie-Britannique et de l'Ontario, une action sera certifiée comme un recours collectif si (1) les actes de procédure ou l'avis de requête révèlent une cause d'action; (2) il existe un groupe identifiable d'au moins deux personnes qui seraient représentées par le représentant du groupe; (3) les demandes ou les défenses des membres du groupe soulèvent des questions communes (en Colombie-Britannique, [TRADUCTION] « que ces questions communes l'emportent ou non sur des questions touchant seulement certains membres du groupe »; (4) le recours collectif est le meilleur moyen de régler les questions communes; et (5) le représentant du groupe représente équitablement les intérêts du groupe, présente une méthode efficace de faire avancer l'instance et d'aviser les membres du groupe, et n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les questions communes : voir pour l'Ontario, *Loi de 1992 sur les recours collectifs*, par. 5(1), et pour la Colombie-Britannique, *Class Proceedings Act*, par. 4(1). Au Québec, l'exercice d'un recours collectif est autorisé si (1) les recours des membres du groupe soulèvent des questions de droit ou de fait identiques, similaires ou connexes; (2) les faits allégués paraissent justifier les conclusions recherchées; (3) la composition du groupe rend peu pratique la jonction des parties; et (4) le représentant est en mesure d'assurer une représentation adéquate des intérêts des membres du groupe : voir *Code de procédure civile*, art. 1003.

38 While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.

Bien qu'il existe des différences entre les critères, il se dégage quatre conditions nécessaires au recours collectif. Premièrement, le groupe doit pouvoir être clairement défini. La définition du groupe est essentielle parce qu'elle précise qui a droit aux avis, qui a droit à la réparation (si une réparation est accordée), et qui est lié par le jugement. Il est donc primordial que le groupe puisse être clairement défini au début du litige. La définition devrait énoncer des critères objectifs permettant d'identifier les membres du groupe. Les critères devraient avoir un rapport rationnel avec les revendications communes à tous les membres du groupe mais ne devraient pas dépendre de l'issue du litige. Il n'est pas nécessaire que tous les membres du groupe soient nommés ou connus. Il est toutefois nécessaire que l'appartenance d'une personne au groupe puisse être déterminée sur des critères explicites et objectifs : voir Branch, *op. cit.*, par. 4.190-4.207; Friedenthal, Kane et Miller, *Civil Procedure* (2e éd. 1993), p. 726-727; *Bywater c. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (C. Ont. (Div. gén.)), par. 10-11.

39 Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of

Deuxièmement, il faut des questions de fait ou de droit communes à tous les membres du groupe. Les critères de communauté ont toujours été une source de confusion pour les tribunaux. Il faut aborder le sujet de la communauté en fonction de l'objet. La question sous-jacente est de savoir si le fait d'autoriser le recours collectif permettra d'éviter la répétition de l'appréciation des faits ou de l'analyse juridique. Une question ne sera donc « commune » que lorsque sa résolution est nécessaire pour le règlement des demandes de chaque membre du groupe. Il n'est pas essentiel que les membres du groupe soient dans une situation identique par rapport à la partie adverse. Il n'est pas nécessaire non plus que les questions communes prédominent sur les questions non communes ni que leur résolution règle les demandes de chaque membre du groupe. Les demandes des membres du groupe doivent toutefois partager un élément commun important afin de justifier le recours collectif. Pour décider si des questions communes motivent un recours collectif, le tribunal peut avoir à évaluer l'importance des questions communes par rapport

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each class member with the same particularity as would be required in an individual suit.

aux questions individuelles. Dans ce cas, le tribunal doit se rappeler qu'il n'est pas toujours possible pour le représentant de plaider les demandes de chaque membre du groupe avec un degré de spécificité équivalant à ce qui est exigé dans une poursuite individuelle.

Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

40 Troisièmement, en ce qui concerne les questions communes, le succès d'un membre du groupe signifie nécessairement le succès de tous. Tous les membres du groupe doivent profiter du succès de l'action, quoique pas nécessairement dans la même mesure. Le recours collectif ne doit pas être autorisé quand des membres du groupe sont en conflit d'intérêts.

Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, *supra*, at paras. 4.210-4.490; Friedenthal, Kane and Miller, *supra*, at pp. 729-32.

41 Quatrièmement, le représentant du groupe doit adéquatement représenter le groupe. Quand le tribunal évalue si le représentant proposé est adéquat, il peut tenir compte de sa motivation, de la compétence de son avocat et de sa capacité d'assumer les frais qu'il peut avoir à engager personnellement (par opposition à son avocat ou aux membres du groupe en général). Il n'est pas nécessaire que le représentant proposé soit un modèle type du groupe, ni qu'il soit le meilleur représentant possible. Le tribunal devrait toutefois être convaincu que le représentant proposé défendra avec vigueur et compétence les intérêts du groupe : voir Branch, *op. cit.*, par. 4.210-4.490; Friedenthal, Kane et Miller, *op. cit.*, p. 729-732.

While the four factors outlined must be met for a class action to proceed, their satisfaction does not mean that the court must allow the action to proceed. Other factors may weigh against allowing the action to proceed in representative form. The defendant may wish to raise different defences with respect to different groups of plaintiffs. It may be necessary to examine each class member in discovery. Class members may raise important issues not shared by all members of the class. Or the proposed class may be so small that joinder would be a better solution. Where such countervailing factors exist, the court has discretion to decide whether the class action should be permitted to proceed, notwithstanding that the essential condi-

42 Même si les quatre facteurs mentionnés doivent être présents pour autoriser un recours collectif, le fait qu'ils le soient ne signifie pas que le tribunal doit l'autoriser. D'autres facteurs peuvent militer contre l'autorisation de poursuivre par recours collectif. Le défendeur peut souhaiter soulever différentes défenses relativement à différents groupes de demandeurs. Il peut s'avérer nécessaire d'interroger au préalable chaque membre du groupe. Certains membres peuvent soulever des questions importantes qui ne sont pas partagées par tous les membres du groupe. Ou le groupe proposé peut être si petit que la jonction serait une meilleure solution. Lorsqu'il existe de tels facteurs défavorables, le tribunal a le pouvoir discrétionnaire de

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tions for the maintenance of a class action have been satisfied.

43 The class action codes that have been adopted by British Columbia and Ontario offer some guidance as to factors that would generally not constitute arguments against allowing an action to proceed as a representative one. Both state that certification should not be denied on the grounds that: (1) the relief claimed includes a demand for money damages that would require individual assessment after determination of the common issues; (2) the relief claimed relates to separate contracts involving different members of the class; (3) different class members seek different remedies; (4) the number of class members or the identity of every class member is unknown; or (5) the class includes subgroups that have claims or defences that raise common issues not shared by all members of the class: see Ontario *Class Proceedings Act, 1992*, s. 6; British Columbia *Class Proceedings Act*, s. 7; see also Alberta Law Reform Institute, *supra*, at pp. 75-76. Common sense suggests that these factors should no more bar a class action suit in Alberta than in Ontario or British Columbia.

44 Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

45 The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious", as the Chambers judge held. Unlike Rule 129, which is directed at the question of whether the claim should be prose-

décider si le recours collectif devrait être autorisé, malgré le fait que les conditions essentielles à l'exercice du recours collectif sont remplies.

Les règles en matière de recours collectifs qui ont été adoptées par la Colombie-Britannique et par l'Ontario peuvent aider à déterminer les facteurs qui en général ne constitueraient pas des arguments défavorables à l'autorisation d'un recours collectif. Les deux régimes prévoient que l'autorisation ne devrait pas être refusée parce que, selon le cas, (1) la réparation demandée comporte une demande de dommages-intérêts qui exigerait une évaluation individuelle après le règlement des questions communes; (2) la réparation demandée porte sur des contrats distincts concernant différents membres du groupe; (3) différents membres du groupe cherchent à obtenir des réparations différentes; (4) le nombre de membres du groupe ou l'identité de chacun d'eux ne sont pas connus; (5) le groupe comprend des sous-groupes qui ont des demandes ou des défenses qui soulèvent des questions communes que ne partagent pas tous les membres du groupe : voir pour l'Ontario, *Loi de 1992 sur les recours collectifs*, art. 6; pour la Colombie-Britannique, *Class Proceedings Act*, art. 7; voir également Alberta Law Reform Institute, *op. cit.*, p. 75-76. Le bon sens recommande que ces facteurs ne fassent pas plus obstacle à un recours collectif en Alberta qu'en Ontario ou en Colombie-Britannique.

Quand les conditions nécessaires à un recours collectif sont remplies, le tribunal devrait exercer son pouvoir discrétionnaire de l'interdire pour des raisons défavorables de manière libérale et souple, comme les anciens tribunaux d'equity. Le tribunal devrait prendre en considération les avantages que le recours collectif offre dans les circonstances de l'affaire ainsi que des injustices qu'il peut provoquer. En fin de compte, le tribunal doit concilier efficacité et équité.

La nécessité de concilier efficacité et équité dément l'idée exprimée par le juge en chambre qu'un recours collectif ne devrait être radié que lorsque le vice est « évident et manifeste ». Contrairement à la règle 129, qui pose la question de savoir s'il y a lieu de poursuivre l'action, la règle

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cuted at all, Rule 42 is directed at the question of how the claim should be prosecuted. The "plain and obvious" standard is appropriate where the result of striking is to forever end the action. It recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success": *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094 (C.A.), at p. 1102 (quoted in *Hunt*, *supra*, at pp. 974-75). Denial of class status under Rule 42, by contrast, does not defeat the claim. It merely places the plaintiffs in the position of any litigant who comes before the court in his or her individual capacity. Moreover, nothing in Alberta's rules suggests that class actions should be disallowed only where it is plain and obvious that the action should not proceed as a representative one. Rule 42 and the analogous rules in other provinces merely state that a representative may maintain a class action if certain conditions are met.

