Court File No.: CV-19-615862-00CL

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.**

Applicant

RESPONDING MOTION RECORD OF THE APPLICANT
Returnable April 4-5, 2019

April 1, 2019

Thornton Grout Finnigan LLP
100 Wellington Street West
Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Robert I. Thornton (LSO# 24266B)
Email: rthornton@tgf.ca

Leanne M. Williams (LSO# 41877E)
Email: lwilliams@tgf.ca

Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Applicant

Court File No.: CV-19-615862-00CL

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.**

Applicant

INDEX

Tab	**Document**
1	Affidavit of Robert McMaster sworn April 1, 2019
Schedule 1	Material Service Agreements between the Applicant and Related Entities
A	Affidavit of Robert McMaster sworn March 8, 2019 (without exhibits)
B	Quebec Superior Court Judgment dated May 27, 2015
C	Unofficial English translation of QCA Judgment dated March 1, 2019
D	Affidavit of Mary Carol Holbert sworn September 12, 2013
E	Fourth Report to the Court dated February 16, 2005
F	Judgment issued on December 4, 2013 regarding Safeguard Decision
G	Unofficial English translation of Judgment dated March 10, 2014
H	Transcripts of the hearing of October 6, 2015 before Justice Schrager
I	Deposit Judgment dated October 27, 2015
J	Eleventh Report of the 2004 Monitor dated January 13, 2006
K	Transcript of Justice Riordan ruled orally on September 29, 2014
L	JTIM's Argument Plan

2	Affidavit of William E. Aziz sworn April 1, 2019
A	Curriculum Vitae of William E. Aziz
B	Letter dated May 16, 2005 along with unofficial English translation
C	Repayment Agreement between the Applicant and JT International Holding B.V.
D	2017 Financial Statements for JT International Holding B.V.

Tab 1

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

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.

Applicant

AFFIDAVIT OF ROBERT MCMASTER
(sworn April 1, 2019)

I, **ROBERT MCMASTER**, of the Town of Whitby, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a Chartered Professional Accountant (CPA, CA) and the Director, Taxation and Treasury for JTI-Macdonald Corp. (the "**Applicant**" or "**JTIM**") and as such have knowledge of the matters hereinafter deposed to, save where I have obtained information from others. Where I have obtained information from others I have stated the source of the information and believe it to be true.

INTRODUCTION

2. All capitalized terms not otherwise defined herein shall be as defined in the Order of Justice Hainey dated March 8, 2019 (the "**Initial Order**").

3. This affidavit is sworn in response to certain relief requested by counsel to the Class Action Plaintiffs (as defined herein):

(a) prohibiting JTIM from making payments to the JTI Group, save and except for the payment for physical inventory actually supplied by such member of the JTI Group in connection with the manufacture, purchase and sale of Tobacco Products. Prohibited payments include:

   i. the payment of principal and interest to the Applicant's secured creditor, JTI-Macdonald TM Corp. ("**JTI-TM**");

   ii. the payment of royalties to any member of the JTI Group;

   iii. the payment for services rendered by the JTI Group by way of set-off or otherwise;

   iv. the transfer of funds to entities in the JTI Group for any consideration or reason whatsoever; and

   v. the payment of dividends;

(b) ordering that all net cash generated by JTIM remain with JTIM;

(c) rescinding the appointment of Deloitte Restructuring Inc. ("**Deloitte Restructuring**") as the Monitor; and

(d) rescinding the appointment of the CRO.

BACKGROUND

4. The Applicant was granted protection from its creditors pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, C. C-36, as amended (the "**CCAA**") on March 8, 2019 pursuant to the Initial Order. This affidavit is sworn in addition to my affidavits sworn in this proceeding on March 8, 2019 (the "**Initial Affidavit**") and March 28, 2019. A copy of the Initial Affidavit (without exhibits) is attached as **Exhibit "A"**.