42 pose la question de savoir comment la poursuivre. Le critère du caractère « évident et manifeste » est correct quand la radiation entraîne la fin permanente de l'action. Il exprime l'idée qu'un demandeur [TRADUCTION] « ne devrait pas être 'privé d'un jugement' à cette toute première étape à moins qu'il ne soit très clair que la cause d'action qu'il invoque n'a aucune chance de succès » : *Drummond-Jackson c. British Medical Association*, [1970] 1 All E.R. 1094 (C.A.), p. 1102 (cité dans *Hunt*, précité, p. 975). Le refus d'un recours collectif en vertu de la règle 42, à l'opposé, ne met pas fin à la demande. Il place seulement les demandeurs dans la situation de toute autre partie qui se présente devant le tribunal à titre individuel. En outre, rien dans les règles de l'Alberta n'indique que les recours collectifs ne devraient être refusés que lorsqu'il est évident et manifeste que l'action ne devrait pas être intentée comme un recours collectif. La règle 42 et les règles analogues dans d'autres provinces ne font qu'énoncer qu'un représentant peut exercer un recours collectif si certaines conditions sont remplies.

The need to strike a balance between efficiency and fairness also belies the suggestion that class actions should be approached restrictively. The defendants argue that *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, precludes a generous approach to class actions. I respectfully disagree. First, when *Naken* was decided, the modern class action was very much an untested procedure in Canada. In the intervening years, the importance of the class action as a procedural tool in modern litigation has become manifest. Indeed, the reform that has been effected since *Naken* has been motivated in large part by the recognition of the benefits that class actions can offer the parties, the court system, and society: see, e.g., Ontario Law Reform Commission, *supra*, at pp. 3-4.

46 La nécessité de concilier efficacité et équité dément aussi l'idée que les recours collectifs devraient être abordés de façon restrictive. Les défendeurs soutiennent que l'arrêt *General Motors of Canada Ltd. c. Naken*, [1983] 1 R.C.S. 72, empêche d'aborder de manière libérale les recours collectifs. Avec égards, je ne suis pas d'accord. Premièrement, à l'époque de l'arrêt *Naken*, le recours collectif moderne n'était pas une procédure bien établie au Canada. Depuis lors, l'importance du recours collectif comme instrument de procédure dans les litiges modernes est devenue évidente. En fait, la réforme mise en œuvre depuis *Naken* est attribuable pour une large part à la reconnaissance des avantages que les recours collectifs offrent aux parties, à l'organisation judiciaire et à la société : voir, par ex., Commission de réforme du droit de l'Ontario, *op. cit.*, p. 3-4.

Second, *Naken* on its facts invited caution. The action was brought on behalf of all persons who purchased new 1971 or 1972 Firenza motor vehicles in Ontario. The complaint was that General

47 Deuxièmement, les faits de l'arrêt *Naken* invitent à la prudence. L'action était intentée pour le compte de toutes les personnes qui avaient acheté une voiture neuve de marque Firenza, modèle 1971

Motors had misrepresented the quality of the vehicles and that the vehicles "were not reasonably fit for use" (p. 76). The statement of claim alleged breach of warranty and breach of representation, and sought $1,000 in damages for each of approximately 4,600 plaintiffs. Estey J., writing for a unanimous Court, disallowed the class action. While each plaintiff raised the same claims against the defendant, the resolution of those claims would have required particularized evidence and fact-finding at both the liability and damages stages of the litigation. Far from avoiding needless duplication, a class action would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims.

ou 1972, en Ontario. La plainte disait que General Motors avait présenté de manière inexacte la qualité des voitures et que les voitures [TRADUCTION] « n'étaient pas raisonnablement propres à être utilisé[es] » (p. 76). La déclaration alléguait l'inobservation de la garantie et de la représentation, et sollicitait 1 000 $ en dommages-intérêts pour chacun des quelque 4 600 demandeurs. Le juge Estey, auteur des motifs unanimes de la Cour, a rejeté le recours collectif. Même si tous les défendeurs avaient les mêmes demandes contre le défendeur, le règlement de ces demandes aurait exigé la présentation d'une preuve et une appréciation des faits individualisées pour établir tant la responsabilité que les dommages-intérêts. Loin d'éviter une duplication inutile, un recours collectif aurait inutilement compliqué le règlement de ce qui s'élevait à 4 600 demandes individuelles.

48 To summarize, class actions should be allowed to proceed under Alberta's Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of fact or law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed.

En résumé, les recours collectifs devraient être autorisés aux termes de la règle 42 de l'Alberta lorsque les conditions suivantes sont remplies : (1) le groupe peut être défini clairement; (2) des questions de droit ou de fait sont communes à tous les membres du groupe; (3) le succès d'un membre du groupe signifie le succès de tous; et (4) le représentant proposé représente adéquatement les intérêts du groupe. Si ces conditions sont remplies, le tribunal doit également être convaincu, dans l'exercice de son pouvoir discrétionnaire, qu'il n'existe pas de considérations défavorables qui l'emportent sur les avantages que comporte l'autorisation d'un recours collectif.

49 Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

D'autres questions de procédure peuvent se poser. L'une d'elles concerne l'avis. Un jugement ne lie un membre du groupe que s'il a été avisé de la poursuite et a eu la possibilité de s'exclure de la procédure. En l'espèce, la question de savoir ce qui constitue un avis suffisant ne se pose pas. La prudence recommande cependant que tous les participants possibles soient informés de l'existence de la poursuite, des questions communes que la poursuite cherche à résoudre ainsi que du droit de chaque membre du groupe de se retirer, et ce avant que ne soit rendue une décision pouvant avoir une incidence, défavorable ou non, sur les intérêts des membres du groupe.

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Another procedural issue that may arise is how to deal with non-common issues. The court retains discretion to determine how the individual issues should be addressed, once common issues have been resolved: see Branch, *supra*, at para. 18.10. Generally, individual issues will be resolved in individual proceedings. However, as under the legislation of British Columbia, Ontario, and Quebec, a court may specify special procedures that it considers necessary or useful: see Ontario *Class Proceedings Act, 1992*, s. 25; British Columbia *Class Proceedings Act*, s. 27; Quebec *Code of Civil Procedure*, art. 1039.

50 Une autre question de procédure pouvant se poser est la manière d'envisager les questions autres que les questions communes. Le tribunal conserve le pouvoir discrétionnaire de déterminer comment les questions individuelles devraient être abordées, une fois que les questions communes ont été résolues : voir Branch, *op. cit.*, par. 18.10. Les questions individuelles seront généralement tranchées dans des instances individuelles. Toutefois, comme sous le régime des lois de la Colombie-Britannique, de l'Ontario et du Québec, un tribunal peut préciser une procédure spéciale s'il le juge nécessaire ou utile : voir en Ontario, *Loi de 1992 sur les recours collectifs*, art. 25; en Colombie-Britannique, *Class Proceedings Act*, art. 27; au Québec, *Code de procédure civile*, art. 1039.

The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

51 La variété des recours collectifs fait qu'il est difficile de prévoir toutes les complications procédurales qui peuvent surgir. Sans législation complète en matière de recours collectif, les tribunaux doivent régler les complications procédurales cas par cas. Ils doivent aborder ces problèmes de la même façon qu'ils décident si un recours collectif doit être autorisé : de manière souple et libérale, en cherchant à concilier efficacité et équité.

C. *Whether the Investors Have Satisfied Rule 42*

C. *Les investisseurs ont-ils satisfait à la règle 42?*

The four conditions to the maintenance of a class action are satisfied here. First, the class is clearly defined. The respondents Lin and Wu represent themselves and "[229 other] immigrant investors . . . who each invested at least the sum of $150,000.00 into a fund totalling $34,065,000.00, the said sum to be managed, administered and secured by . . . Western Canadian Shopping Centres Inc.". Who falls within the class can be ascertained on the basis of documentary evidence that the parties have put before the court. Second, common issues of fact and law unite all members of the class. The essence of the investors' complaint is that the defendants owed them fiduciary duties which they breached. While the investors' Amended Statement of Claim alludes to claims in negligence and misrepresentation, counsel for the investors undertook in argument before this Court to abandon all but the fiduciary duty claims. Third, at this stage of the proceedings, it appears that

52 Les quatre conditions nécessaires à l'exercice d'un recours collectif sont remplies en l'espèce. Premièrement, le groupe est clairement défini. Les intimés Lin et Wu se représentent eux-mêmes et 229 autres [TRADUCTION] « immigrants-investisseurs [. . .] qui ont chacun investi 150 000 $ au moins dans un fonds s'élevant au total à 34 065 000 $, cette somme devant être gérée, administrée et garantie par [. . .] Western Canadian Shopping Centres Inc. ». Il est possible de déterminer qui fait partie du groupe grâce à la preuve documentaire que les parties ont déposée devant la cour. Deuxièmement, des questions communes de fait et de droit unissent tous les membres du groupe. La plainte des investisseurs repose essentiellement sur l'allégation que les défendeurs ont manqué aux obligations fiduciaires qu'ils avaient envers eux. Même si la déclaration modifiée des investisseurs fait état de réclamations fondées sur la négligence et sur la fausse déclaration, l'avocat

resolving one class member's breach of fiduciary claim would effectively resolve the claims of every class member. As a result of security-pooling agreements effected by WCSC, each investor now has an interest, proportional to his or her investment, in the same underlying security. Finally, the representative plaintiffs are appropriate.

des investisseurs s'est engagé au cours des débats devant notre Cour à abandonner toutes les réclamations ne visant pas l'obligation fiduciaire. Troisièmement, à la présente étape de la procédure, il semble que le règlement de la revendication d'un seul membre concernant le manquement à l'obligation fiduciaire réglerait de fait les revendications de tous les membres du groupe. En raison d'ententes de regroupement des garanties prises par WCSC, chaque investisseur a maintenant un intérêt, proportionnel à son investissement, dans la même garantie sous-jacente. Enfin, les demandeurs sont des représentants appropriés.

53 The defendants argue that the proposed suit is not amenable to prosecution as a class action because: (1) there are in fact multiple classes of plaintiffs; (2) the defendants will raise multiple defences to different causes of action advanced against different defendants; and (3) in order to prevail, the investors must show actual reliance on the part of each class member. I find these arguments unpersuasive.

Les défendeurs soutiennent que l'action proposée ne peut pas faire l'objet d'un recours collectif parce que : (1) il existe en fait de nombreux groupes de demandeurs; (2) les défendeurs soulèveront plusieurs défenses contre différentes causes d'action intentées par différents défendeurs; et (3) afin de l'emporter, les investisseurs doivent faire la preuve d'un véritable lien de confiance de la part de chaque membre du groupe. Je suis d'avis que ces arguments ne sont pas convaincants.

54 The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times, in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

L'argument des défendeurs selon lequel il existe de nombreux groupes de demandeurs n'est pas convaincant. Sans aucun doute, il y a des différences. Des investisseurs différents ont investi à différentes époques, dans des ressorts différents, en se fondant sur des notices d'offre différentes, par le biais de représentants différents, dans différentes séries de débentures, et ont entendu parler des événements sous-jacents par différents documents d'information. Certains investisseurs peuvent disposer de droits de résiliation que d'autres n'ont pas. Il demeure toutefois que les investisseurs soulèvent essentiellement les mêmes revendications qui exigent la résolution des mêmes faits. Il est possible qu'en fin de compte émergent différents sous-groupes d'investisseurs qui auront des droits différents contre les défendeurs, cependant cette possibilité ne retire pas le droit des investisseurs de poursuivre collectivement. Si des différences importantes surviennent, le tribunal réglera la question le moment venu.

55 The defendants' contention that the investors should not be permitted to sue as a class because

L'argument des défendeurs selon lequel les investisseurs ne devraient pas être autorisés à

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each must show actual reliance to establish breach of fiduciary duty also fails to convince. In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined. The fiduciary duty issues raised here are common to all the investors. A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.

intenter un recours collectif parce que chacun d'eux doit démontrer un vrai lien de confiance pour établir un manquement à l'obligation fiduciaire n'est pas convaincant non plus. Dans les dernières décennies, les obligations fiduciaires ont été utilisées dans de nouveaux contextes, et toute la portée de leur utilisation reste à définir plus précisément. Les questions relatives aux obligations fiduciaires en l'espèce sont communes à tous les investisseurs. On ne devrait pas interdire un recours collectif en raison de l'incertitude relative à la résolution de questions communes à tous les membres du groupe. Si on juge que les investisseurs doivent faire la preuve d'un lien de confiance individuel, le tribunal peut alors décider si le recours collectif doit ou non se poursuivre.

The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

56 Cela s'applique aussi à l'argument selon lequel des défenses différentes seront invoquées envers différents membres du groupe. Cette simple possibilité n'interdit pas le recours collectif. Si différentes défenses sont invoquées, le tribunal peut alors résoudre le problème ou retirer l'autorisation du recours collectif.

I conclude that the basic conditions for a class action are met and that efficiency and fairness favour permitting it to proceed.

57 Je conclus que les conditions essentielles à l'exercice d'un recours collectif sont remplies et que l'efficacité et l'équité militent en faveur de son autorisation.

D. *Cross-Appeal*

D. *Pourvoi incident*

The investors take issue on cross-appeal with the Court of Appeal's allowance of individualized discovery from each class member. The Court of Appeal held that the defendants are entitled, under Rules 187 and 201, to examination and discovery of each member of the class. The investors argue that the question of whether discovery should be allowed from each class member is a question best left to a case management judge appointed pursuant to the Alberta Rules of Court Binder, Practice Note No. 7.

58 Les investisseurs contestent dans le pourvoi incident l'autorisation par la Cour d'appel de l'interrogatoire préalable individuel de chaque membre du groupe. La Cour d'appel a jugé que les défendeurs ont droit, en vertu des règles 187 et 201, à l'interrogatoire et à l'examen de chaque membre du groupe. Les investisseurs soutiennent que la question de savoir si l'interrogatoire préalable de chaque membre du groupe doit être autorisé est une question qui relève du juge responsable de la gestion de l'instance nommé selon l'avis de pratique 7 des règles de procédure de l'Alberta.

I agree that allowing individualized discovery at this stage of the proceedings would be premature. One of the benefits of a class action is that discovery of the class representatives will usually suffice

59 Je conviens qu'il serait prématuré d'accorder l'interrogatoire préalable individuel à cette étape-ci. L'un des avantages du recours collectif est que l'interrogatoire préalable des représentants d'un

and make unnecessary discovery of each individual class member. Cases where individual discovery is required of all class members are the exception rather than the rule. Indeed, the necessity of individual discovery may be a factor weighing against allowing the action to proceed in representative form.

60 I would allow the defendants to examine the representative plaintiffs as of right. Thereafter, examination of other class members should be available only by order of the court, upon the defendants showing reasonable necessity.

VI. Conclusion

61 For the foregoing reasons, I would dismiss the appeal and allow the investors to proceed as a class. I would allow the cross-appeal.

62 Costs of the appeal and cross-appeal are to the respondents.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for the appellant/respondent on cross-appeal The Royal Trust Company: Burnet, Duckworth & Palmer, Calgary.

Solicitors for the appellants/respondents on cross-appeal James G. Engdahl, William R. MacNeill, Jon R. MacNeill, Gary L. Billingsley, R. Byron Henderson: McLennan Ross, Edmonton.

Solicitors for the appellant/respondent on cross-appeal C. Michael Ryer: Peacock Linder & Halt, Calgary.

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Solicitors for the appellants/respondents on cross-appeal Ernst & Young and Alan Lundell: Parlee McLaws, Edmonton.

groupe sera habituellement suffisant et rendra superflu l'interrogatoire de chaque membre du groupe. Les affaires exigeant l'interrogatoire préalable individuel des membres d'un groupe sont l'exception plutôt que la règle. En fait, le besoin de procéder à des interrogatoires préalables individuels peut être un facteur défavorable à l'autorisation du recours collectif.

Je suis d'avis d'autoriser les défendeurs à interroger les représentants des demandeurs comme ils en ont le droit. Par la suite, l'interrogatoire des autres membres du groupe ne devrait être autorisé que par ordonnance de la cour, si les défendeurs prouvent que cela est raisonnablement nécessaire.

VI. Conclusion

Pour ces motifs, je suis d'avis de rejeter le pourvoi, d'autoriser les investisseurs à intenter un recours collectif et d'accueillir le pourvoi incident.

Les dépens du pourvoi et du pourvoi incident vont aux intimés.

Pourvoi rejeté et pourvoi incident accueilli avec dépens.

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Procureurs pour les appelants/intimés au pourvoi incident James G. Engdahl, William R. MacNeill, Jon R. MacNeill, Gary L. Billingsley, R. Byron Henderson : McLennan Ross, Edmonton.

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TAB 18

See paras. 53, 215

The Modern Cy-près Doctrine

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Summary of Contents

1

Introduction

A INTRODUCTION

1. The *Cy-près* Doctrine: Traditional Definition

TRADITIONALLY, AND STATED in its simplest of terms, the *cy-près* doctrine is the vehicle by which the intentions of a donor (settlor or testator) may be given effect 'as nearly as possible' in circumstances where literal compliance with the donor's stated intentions cannot be effectuated. Accordingly, in the law of charitable trusts, the *cy-près* doctrine states that where a donor has directed a gift of money or property to a charitable object (purpose), but has expressed a general charitable intention that is impossible or impractical to effect, the courts will allow the intention to be carried out in an approximate fashion.

In this, its most traditionalist context, the doctrine has received widespread judicial recognition and adoption. Indeed, from the materials explored in developing this book, it could be said that the doctrine has virtual universal acceptance, at least in common law jurisdictions. This generalisation is evidenced by the referenced materials from a number of widespread and culturally-diverse jurisdictions. By way of introduction and illustration, examples are taken of the following: England,[1] the United States,[2] Australia,[3] Canada,[4] New Zealand,[5] Ireland,[6] Scotland,[7] South Africa,[8] India,[9]

[1] Eg: *Oldham BC v A-G* [1993] Ch D 210 (CA) 221.

[2] Eg: *Evans v Abney*, 396 US 435, 437 (1970).

[3] Eg: *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396 (HCA) 415 (Latham CJ) 428 (Dixon J).

[4] Eg: *Nova Scotia (A-G) v Axford* (1885), 13 SCR 294.