5. This CCAA proceeding was initiated as a result of the release of the judgment of the

Quebec Court of Appeal (the "**QCA**") on March 1, 2019 (the "**QCA Judgment**"), which substantially upheld the judgment of Mr. Justice Riordan of the Quebec Superior Court publicly released on June 1, 2015, and subsequently amended on June 9, 2015 (the "**Trial Judgment**"). The QCA Judgment is in respect of the Quebec Class Actions and ordered JTIM and the other co-defendants to pay damages to the Quebec class action plaintiffs (the "**Class Action Plaintiffs**") in the approximate amount of $13.5 billion (including interest and an additional indemnity) on a solidary basis. A copy of the Trial Judgment is attached as **Exhibit "B"** and a copy of an unofficial English translation of the QCA Judgment is attached as **Exhibit "C"**.

6. In addition to the QCA Judgment, JTIM is also the subject of significant health care cost recovery litigation (the "**HCCR Actions**") and certain other tobacco-related class action litigation (the "**Additional Class Actions**"), which are in various stages of progress. I am informed by counsel to the Applicant that, contrary to the materials filed by the Class Action Plaintiffs, none of JTIM's affiliates, including its indirect parent, Japan Tobacco Inc. ("**Japan Tobacco**"), a publicly listed company in Japan, are defendants in any of the Class Actions, the HCCR Actions or the Additional Class Actions.

7. The other defendants in the Class Actions, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (collectively, "**ITL**") and Rothmans, Benson & Hedges Inc. ("**RBH**"), have also obtained protection under the CCAA.

PAYMENT OF PRINCIPAL, INTEREST AND ROYALTIES

8. The Initial Order permits the Applicant to pay: (i) all interest due and payable on the Applicant's secured obligations, and (ii) for goods or services supplied or to be supplied to the Applicant (including the payment of any royalties or shared services). The Applicant did not seek

and it was not provided with the authority to make principal payments on its secured obligations. JTIM also has not paid dividends to any member of the JTI Group and will not do so during the course of these proceedings. Since the Applicant is insolvent, I am informed by legal counsel to the Applicant that it is prohibited as a matter of corporate law from paying dividends.

9. The Class Action Plaintiffs have sought to prohibit the payment of principal, interest and royalties to JTI-TM during the course of these proceedings. It is the position of the Applicant that interest and royalty payments to JTI-TM should continue to be made until and unless there is a determination that the security granted by the Applicant to JTI-TM is invalid and unenforceable and that the transfer of trademarks to JTI-TM should be set aside. No such order has been made or sought.

Recapitalization Transactions

10. On March 9, 1999, it was announced that Japan Tobacco had reached an agreement to purchase the international, non-U.S., tobacco assets of RJR Nabisco, Inc., R.J. Reynolds Tobacco Company and their affiliates (collectively, the "**RJR Group**"). The bid process was competitive and the major international tobacco groups participated in it.

11. For tax-planning purposes, the acquisition of the Canadian assets was structured as a leveraged buyout leaving the Canadian operating company with debt and interest that would be deductible from its earnings. I have reviewed the affidavit of Mary Carol Holbert (tax counsel with R.J Reynolds Tobacco International, S.A. ("**RJRI**") in 1999) sworn on September 12, 2013 (the "**Holbert Affidavit**") in the context of the Safeguard Motion (as defined below). According to the Holbert Affidavit, at the time of the acquisition, Japan Tobacco was a large public company in Japan but only had a limited international presence and limited experience in international

acquisitions. Because of the extremely tight time frame available to close the transaction, the completion of many of the necessary planning and implementation steps required to integrate this worldwide acquisition had to be completed after closing. At the time of the acquisition, I was the Manager, Taxation and Insurance of RJR-Macdonald Corp. ("**RJRM**"), the predecessor of JTIM. Although responsibility for the tax planning of the acquisition by Japan Tobacco was led by RJRI, as a result of my position, I was aware of the recapitalization steps and their Canadian tax implications. A copy of the Holbert Affidavit is attached as **Exhibit "D"**.