[5] Eg: *Re Lushington (decd), Manukau County v Wynyard* [1964] NZLR 161 (CA) 172 (North J), 181 (McCarthy J).

[6] Eg: *The Representative Church Body v A-G* [1988] IR 19, 22.

[7] Eg: *Guild v Russell* 1987 SCLR 221 (Court of Session, Outer House) 222.

[8] Eg: *Ex p Wit Deep and Knights Central Joint Medical Society* 1918 WLD 13.

[9] Eg: *Merchant v Shaifuddin* [2000] 1 LRI 1028 (SC App), and no longer *only* applicable to testamentary gifts, since: *State of Uttar Pradesh v Bansi Dhar* [1974] AIR 1084 (SC). Cf the position when LA Sheridan and VTH Delany, *The Cy-près Doctrine* (Sweet & Maxwell, London, 1959) 24, and fn 44, was written.

Singapore,[10] Malaysia,[11] Hong Kong,[12] Northern Ireland,[13] and elsewhere.[14]

One of the most succinct, yet fulsome, definitions of the traditional *cy-près* doctrine is provided by the *American Restatement of the Law (Second), Trusts*:

> If property is given in trust to be applied to a charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general charitable intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.[15]

Such is the clarity of enunciation in this definition that it has been cited with approval by courts from New Zealand[16] to Canada,[17] and by leading academic charity texts.[18] (The definition has since been redrafted by the American Law Institute,[19] although not, in this author's opinion, for the better.[20]) Notably, current law dictionaries from several jurisdictions also define the doctrine singularly by reference to its charitable trusts genesis.[21]

2. Redefining the *Cy-près* Doctrine

Whilst historically (and 'historical' may be traced to 'Roman law') the doctrine has its roots, by and large, in the context of the law of charitable trusts, notably

[10] Eg: *Hwa Soo Chin v Personal Representatives of the Estate of Lim Soo Ban (decd)* 1994 2 SLR 657 (HC).

[11] Eg: *Tai Kien Luing v Tye Poh Sun* [1961] 1 MLJ 78 (OCJ Penang).

[12] Eg: *A G (Hong Kong) v Pon Yup Chong How Benevolent Assn* [1992] 24 HKCU 1 (SC).

[13] Eg: *In re Millar (decd); Millar v Ben Hardwick Memorial Fund* (NI Ch, 5 Sep 1997).

[14] Eg, in Jersey Islands: *Re the Greville Bathe Fund* [1973] IJJ 2513. Further, all jurisdictions which have implemented non-charitable purpose trust statutory regimes (considered in Chapter 6) have either expressly or impliedly acknowledged within those regimes that the charitable trusts *cy-près* doctrine comprises part of their body of law.

[15] American Law Institute, *Restatement of the Law (Second), Trusts* (ALI Publishers, St Paul Minn, 1959) Vol II, § 399, p 297.

[16] *Re Collier (decd)* [1998] 1 NZLR 81, 93.

[17] *Re Christian Brothers of Ireland in Canada* (2000), 47 OR (3d) 674 (CA) [71].

[18] H Picarda, *The Law and Practice Relating to Charities* (3rd edn, Butterworths, London, 1999) 295; LA Sheridan and VTH Delany, *The Cy-près Doctrine* (Sweet & Maxwell, London, 1959) 4. Also preferred as the definition of choice by: EL Fisch, *The Cy-près Doctrine in the United States* (Matthew Bender & Co, Albany NY, 1950) 2, citing the version in the *First Restatement* (1935) which was in similar terms.

[19] See: ALI, *Restatement of the Law (Third), Trusts (Tentative Draft No 3)* (ALI Publishers, St Paul Minn, 5 Mar 2001) § 67, p 189–90.

[20] The revised definition permits *cy-près* where 'it is or becomes wasteful to apply all of the property to the designated purpose'—too wide a trigger power, in this author's opinion. The triggers for the *cy-près* jurisdiction, in the Commonwealth context, are explored in ch 4, sections C and D.

[21] In Australia, eg: PE Nygh and P Butt (eds), *Australian Legal Dictionary* (Butterworths, Sydney, 1997) 316. In England, eg: JB Saunders (ed), *Words and Phrases Legally Defined* (Butterworths, London, 1988) vol 1, 394; D Greenberg and A Millbrook (eds), *Stroud's Judicial Dictionary of Words and Phrases* (6th edn, Sweet & Maxwell, London, 2000) 594. In the United States, eg; *Words and Phrases* (Permanent edn, West Publishing Co, St Paul Minn, 1968) vol 10A, 558–78; BA Garner (ed), *Black's Law Dictionary* (8th edn, West Group, St Paul Minn, 2004) 415.

7

Class Actions Cy-près: *An Introduction*

A INTRODUCTION

THE NOTION UNDERPINNING class actions *cy-près* is that where a judgment or settlement has been achieved against a defendant, and where distribution to the class of plaintiffs who should strictly receive the sum is 'impracticable' or 'inappropriate', then (subject always to court approval) the damages should be distributed in the 'next best' fashion in order, as nearly as possible, to approximate the purpose for which they were awarded.[1] In other words, where a *cy-près* trigger manifests, the court orders that the damages, whose original purpose was to compensate those victims harmed by the defendant's unlawful conduct, be distributed 'for the indirect prospective benefit of the class.'[2] This phrase is something of a misnomer, for even non-class members—those who suffered no loss or damage whatsoever—may benefit under *cy-près* orders within the class actions context.

It has frequently been judicially acknowledged by American courts, in particular, that the *cy-près* doctrine applicable in class actions jurisprudence is derived from, and intended to be analogous to, the doctrine's application to charitable trusts.[3] For example, the charitable trust doctrine (it has been stated):

[1] *In re Folding Carton Antitrust Litig*, 557 F Supp 1091, 1108 (ND Ill 1983). Another good definition is drawn from the South African Law Comm, *The Recognition of a Class Action in South African Law* (Working Paper 57, 1995) [5.38] ('application of [an aggregate] award in a way which compensates or benefits the class members, where actual division and distribution of the award among the class members is impossible or impracticable').

[2] *Powell v Georgia-Pacific Corp*, 119 F 3d 703, 706 (8th Cir 1997), citing: HB Newberg and A Conte, *Newberg on Class Actions* (3rd edn, Shepard McGraw-Hill Inc, Colorado Springs, 1992) § 10.17. See also, for early American academic endorsement: Deems, 'The *Cy-près* Solution to the Damage Distribution Problems of Mass Class Actions' (1975) 9 *Georgia L Rev* 893, 904, and SR Shepherd, 'Damage Distribution in Class Actions: The *Cy-près* Remedy' (1972) 39 *U Chicago L Rev* 448, 452, both cited and explained further in: OLRC, *Report on Class Actions* (1982) 573.

[3] Eg: *In re Holocaust Victim Assets Litig*, 311 F Supp 2d 407, 415–16 (EDNY 2004) ('[t]he *cy-près* doctrine developed in the context of testamentary charitable trusts. Where a trust would otherwise fail, a court would attempt to fulfill the testator's charitable intent "as near as possible". . . . The same basic notion is now employed in class action settlements such as this one'). Also, the analogy is noted in, eg: *In re Compact Disc Minimum Advertised Price Antitrust Litig*, 2005 US Dist LEXIS 11332, at 7 (D Maine 2005); *Van Gemert v Boeing Co*, 573 F 2d 733, fn 7 (2nd Cir 1978); *Schwartz v Dallas Cowboys Football Club Ltd*, 362 F Supp 2d 574, 576 (ED Pa 2005); *In re 'Agent Orange' Prod Liab Litig*, 611 F Supp 1396, 1403 (EDNY 1985); *In re Department of Energy Stripper Well Exemption Litig*, 578 F Supp 586, 594 (D Kans 1983); *In re Matzo Food Prods Litig*, 156 FRD 600, 605 (DNJ 1994); *Brewer v Southern Union Co*, 1987 US Dist LEXIS 15940, at 7 (D Colo 1987); *In re Folding Carton Antitrust Litig*, 557 F Supp 1091, 1108–9 (ND Ill 1983); *Pray v Lockheed Aircraft Corp*,

> originated to save testamentary charitable gifts that would otherwise fail. Under *cy-près*, if the testator had a general charitable intent, the court will look for an alternate recipient that will best serve the gift's original purpose. In the class action context, it may be appropriate for a court to use *cy-près* principles to distribute unclaimed funds. In such a case, the unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated.[4]

Essentially, the doctrine allows the damages award or settlement sum to be distributed to the 'next best' class whenever the class members (or some of them—*cy-près* funds often deal with residual parts of class actions judgments or settlements) are unable to be compensated individually.[5] The *cy-près* fund varies inversely with the number of claims made by individual class members,[6] and can also result from a 'trickle-on' effect where damages funds set aside for designated categories of plaintiffs have not been fully dispersed.[7]

This chapter will deal with some introductory matters concerning class actions *cy-près*. Section B discusses the various terminology, and the two main strands of application, associated with the doctrine. The manifestation of class actions *cy-près* in the leading jurisdictions which have implemented opt-out class action regimes is outlined in Section C, whilst the principal alternatives to *cy-près* orders in this context—from reversionary orders in favour of the defendant to the damages simply falling into governmental coffers—are explored in Section D.

B THE WIDE AND NARROW MEANINGS OF '*CY-PRÈS*'

This field of jurisprudence is, unfortunately, rife with terminological obfuscation. The descriptors, '*cy-près*' and 'fluid recovery' appear, on occasion, to be

644 F Supp 1289, 1303 (DDC 1986); *In re Wells Fargo Securities Litig*, 991 F Supp 1193, 1194 (ND Cal 1998); *Six (6) Mexican Workers v Arizona Citrus Growers*, 641 F Supp 259, 265 (D Ariz 1986).

[4] *Airline Ticket Commission Antitrust Litig Travel Network Ltd v United Air Lines Inc*, 307 F 3d 679, 682 (8th Cir 2002), citing: *In re Airline Ticket Commission Antitrust Litig*, 268 F 3d 619, 625–26 (D Minn 2001); *Democratic Central Committee of District of Columbia v Washington Metro Area Transit Comm*, 84 F 3d 451, 455 fn 1 (DC Cir 1996).

[5] *Weber v Goodman*, 1998 US Dist LEXIS 22832, at 16 (EDNY 1998); *Democratic Central Committee of District of Columbia v Washington Metro Area Transit Comm*, 84 F 3d 451, 455 (DC Cir 1996).

[6] Note the discussion and cases cited in: RA Higgins, 'The Equitable Doctrine of *Cy-près* and Consumer Protection' (Annex 1, ACA Submission, Trade Practices Act Review, 15 Jul 2002) 4 and fn 13.

[7] As occurred in, eg: *Ford v F Hoffmann-La Roche Ltd* (SCJ, 23 Mar 2005) [65] ('no unclaimed money will be repaid to the Settling Defendants. Any monies not paid out of the Direct Purchaser Fund will trickle down to the Consumer Fund. The Intermediate Purchaser Fund and Consumer Fund will be fully distributed *cy-près*'). For lawyers' representatives' comments on this settlement outcome, see: J Jaffey, 'Settlement Reached on Vitamin Price-Fixing' (2005) *Lawyers' Weekly* Vol 24 No 6. Incidentally, termed a 'pour-over provision' by Higgins, *ibid.*

TAB 19

See para. 32

THE LAW OF CLASS ACTIONS IN CANADA

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Chapter 1

THE NATURE AND PROCESS OF CLASS PROCEEDINGS

A. Objectives of Class Proceedings

The class action is a procedural device for people who have suffered a common wrong. One or more plaintiffs can bring an action on behalf of many, and in this way have an efficient mechanism to achieve legal redress.[1]

Class actions have a long pedigree in the United States and in the common law. The modern class proceeding in the United States and Canada is the successor to the English common law's representative action, which authorized a plaintiff to sue on behalf of others who would be bound as a matter of *res judicata* and issue estoppel to the outcome of the litigation.[2] Historically, representative proceedings served the practical purpose of efficiently determining the rights of persons who were not parties to the litigation. Class action legislation was introduced in the United States in 1938, and the current Rule 23 of the American *Federal Rules of Civil Procedure* was enacted in 1966.[3] In 1978, Québec became the first Canadian province to introduce class action legislation.[4] Ontario followed in 1993,[5] as did British Columbia in 1996.[6] In the years that followed, the federal government[7] and all of the provinces with the exception of Prince Edward Island enacted class action regimes.[8]

---

1 The Ontario Law Reform Commission, in its *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982), vol. 1, at p. 15, defined a class action as an "action brought on behalf of, or for the benefit of numerous persons having a common interest. It is a procedural mechanism that is intended to provide an efficient means to achieve redress for widespread harm or injury by allowing one or more persons to bring the action on behalf of the many."

2 For a discussion of the history of class actions, see Shaun Finn, "In a Class All Its Own: The Advent of the Modern Class Action and Its Changing Legal and Social Mission" (2005), 2 Can. Class Action Rev. 333.

3 *Federal Rules of Civil Procedure*, r. 23.

4 *Code of Civil Procedure*, C.Q.L.R. c. C-25, arts. 1002-1051.

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

6 *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

7 *Federal Courts Rules*, SOR/98-106, enacted pursuant to *Federal Courts Act*, R.S.C. 1985, c. F-7.

8 Alberta: *Class Proceedings Act*, S.A. 2003, c. C-16.5; British Columbia: *Class Proceedings Act*, R.S.B.C. 1996, c. 50; Manitoba: *The Class Proceedings Act*, C.C.S.M. c. C.130; New Brunswick: *Class Proceedings Act*, R.S.N.B. 2011, c. 125; Newfoundland and Labrador:

In its modern formulation, the class action promotes more than just efficiency; there is also the idea that modern society creates harms that affect large numbers of people who do not have the means to seek redress.[9] As discussed further in this chapter and a theme throughout the text, the three public policy purposes that underlie the modern class action are: (1) access to justice; (2) behaviour modification; and (3) judicial economy, including the avoidance of a multiplicity of proceedings.

Access to Justice

The fundamental policy idea supporting class proceedings is access to justice for a group of claimants who have suffered a common wrong. For example, in a class proceeding (typically an action, but in some jurisdictions, also applications), numerous consumers, all injured by a negligently manufactured pharmaceutical or medical device, can sue the manufacturer for compensation for their personal injuries in a single proceeding. Similarly, all passengers injured or killed in a train derailment, a sinking boat, or a plane crash can sue the carrier for their losses. Class actions have been used to advance claims regarding aboriginal rights, trade and competition offences, breaches of contract, employment and labour relations, environmental harm, the spread of diseases and infections, illegal interest charges, Ponzi schemes, pension plans and disability benefits, and defective products causing personal injuries or economic harm.

These myriad types of claims raise at least three different kinds of economic barriers to justice. First, there is the cost of obtaining legal services to prosecute what are usually small claims. Second, the economics of litigation (economies of scale and efficiency) favour the defendant wrongdoer and not the claimant. Third, in some jurisdictions, there is the claimant's exposure to an adverse costs award payable to the defendant. Class action legislation is designed, in part, to overcome or at least reduce these barriers.

The availability of contingency fee agreements and the court's supervision of lawyers' fees address the first economic barrier. In exchange for not charging a fee and for assuming the expense of the disbursements, the class action lawyer obtains a share of the recovery if the client's claim on behalf of the class ultimately succeeds. As will be noted more than once throughout this text, the legislatures in Canada have determined that

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Class Actions Act, S.N.L. 2001, c. C-18.1; Nova Scotia: *Class Proceedings Act*, S.N.S. 2007, c. 28; Ontario: *Class Proceedings Act, 1992*, S.O. 1992, c. 6; Québec: *Code of Civil Procedure*, C.Q.L.R. c. C-25, Book IX, arts. 999 to 1026; Saskatchewan: *The Class Actions Act*, S.S. 2001, c. C-12.01.

9 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.), at paras. 26-28.

access to justice can be promoted by means of entrepreneurial lawyers taking on the risks of group litigation in exchange for a share in the claimant's recovery on behalf of the class.

Second, by aggregating the group members' individual claims, a class action is designed to balance the litigation efficiencies that normally favour the defendant, whose investment in mounting a defence to one claimant's case has utility for resisting other claimants' cases. Without a class proceeding, a plaintiff's investment in his or her individual litigation has no additional economic utility, because it cannot be shared and must be repeated by the next claimant. The ability to share the costs of prosecuting an action between hundreds or thousands of class members improves access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually.[10]

The third economic barrier to access to justice is the risk in some jurisdictions of paying costs to the opposing party (a loser-pays costs rule). The exposure of the representative plaintiff varies depending upon the jurisdiction in which the action is being prosecuted. However, as the discussion in the chapters about costs and about legal fees (Chapters 19 and 20) will reveal, plaintiffs in class actions have developed mechanisms to shift the exposure and the burden of an adverse costs award onto class counsel and, in a recent development, onto third-party litigation funders.

Thus, reducing economic barriers promotes access to the courts and is an important feature of the class action regime. Class proceedings also remove psychological, societal, and other barriers to the compensatory, restitutionary, and declaratory remedies of the judicial system. For example, the willingness of one plaintiff to represent a class of vulnerable persons in institutional abuse litigation ensures that the emotional barriers to pursuing a court action do not preclude redress.[11]

Behaviour Modification

In addition to providing access to justice for mass claims, another policy goal of the modern class action is behaviour modification.[12] To the extent that the procedural device is used to litigate claims that would not be

[10] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.), at para. 28: "Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied" (citations omitted).