12. A typical form of leveraged buy-out is accomplished by replacing equity with debt. A portion of the debt is typically taken by the acquirer of international assets and is transferred to an acquired entity that generates earnings. The intention to execute a leveraged buyout explains the capitalization of the Canadian company at the time of closing with redeemable preferred shares that subsequently facilitated the implementation of the debt structure. The leveraged buyout was accomplished by taking on a loan and using its proceeds to redeem preferred shares. This leveraged buyout structure has well known tax advantages, including the deduction of interest expense by the entity that generates the earnings (i.e. taxable income).

13. At the time of the acquisition by Japan Tobacco, the federal government and several provinces imposed capital taxes based on the book value of assets and liabilities in the statutory financial statements that were required for tax return purposes. Generally accepted accounting principles required a "step up" to the fair value of the assets of an acquired company if that acquired company was later amalgamated with the acquiring company. The trademarks had a significant value and were thus expected to have a significant impact on the stepped up book value of JTIM once the planned amalgamation occurred. This would create a significant capital tax liability for

JTIM.

14. It was also common at the time that, in order to alleviate the imposition of a substantial capital tax burden resulting from a high value asset in an operating entity, that asset would be transferred to a subsidiary in consideration for shares pursuant to a section 85 rollover election in accordance with the provisions of the *Income Tax Act* (Canada)(the "**ITA**"). Generally accepted accounting principles allowed JTI-TM to have a nominal book value based on the tax election. Shortly after the acquisition and prior to the amalgamation of JT Nova Scotia Corp. and RJRM to create JTIM, the trademarks were transferred to a wholly-owned subsidiary, JTI-TM, in consideration for the issuance of shares. As a result, after the amalgamation to create JTIM, the trademarks were included in the investment in a subsidiary category for capital tax purposes, which was an allowed investment deduction in the capital value of JTIM. Direct investments in trademarks were not an allowable investment deduction in capital value for capital tax purposes. I also note that JTI-TM had a lower combined federal and provincial corporate tax rate than JTIM, which resulted in an additional tax benefit after the transfer of the trademarks to JTI-TM.

15. The capital tax savings on an annual basis as a result of the transfer of the trademarks to JTI-TM was approximately $3.6 million, beginning in 1999, until 2005. Starting in 2006, these capital taxes were reduced and ultimately eliminated at the end of 2010 as a result of changes to the tax legislation.

16. Subsequent to the transfer of the trademarks, on November 23, 1999, JT International B.V. ("**JTI-BV**"), an affiliated entity incorporated under the laws of the Netherlands, borrowed $1.2 billion from ABN AMRO Bank N.V. ("**ABN AMRO**"), a third-party financial institution. JTI-BV made a secured advance of $1.2 billion to JT Canada LLC Inc. ("**JT-LLC**"). JT-LLC then

made a secured advance of $1.2 billion to TM and TM made a secured advance of $1.2 billion to JT Nova Scotia Corporation (now the Applicant through amalgamation). The Applicant then returned capital of $1.2 billion to its then parent, JT Canada LLC II Inc. Through various intercompany transactions as more particularly set out in the Fourth Report (as defined below), the funds were eventually paid to JTI-BV, who repaid the loan to ABN AMRO collectively, (the "**Recapitalization Transactions**"). These steps created the leveraged buyout structure.

17. At the time of the acquisition from the RJR Group, Canada was generally considered to be a high tax jurisdiction. According to the Holbert Affidavit, the Canadian income tax burden of JTIM represented approximately one-third of the entire RJR Group's income tax expense. In 1999, the ITA permitted foreign investors to leverage their acquisitions by capitalizing the acquired entity with a prescribed ratio of debt to equity. These are referred to as the "thin capitalization rules" that prescribed that ratio to be 3:1 at the time of the Recapitalization Transactions. At all times, the Recapitalization Transactions respected the thin capitalization rules prescribed ratio.

18. The Recapitalization Transactions allowed JTIM to pay interest on the secured loan and claim an interest expense deduction to reduce income, resulting in lower taxes paid in Canada, and the receipt of interest income in a more favourable tax jurisdiction.