[11] For a discussion of the meaning of access to justice in the context of class actions, see Hon. Frank Iacobucci, "What is Access to Justice in the Context of Class Actions?" (2011), 53 S.C.L.R. 17, at p. 20; Jasminka Kalajdzic, "Access to a Just Result: Revisiting Settlement Standards and Cy Près Distributions" (2010), 6 Can. Class Action Rev. 215, at pp. 216-221, and *Access to Justice for the Masses: A Critical and Empirical Discussion of Class Actions in Canada* (Vancouver: UBC Press, forthcoming); Mathew Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009), 47 Alta L. Rev. 185, pp. 185-227.

economical to pursue individually, class actions serve a regulatory and public law function by encouraging compliance with the substantive law. Both specific and general deterrence may be achieved. For example, exposure to a class proceeding not only compels a defendant to take into account the full cost of its conduct, but may also deter it and others from conduct in the future that may cause harm.[13]

In recommending a class action regime, the Ontario Law Reform Commission viewed behaviour modification as an inevitable but valuable by-product of achieving the legislation's primary purposes of furthering access to justice and promoting judicial economy.[14]

Judicial Economy

The third goal of a class proceeding is judicial economy. The class action procedures adopted by the legislatures across the country were designed to provide opportunities to aggregate claims and thereby negate the need for a multiplicity of proceedings. A class action is designed to avoid, rather than encourage, the unnecessary filing of repetitious papers and motions.[15] Class proceedings legislation is meant to achieve the efficient handling of potentially complex cases of wrongs affecting more than one person.[16]

B. Benefits of a Class Proceeding

As the discussion in later chapters will reveal, class actions provide advantages over traditional litigation to both plaintiffs and defendants. For plaintiffs, the advantages include: (a) the tolling of the limitation period for the class; (b) a notice program to advise interested persons about the status of the litigation; (c) the availability of counsel attracted by contingency fee arrangements; (d) preventing the defendant from creating procedural obstacles that would confront individual litigants; (e) the ability of class members to participate in the litigation; (f) case management by a single judge; (g) court powers to protect the interests of absent members; (h) protection from adverse costs awards against class members; (i) ability of the court to create structures and procedures to resolve individual issues; and (j) any order or settlement will accrue to the benefit of the whole class.[17]

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12 Craig Jones, in *Theory of Class Actions* (Toronto: Irwin Law, 2003), analyzes class actions from the perspective of behaviour modification.

13 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.), at para. 29.

14 Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982), vol. 1, at p. 145.

15 *Hoffman v. Monsanto Canada Inc.*, 2002 SKCA 120 (Sask. C.A.), at para. 16.

16 *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.), at p. 455.

17 *Bouchanskaia v. Bayer Inc.*, 2003 BCSC 1306 (B.C. S.C.), at para. 150.

Chapter 4

DEFINING THE CLASS

A. Introduction: The Identifiable Class Criterion

An identifiable class of claimants constitutes the second of the five criteria for the certification of an action as a class proceeding under the class action statutes of the common law provinces. For an action to be certified as a class proceeding, there must be an "identifiable class of two or more persons that would be represented by the representative plaintiff or defendant."[1]

To satisfy the identifiable class requirement, the plaintiff must establish "some basis in fact" that two or more persons will be able to determine that they are in fact members of the class.[2] Class action legislation is designed to provide an effective means of resolving situations where two or more people have the same or similar complaints, not to create complaints where none exist. As was explained in *Lau v. Bayview Landmark Inc.*:[3]

> [A] class proceeding cannot be created by simply shrouding an individual action with a proposed class. That is to say, it is not sufficient to make a bald assertion that a class exists. The record before the court must contain a sufficient evidentiary basis to establish the existence of the class.

In this chapter, the purpose of the second certification criterion is described, and the law related to class definition is explored. The issues of class size, non-resident class members and subclasses are also discussed.

B. Purpose of the Identifiable Class Criterion

The criterion of an identifiable class serves three purposes:

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1 *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)(b). Virtually identical language appears in *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(1)(b); *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 5(1)(b); *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 7(1)(b); *The Class Proceedings Act*, C.C.S.M. c. C130, s. 4(b); *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. (6(1)(b); *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 6(1)(b); *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 5(1)(b). Saskatchewan's statute does not specify that the identifiable class be of "two or more persons".

2 *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 (S.C.C.), at paras. 52-76; *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, 2001 SCC 68 (S.C.C.), at para. 25.

3 (1999), 40 C.P.C. (4th) 301, [1999] O.J. No. 4060 (Ont. S.C.J.), at para. 23, additional reasons (1999), 92 A.C.W.S. (3d) 752 (Ont. S.C.J.).

(1) it identifies the persons who have a potential claim against the defendant;

(2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and

(3) it describes who is entitled to notice.[4]

The class definition criterion is critically important because it is connected to the cause of action criterion and it also affects the three other certification criteria. The class definition influences the commonality of proposed common issues, the manageability of the procedure, and whether a class action is preferable. In addition, the class definition affects the appropriateness of the litigation plan and the ability of the representative plaintiff(s) to represent the class members without conflict.[5]

The class definition will determine the size of the class, which may influence whether a class action will attract class counsel to the case, since a small class size may not justify the economic risks associated with prosecuting a class action. The class definition and how it affects class size is also of interest to the defendant because it will influence the extent of the defendant's exposure to liability. If the action settles, class size will determine the scope of the releases exchanged for the settlement proceeds.

C. Satisfying the Identifiable Class Criterion

The class definition criterion is not an onerous requirement to satisfy. In *Hollick v. Metropolitan Toronto (Municipality)*,[6] Chief Justice McLachlin stated:

> It falls to the putative representative to show the class is defined sufficiently narrowly. The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues. Where the class

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4 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.), at para. 38; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.), additional reasons (1999), 30 C.P.C. (4th) 131 (Ont. Gen. Div.); *Davis v. Canada (Attorney General)*, 2007 NLTD 25 (N.L. T.D.), at para. 42, affirmed 2008 NLCA 49 (N.L. C.A.); *Sorotski v. CNH Global N.V.*, 2007 SKCA 104 (Sask. C.A.), reversing 2006 SKQB 168 (Sask. Q.B.), leave to appeal refused (2008), 451 W.A.C. 319 (note).

5 *Fischer v. IG Investment Management Ltd.*, 2010 ONSC 296 (Ont. S.C.J.), at para. 133, additional reasons 2010 ONSC 2839 (Ont. S.C.J.), reversed but not on this point 2011 ONSC 292 (Ont. Div. Ct.), affirmed 2012 ONCA 47 (Ont. C.A.), affirmed 2013 SCC 69 (S.C.C.); *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301, [1999] O.J. No. 4060 (Ont. S.C.J.), at paras. 21-31, additional reasons (1999), 92 A.C.W.S. (3d) 752 (Ont. S.C.J.).

6 [2001] 3 S.C.R. 158, 2001 SCC 68 (S.C.C.), at paras. 20-21.

resolved on the motion for certification.[37] This is because the determination whether a class proceeding should be certified is made by reference only to the pleadings and any documents identified in the pleadings.[38]

E. The Definition Must Contain Objective Measures that are not Merits-Based

Although it is not necessary to list each class member, it is essential that the class be defined clearly at the outset of the litigation, using objective measures by which members of the class can be identified.[39] These criteria should bear a rational relationship to the common issues asserted by all class members; however, the criteria should not depend on the outcome of the litigation.[40]

In *R. v. Nixon*,[41] an action commenced on behalf of penitentiary inmates who allegedly suffered injury from a fire, the court held that a class definition that would have included all inmates in a particular part of the building "other than those who set the fires" was not acceptable. Such a definition would require a series of mini-trials to determine who did not set the fires or impede efforts of correctional officers to extinguish the fires and who were therefore disqualified as a member of the class. The members of the class could not be defined clearly at the start of the litigation.

The plaintiff's state of mind is a subjective factor to be avoided in the class definition. For example, in *Paron v. Alberta (Minister of Environmental Protection)*, the court rejected a class definition that stated: "All Alberta residents *who claim that*, between 1996 and 2005 they owned residential lands contiguous to Wabamun Lake and that their use and enjoyment of their lands or the value of their lands were adversely affected by diminished water levels in or pollution of Wabamun Lake."[42] Since membership was dependent on a state of mind, *i.e.*, those plaintiffs who claim to have experienced loss of enjoyment of the lake, it was impossible for the defendants to know who was in or out of the class. Persons who would otherwise be class members could argue that they were not bound by

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37 *Mayotte v. Ontario*, 2010 ONSC 3765 (Ont. S.C.J.), at para. 64, leave to appeal refused 2010 ONSC 5275 (Ont. Div. Ct.); *Fantl v. Transamerica Life Canada*, 2013 ONSC 2298 (Ont. S.C.J.), at para. 168, additional reasons 2013 ONSC 5198 (Ont. S.C.J.), leave to appeal refused 2013 ONCA 580 (Ont. C.A.).

38 *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2013 ONCA 254 (Ont. C.A.), at para. 5, leave to appeal refused 2013 CarswellOnt 13700, [2013] S.C.C.A. No. 266 (S.C.C.).

39 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), at p. 554.

40 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (S.C.C.), at p. 554.

41 (2002), 21 C.P.C. (5th) 269, [2002] O.J. No. 1009 (Ont. S.C.J.).

42 *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375 (Alta. Q.B.), at para. 40.

the result of the class action, because they did not "claim" anything during the relevant time, resulting in the undesirable potential of multiple proceedings despite the class action.[43]

The class must be defined without elements that require a determination of the merits of the claim.[44] A class of claimants cannot be defined meaningfully in terms of persons to whom the defendant is liable, or to whom the defendant owes a duty of care, if liability or the existence of a duty of care owed to class members is a common issue.[45]

Definitions where membership depends on a successful claim (*i.e.*, merits-based class definitions) are problematic because unsuccessful claimants would not be bound by the outcome and would be free to commence repeat litigation.[46] In other words, if the class is defined by success on the merits, then, tautologically, it follows that unsuccessful claimants will not be bound by being members of the class. The purposes of the legislation are thereby frustrated because the goals of access to justice and judicial economy are not achieved.

There are many examples where merits-based definitions have been rejected. In *Chadha v. Bayer Inc.*,[47] for example, a class that was defined in terms of persons who suffered damages as a result of the defendant's conduct was rejected on the basis that the definition turned on the merits of the claim.

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43 *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375 (Alta. Q.B.), at para. 49.