19. As a result of the Recapitalization Transaction, JTIM has realized significant Canadian tax savings since 1999. For the first five years following the completion of the Recapitalization Transactions, JTIM had an average tax saving of $45 million per year. The annual savings continue to be significant but at lesser levels due to lower royalty expenses and lower corporate income tax rates. Currently, JTIM saves approximately $27 million annually as a result of the Recapitalization Transactions. Notwithstanding the tax savings, the provincial and federal

governments currently collect more than $1.3 billion in taxes annually in relation to the sale of JTIM's products as indicated in my Initial Affidavit.

20. As outlined in my Initial Affidavit, the Recapitalization Transactions were reviewed in detail during the CCAA proceedings commenced by JTIM in 2004 (the "**2004 CCAA Proceedings**"). In connection with the contraband litigation commenced by the Attorney General of Canada ("**AG Canada**") on August 13, 2003 against the Applicant (which was later settled), AG Canada filed a statement of claim which included a challenge to the validity of the Recapitalization Transactions (the "**AG Claim**"). As a result of the AG Claim, Ernst & Young Inc., in its capacity as Court-appointed Monitor of JTIM (the "**2004 Monitor**") described in detail the Recapitalization Transactions and the documentation that instituted and/or recorded the inter-company debt and royalty obligations during the 2004 CCAA Proceedings in its Fourth Report to the Court dated February 16, 2005 (the "**Fourth Report**"), a copy of which is attached as Exhibit "**E**".

21. The 2004 Monitor noted that a recapitalization plan to introduce a substantial debt component, such as the structure employed by Japan Tobacco in Canada, was not unusual at the time and was typically done primarily for tax purposes. The 2004 Monitor also obtained opinions confirming, among other things, the validity of the security interests of JTI-TM in the assets of JTIM in Ontario, Nova Scotia, and Quebec.

22. As noted above, AG Canada filed a statement of claim challenging the Recapitalization Transactions as a fraudulent conveyance, but the action did not proceed. As stated in paragraph 8 of the Endorsement of Justice Farley dated February 8, 2006 (the "**2006 Endorsement**") in the 2004 CCAA Proceedings, the Recapitalization Transactions were in the past and not proven as a

fraudulent conveyance. Justice Farley found that the Recapitalization Transactions were of "no material relevance" to a determination of whether JTIM should be allowed to commence the payment of principal, interest and royalties during the 2004 CCAA Proceedings.

23. The Class Action Plaintiffs assert that the "real reason" that the Recapitalization Transactions occurred were for creditor proofing purposes. This is not the case. As set out in the Holbert Affidavit, the Recapitalization Transactions were motivated by tax efficiency, as evidenced by the significant tax benefits. However, as noted in the Holbert Affidavit, in order to avoid the possible imposition of the general anti-avoidance rule ("**GAAR**") with respect to the transfer of the trademarks to JTI-TM, JTIM was required to provide a business purpose, other than the tax benefit, to taxing authorities for transactions that result in diminished taxes payable. The business purpose attributed by JTIM to the transfer of the trademarks was to afford protection to a portion of the business by placing the trademarks in a "bankruptcy remote" position. JTIM's position was that this was an acceptable business purpose under GAAR. Canada Revenue Agency ("**CRA**") has completed tax audits up to the 2013 taxation year and is currently in the process of auditing the 2014-2016 taxation years and has not issued any proposed reassessments related to this issue.

24. Ms. Holbert clearly states in the Holbert Affidavit that she was unaware of the existence of any litigation against RJRM (now JTIM) at the time of the acquisition, including the Class Actions which, I am informed by the Applicant's litigation counsel, were not yet certified as a class proceeding in 1999. Ms. Holbert also did not receive any suggestions or instructions from anyone to develop such a plan to counter any actual or threatened litigation involving RJRM (now JTIM) in the preparation of the Recapitalization Transactions. The Class Actions (as they then were) were completely irrelevant to the instructions that Ms. Holbert had and her work as a tax specialist

for RJRI. I am informed by the Applicant's legal counsel that counsel to the Class Action Plaintiffs chose not to cross-examine Ms. Holbert on the Holbert Affidavit nor challenge the veracity of the statements therein.