44 *Spurr v. R.*, 2009 SKQB 478 (Sask. Q.B.), leave to appeal refused 2010 SKCA 99 (Sask. C.A. [In Chambers]); *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (Ont. C.A.), at para. 19, reversing 78 O.R. (3d) 38 (Ont. Div. Ct.), which affirmed 71 O.R. (3d) 741 (Ont. S.C.J.), leave to appeal refused [2007] 3 S.C.R. xii (note), [2007] S.C.C.A. No. 346 (S.C.C.); *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), at para. 30, additional reasons (1999), 92 A.C.W.S. (3d) 752 (Ont. S.C.J.); *R. v. Nixon* (2002), 21 C.P.C. (5th) 269 (Ont. S.C.J.); *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), affirmed (2008), 54 C.P.C. (6th) 167 (Ont. Div. Ct.), additional reasons (2009), 71 C.P.C. (6th) 394 (Ont. Div. Ct.); *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.), reversing 2007 SKQB 29 (Sask. Q.B.) and 2008 SKQB 78 (Sask. Q.B.) and 2008 SKQB 229 (Sask. Q.B.), leave to appeal granted 2008 SKCA 79 (Sask. C.A.), leave to appeal refused 359 Sask. R. 318 (note), [2008] S.C.C.A. No. 512 (S.C.C.).

45 *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), at para. 13, affirmed (2008), 54 C.P.C. (6th) 167 (Ont. Div. Ct.), additional reasons (2009), 71 C.P.C. (6th) 394 (Ont. Div. Ct.).

46 *Frohlinger v. Nortel Networks Corp.* (2007), 40 C.P.C. (6th) 62 (Ont. S.C.J.), at para. 21; *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.), reversing 2007 SKQB 229 (Sask. Q.B.), leave to appeal refused 359 Sask. R. 318 (note), [2008] S.C.C.A. No. 512 (S.C.C.); *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 (Ont. S.C.J.), at paras. 159-167, additional reasons 2013 ONSC 1361 (Ont. S.C.J.), reversed 2014 ONSC 1677 (Ont. Div. Ct.), additional reasons 2014 ONSC 3690 (Ont. Div. Ct.).

47 (2003), 63 O.R. (3d) 22 (Ont. C.A.), at paras. 69-70, additional reasons (2003), 170 O.A.C. 126 (Ont. C.A.), leave to appeal refused [2003] 2 S.C.R. vi (note), [2003] S.C.C.A. No. 106 (S.C.C.).

Although a class definition that includes criteria for membership that depend on the outcome of litigation of the common issues certified is prohibited, this prohibition does not necessarily extend to all cases where the class definition turns on whether an individual has suffered injury or loss.[48] Some courts have held that, provided it does not offend the prohibition against merits-based class descriptions, a limiting phrase in the class description to the effect of "all those persons who claim" in respect of the alleged harm (a claims-made limiter) is a possible way to define a class.[49] Other courts, however, do not accept claims-made limiters.[50]

Some courts have concluded that the addition of the qualifying words "who claim to" does not rectify the underlying problem of the overly-broad definition of class members.[51] In *L. (T.) v. Alberta (Director of Child Welfare)*, the court stated that it "is not an acceptable situation for a class member to potentially argue in the future that they are not bound by the result of the class proceedings, or a settlement, because they never 'claimed' anything, or that they never claimed anything at a relevant point in time."[52] Thus, care must be taken when using claims-limiters, especially because the case law is inconsistent and difficult to reconcile.

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48 *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.), reversing 2007 SKQB 29 (Sask. Q.B.) and 2008 SKQB 78 (Sask. Q.B.) and 2008 SKQB 229 (Sask. Q.B.), leave to appeal granted 2008 SKCA 79 (Sask. C.A.), leave to appeal refused 359 Sask. R. 318 (note), [2008] S.C.C.A. No. 512 (S.C.C.), at paras. 67-69.

49 *Attis v. Canada (Minister of Health)* (2007), 46 C.P.C. (6th) 129 (Ont. S.C.J.), at paras. 55-58, additional reasons 2007 CarswellOnt 4258 (Ont. S.C.J.), affirmed 2008 ONCA 660 (Ont. C.A.), leave to appeal refused (2009), 303 D.L.R. (4th) vi, [2008] S.C.C.A. No. 491 (S.C.C.); *Wheadon v. Bayer Inc.*, 2004 NLSCTD 72 (N.L. T.D.), at paras. 103-111, leave to appeal refused 2005 NLCA 20 (N.L. C.A.), leave to appeal refused 257 Nfld. & P.E.I.R. 359 (note), [2005] S.C.C.A. No. 211 (S.C.C.); *Walls v. Bayer Inc.*, 2005 MBQB 3 (Man. Q.B.), at paras. 27-28, leave to appeal refused 2005 MBCA 93 (Man. C.A. [In Chambers]), leave to appeal refused (2005), 389 W.A.C. 318 (note), [2005] S.C.C.A. No. 409 (S.C.C.); *Thorpe v. Honda Canada Inc.*, 2011 SKQB 72 (Sask. Q.B.), at paras. 55-58, additional reasons 2011 SKQB 72 (Sask. Q.B.).

50 *L. (T.) v. Alberta (Director of Child Welfare)*, 2006 ABQB 104 (Alta. Q.B.); *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), at para. 44, affirmed (2008), 54 C.P.C. (6th) 167 (Ont. Div. Ct.), additional reasons (2009), 71 C.P.C. (6th) 394 (Ont. Div. Ct.).

51 *Bryson v. Canada (Attorney General)*, 2009 NBQB 204 (N.B. Q.B.), at paras. 45-50; *Ring v. Canada (Attorney General)*, 2010 NLCA 20 (N.L. C.A.), reversing 2007 NLTD 146 (N.L. T.D.), leave to appeal refused (2010), 962 A.P.R. 362 (note), [2010] S.C.C.A. No. 187 (S.C.C.).

52 *L. (T.) v. Alberta (Director of Child Welfare)*, 2010 ABQB 262 (Alta. Q.B.), at para. 65. See also *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), at para. 44, affirmed (2008), 54 C.P.C. (6th) 167 (Ont. Div. Ct.), additional reasons (2009), 71 C.P.C. (6th) 394 (Ont. Div. Ct.).

that class counsel would receive $190,000 in legal fees and that the class members would receive nothing. The court viewed the settlement as demonstrating that the action was a strike suit, and the court did not approve the settlement.

Kidd v. Canada Life Assurance Co.[142] involved a rejection of a proposed amendment to an already approved settlement agreement. The amendment was rejected by the court because it was unfair in all the circumstances.

In *Waldman v. Thomson Reuters Canada Ltd.*, a copyright infringement case, the court rejected a settlement that would have required class members to grant a non-exclusive licence in respect of their court documents, which provided no direct benefit to class members, a *cy près* fund of $350,000 and an $850,000 counsel fee.[143] The motion judge found that the settlement agreement brought the administration of justice into disrepute because the settlement was more beneficial to class counsel than to class members, and amounted to an expropriation of the class members' property rights in exchange for a charitable donation.[144]

K. *Cy près* Distribution

Ideally, to achieve the access to justice purpose of a class proceeding, all of a judgment or all of the settlement funds, less class counsel's share, should be distributed to the class members, who are the intended beneficiaries of the judgment or the settlement. However, sometimes the amounts in question are so small as to make it impractical to identify each individual class member for distribution purposes.[145] At other times surplus or unclaimed funds remain after the distribution to class members. In these circumstances, courts have the authority to order the judgment or settlement funds be distributed *cy près*.

Under the general law about trusts and charities, when a donor or testator makes a gift with conditions that cannot be performed as prescribed by the donor, courts may permit the gift or donation to be completed *cy près* — "as nearly as may be practicable" — to the terms of the gift as intended by the donor so as to honour the spirit if not the letter of the donor's gift or bequest. In the context of a class proceeding, a *cy près*

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141 (2000), 2 B.L.R. (3d) 30, [2000] O.J. No. 452 (Ont. S.C.J.).

142 2013 ONSC 1868 (Ont. S.C.J.). The plaintiffs and defendants appealed the order, and then subsequently abandoned the appeal when they negotiated a new amendment to the settlement. The amended settlement was ultimately approved: *Kidd v. Canada Life Assurance Co.*, 2014 ONSC 457 (Ont. S.C.J.).

143 *Waldman v. Thomson Reuters Canada Ltd.*, 2014 ONSC 1288 (Ont. S.C.J.).

144 *Waldman v. Thomson Reuters Canada Ltd.*, 2014 ONSC 1288 (Ont. S.C.J.), at para. 95.