Safeguard Motion

25. In 2013, the Class Action Plaintiffs brought a "safeguard motion" against the Applicant (the "**Safeguard Motion**") in an attempt to prevent JTIM from making its scheduled principal, interest and royalty payments to JTI-TM. As set out in more detail below, this motion was denied by the Quebec Superior Court and leave to appeal was refused by the QCA.

26. By Judgment issued on December 4, 2013 (the "**Safeguard Decision**"), Justice Mongeon of the commercial branch of the Quebec Superior Court denied the relief sought by the Class Action Plaintiffs and noted at paragraph 44 of the Safeguard Decision that the Class Action Plaintiffs had failed to actually challenge the Recapitalization Transactions. A copy of the Safeguard Decision is attached as Exhibit "**F**".

27. Justice Mongeon noted that the Class Action Plaintiffs sued only JTIM and not the contractual counterparties to the Recapitalization Transactions and stated at paragraph 97 of the Safeguard Decision that, "Whatever the intent or effect of the integrated series of transactions set up to acquire the tobacco operations of the [RJR Group] by [Japan Tobacco] may have been, these integrated transactions are to be considered valid and opposable … unless attacked as being invalid and/or inopposable".

28. Leave to appeal the Safeguard Decision was sought by the Class Action Plaintiffs at the QCA but was denied by Justice Savard on March 10, 2014, a copy of an unofficial English

translation of which is attached as Exhibit "**G**".

Trial Judgment

29. Notwithstanding the Safeguard Decision, Justice Riordan made negative comments in respect of the Recapitalization Transactions in the Trial Judgment in the context of His Honour's consideration of JTIM's ability to pay an award of punitive damages. Justice Riordan acknowledged at paragraph 1099 of the Trial Judgment that "no one has attacked the validity or the legality of the tax planning behind the Interco Contracts, or the contracts themselves" and noted at paragraph 1102 that the matter of their legality was not the subject of the Class Actions.

Deposit Motion

30. I am informed by the Applicant's legal counsel in the Class Actions that:

(a) the Trial Judgment contained a conclusion ordering provisional execution notwithstanding appeal. The Defendants brought a motion to cancel provisional execution, which was granted by the QCA on July 23, 2015. Further to the QCA's decision canceling the provisional execution of the Trial Judgment, the Plaintiffs moved on August 13, 2015 for the posting of security against the Defendants (the "**Deposit Motion**"), which motion was heard by Justice Schrager, J.C.A., on October 6, 2015;

(b) the Class Action Plaintiffs did not seek any order to invalidate the Recapitalization Transactions, or to prevent JTIM from making any payments pursuant to such

transactions after the Trial Judgment was rendered;

(c) prior to the commencement of the hearing of the Deposit Motion, counsel to the Plaintiffs and JTIM were unable to find a mutually agreeable hearing date and the Plaintiffs ultimately decided to withdraw their motion against JTIM, "because attorneys were unavailable due to health issues" on Plaintiffs' chosen date. Rather than adjourn the hearing, counsel to the Plaintiffs advised the Court that, in respect of the appeal to the QCA, it was their intention "not to proceed [with the Deposit Motion] against JTI today or ever". A copy of the transcripts of the hearing of October 6, 2015 before Justice Schrager are attached as Exhibit "**H**"; and

(d) a judgment was granted only against ITL and RBH on October 27, 2015 (the "**Deposit Judgment**") (which was later modified on December 9, 2015), ordering ITL and RBH to furnish security to the Class Action Plaintiffs. The Deposit Motion was dropped against JTIM. A copy of the Deposit Judgment is attached as Exhibit "**I**".