145 *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58 (S.C.C.), at paras. 24-27; *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at paras. 82-83.

distribution of a judgment or settlement fund is used in a similar way to provide indirect benefits for the class members. However, as the discussion below will reveal, the use of a *cy près* distribution is sometimes controversial.[146]

Class action statutes provide for the possibility of *cy près* distributions.[147] Although not specifically referred to by this name, *cy près* awards have been approved pursuant to s. 26 of the Ontario *Class Proceedings Act, 1992*[148] and similar provisions in other statutes.[149] These provisions authorize the court to order the distribution of money "whether or not all of the class members can be identified, or the exact share of each can be determined, and notwithstanding the fact that persons other than class members may incidentally benefit."[150] The statutes contemplate that the distribution will indirectly benefit the class. The Ontario Law Reform Commission in its *Report on Class Actions*, said that the purpose of a *cy près* distribution is compensation for class members through a benefit that "approaches as nearly as possible some form of recompense for injured class members."[151]

For example, in *Serhan Estate v. Johnson & Johnson*,[152] the representative plaintiff sued the manufacturer of an allegedly defective medical device used by diabetics to monitor their blood sugar. The settlement had a cash

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146 J. Kalajdzic, "The 'Illusion of Compensation': *Cy près* Distributions in Canadian Class Actions" (2014), 92 Can. Bar Rev. (forthcoming); L.A. Bihari, "Saving the Law's Soul: A Normative Perspective on the *Cy Près* Doctrine" (2011), 7 Can. Class Action Rev. 293; C. Sgro, "The Doctrine of *Cy Près* in Ontario Class Actions: Towards a Consistent, Principled, and Transparent Approach" (2011), 7 Can. Class Action Rev. 265; J. Berryman, "Nudge, Nudge, Wink, Wink: Behavioural Modification, *Cy près* Distributions and Class Actions" in J. Kalajdzic, *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (Markham, Nexis Lexis Canada, 2011); J. Kalajdzic, "Access to Justice: Revisiting Settlement Standards and *Cy près* Distributions" (2010), 6 Can. Class Action Rev. 215; E.R. Potter and N. Razack, "*Cy Près* Awards in Canadian Class Actions: A Critical Interrogation of What is Meant by 'As Near as Possible'" (2010), 6 Can. Class Action Rev. 297; J. Berryman, "Class Actions and the Exercise of *Cy près* Doctrine: Time for Improved Scrutiny" in J. Berryman and R. Bigwood, *The Law of Remedies: New Directions in the Common Law* (Toronto: Irwin Law, 2009); J.C. Kleefeld, "Book Review: The Modern *Cy près* Doctrine: Applications and Implications by Rachael P. Mulheron (2006)" (2007), 4 Can. Class Action Rev. 203.

147 *Gilbert v. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35, [2004] O.J. No. 4260 (Ont. S.C.J.), at paras. 14-15; *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (Ont. S.C.J.), at para. 14.

148 S.O. 1992, c. 6, s. 26(4).

149 Alberta: *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 34(1); British Columbia: *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 34(1); Manitoba: *The Class Proceedings Act*, C.C.S.M. c. C130, s. 34(1); New Brunswick: *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. 36(1); Newfoundland and Labrador: *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 34(1); Nova Scotia: *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 37(1); Saskatchewan: *The Class Actions Act*, S.S. 2001, c. C-12.01, s. 37(1); Québec: *Code of Civil Procedure*, C.Q.L.R. c. C-25, arts. 1033, 1034 and 1036.

150 *McCutcheon v. Cash Store Inc.* (2006), 27 C.P.C. (6th) 293 (Ont. S.C.J.), at para. 76.

151 Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) (3 vols.), vol. 2. at p. 573.

value of $2.75 million and glucose monitors, strips and lancets worth $1.25 million. The whole settlement was distributed *cy près*, with the products to be distributed by the Canadian Diabetes Association and $1.25 million in cash funds being used: (a) to purchase monitors that would be distributed by the Canadian Diabetes Association through an education program; and (b) to create a public awareness program to raise awareness of the dangers of untreated diabetes.[153] This *cy près* distribution was approved because it was not practical to distribute the benefits of the settlement in any other manner, and the distribution was directly related to the issues in the lawsuit so that class members would receive an indirect benefit from the settlement.

By benefiting the class, albeit indirectly, the *cy près* distribution provides access to justice. In addition, the payment of monies by the defendant may provide some behaviour modification in that the defendant is required to internalize the cost of its products or activities. In considering whether to approve a *cy près* distribution, the court should have regard to the objectives of access to justice for class members and behaviour modification of the defendant.[154] *Cy près* relief should attempt to serve the objectives of the particular case and the interests of the class members.[155] The prospect of a *cy près* distribution should not be used by class counsel, defence counsel, or the defendant as an opportunity to benefit an organization with which they are associated or that they favour.[156] The benefits of the class action are meant for the class members.

As a general rule, *cy près* distributions should not be approved where direct compensation to class members is practicable.[157] Where the expense of any distribution among the class members individually would be prohibitive in view of the limited funds available and the problems of identifying them and verifying their status as members, a *cy près* distribution of the settlement proceeds is appropriate.[158] Where in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members, the court will approve a *cy près* distribution to credible organizations or institutions whose services or

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152 2011 ONSC 128 (Ont. S.C.J.).

153 The remaining $1.5 million in cash was paid to class counsel for their fees.

154 *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (Ont. S.C.J.), at paras. 14-49; *Sorenson v. Easyhome Ltd.*, 2013 ONSC 4017 (Ont. S.C.J.), at paras. 26-30.

155 See B.J. Rothstein and Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, 3rd ed. (Federal Judicial Center, 2010).

156 *Sorenson v. Easyhome Ltd.*, 2013 ONSC 4017 (Ont. S.C.J.), at paras. 32-33.

157 *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (Ont. S.C.J.), at para. 17.

158 *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 (Ont. S.C.J.), at para. 27; *Helm v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2602 (Ont. S.C.J.), at para. 11; *Elliott v. Boliden Ltd.* (2006), 34 C.P.C. (6th) 339 (Ont. S.C.J.); *Serhan Estate v. Johnson & Johnson*, 2011 ONSC 128 (Ont. S.C.J.), at paras. 57-59; *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at paras. 82-83.

programs would benefit class members.[159] The benefit is indirect in the sense of advancing the cause or social purposes of the class action but without providing direct compensation to the class members.

Once it is determined that a *cy près* award is appropriate, class counsel bears the responsibility of designating the beneficiary.[160] Class counsel should consider the views of individual class members about who the recipient should be.[161] Where a class member requests a particular recipient, class counsel will have to be satisfied that it is not a self-serving request that fails to benefit all class members.[162] Class counsel's recommendation will generally be respected by the court, since the court's role is not to remake the settlement agreement or to adjudicate a dispute between the representative plaintiff and class members over who the beneficiary should be. However, in one case where a class member selected a recipient whom class counsel agreed was a worthy recipient, but whom class counsel did not ultimately select as the beneficiary of the *cy près* award, the motion judge ordered that this recipient should receive a portion of the *cy près* award having regard to class counsel's obligation to consider the wishes of class members.[163]

Cy près provisions are also routinely included in settlement agreements to account for any residual funds not distributed to class members at the conclusion of the claims process. Courts have signalled a preference for such residual *cy près* clauses because agreements that revert unclaimed funds back to the defendant may fail to achieve the behaviour modification purpose of the class proceedings legislation. For class counsel, a *cy près* distribution of the residue of a settlement fund is advantageous because this approach preserves the constant value of the settlement of which the counsel fee will be a percentage and diminishes arguments that the counsel fee should be tied to the actual take-up by class members.

Cy près distributions have been approved in numerous cases, mainly in Ontario[164] and Québec,[165] with a few in British Columbia[166] and

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159 *Tesluk v. Boots Pharmaceutical PLC* (2002), 21 C.P.C. (5th) 196 (Ont. S.C.J.), at para. 16; *Alfresh Beverages Canada Corp. v. Hoechst AG* (2002), 16 C.P.C. (5th) 301 (Ont. S.C.J.).

160 *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at paras. 128 and 132-133.

161 *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at paras. 132-133.

162 *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at para. 134.

163 *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.), at paras. 122-142.

164 See, *e.g.*, *Tesluk v. Boots Pharmaceutical PLC* (2002), 21 C.P.C. (5th) 196 (Ont. S.C.J.), at para. 16; *Alfresh Beverages Canada Corp. v. Hoechst AG* (2002), 16 C.P.C. (5th) 301 (Ont. S.C.J.); *Gilbert v. Canadian Imperial Bank of Commerce* (2004), 3 C.P.C. (6th) 35 (Ont. S.C.J.); *Cassano v. Toronto Dominion Bank* (2009), 98 O.R. (3d) 543 (Ont. S.C.J.); *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (Ont. S.C.J.); *Garland v. Enbridge Gas Distribution Inc.* (2006), 56 C.P.C. (6th) 357, [2006] O.J. No. 4907 (Ont. S.C.J.), varied 2008 ONCA 13 (Ont. C.A.); *Elliott v. Boliden Ltd.* (2006), 34 C.P.C. (6th) 339 (Ont. S.C.J.); *Currie v. McDonald's Restaurants of Canada Ltd.* (2006), 27 C.P.C. (6th) 286 (Ont. S.C.J.), additional reasons (2007), 51 C.P.C. (6th) 99 (Ont. S.C.J.); *Carom v. Bre-X Minerals Ltd.*, 2014 ONSC 2507 (Ont. S.C.J.).

elsewhere.[167] According to a study published in 2014, *cy près* distributions were approved in at least 65 cases in the 12-year period ending in 2012.[168]

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165 See, *e.g.*, *D'Urzo v. Tnow Entertainment Group*, 2014 QCCS 365 (Que. S.C.); and *Stieber v. Joseph Ülie ltée*, 2009 QCCS 2498 (Que. S.C.).

166 See, *e.g.*, *R.N. Parton Ltd. v. Bayer Inc.*, 2006 BCSC 1621 (B.C. S.C. [In Chambers]).

167 *Bishay Estate v. Maple Leaf Foods Inc.*, 2009 SKQB 326 (Sask. Q.B.).

168 J. Kalajdzic, "The 'Illusion of Compensation': *Cy près* Distributions in Canadian Class Actions" (2014), 92 Can. Bar Rev. 1 (forthcoming).

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

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