QCA Judgment

31. I am further informed by the Applicant's legal counsel in the Class Actions that JTIM argued at trial that the Court should take the loan and security documents into account when assessing JTIM's ability to pay punitive damages, However, the Trial Judgment and QCA found that the Recapitalization Transactions should be taken into account for the purpose of establishing the entitlement and amount of punitive damages assessed against JTIM, not JTIM's ability to pay. Notwithstanding that the QCA Judgment upheld this aspect of the Trial Judgment, the QCA Judgment expressly notes at paragraph 1158 [unofficial translation] that, "the mere fact that the contracts concluded between [JTIM] and other entities may be legal or valid for tax purposes, an

issue on which the Court does not rule, does not lead to the conclusion that the court cannot take them into account when assessing the company's actual assets".

32. The recapitalization of the Applicant and the security granted in respect thereto has been in place since the acquisition of the RJR Group by Japan Tobacco in 1999. Apart from the fraudulent conveyance challenge in the AG Claim, although full particulars of the Recapitalization Transactions were disclosed and widely known as a result of the 2004 CCAA Proceedings and the Safeguard Motion, I am informed by legal counsel of the Applicant that no party has challenged the validity or enforceability of the security, there are no outstanding proceedings to which JTIM is a party and there are no Court rulings adverse to the enforceability of the debt and security of JTI-TM.

Payment of Royalties

33. As outlined in the Initial Affidavit, JTIM is the parent and sole shareholder of JTI-TM that owns many of the trademarks that JTIM uses in its business and is a secured creditor of JTIM. JTIM's market share and profits in Canada is largely attributed to the brands of tobacco products it exclusively sells in the Canadian market. If such arrangements were terminated, JTIM's business would effectively cease in its current form.

Effect of Failure to Pay Interest and Royalties

34. At the commencement of the 2004 CCAA Proceedings, JTIM and JTI-TM agreed that JTIM would stop making principal, interest and royalty payments to JTI-TM as at the date of filing. During the 2004 CCAA Proceeding, JTIM was the subject of numerous unexpected business developments, including declining sales volumes due to increased untaxed cigarettes in the market

and decreased earnings due to a shift to value brands until 2008 when sales began to recover. JTIM also lost over $97 million during the 2004 CCAA Proceedings as a result of its investments in asset-backed commercial papers (the "**ABCP Loss**"). Earnings from operations had deteriorated from approximately $137 million in 2001 to $47 million in 2006 which is less than half the total royalties and regular interest expense. Earnings from operations have since grown to $207 million in 2018.

35. As outlined in the Eleventh Report of the 2004 Monitor dated January 13, 2006 (the "**Eleventh Report**"), a copy of which is attached as Exhibit "**J**", JTIM and its affiliates began to experience a significant and avoidable tax burden as a result of JTIM's failure to pay principal, interest and royalties. JTI-TM and JT-LLC had no other source of revenue, other than the payments originating from JTIM. As outlined in the Eleventh Report, if JTIM simply accrued the amounts owing to JTI-TM without payment, those amounts would have to be included in the income of JTIM in the subsequent third taxation year following the year the expense was incurred unless a joint election is made to deem the amount paid and loaned back to JTIM. However, the joint election only addresses certain of the implications of non-payment as set out in the Eleventh Report. For example, interest would continue to accrue and be compounded in accordance with the loan and security agreements granted by JTIM to JTI-TM at the rate of 7.75% per annum. Interest on any unpaid royalties would accrue at the rate of 5.85%.

36. I estimate that the annual interest accrual on the debentures granted by JTIM to JTI-TM would equal approximately $2.4 million in the first year and compound thereafter such that it would escalate to $30.8 million by 2023. The estimated annual interest accrual on the royalties

would be approximately $133,000 in 2019 and build to $2.2 million by 2023.

37. If the joint election is made by JTIM and JTI-TM, and also between JTI-TM and JT-LLC and JT-LLC and JT International Holding BV (“**JTIH-BV**”), withholding taxes would become payable by JT-LLC but no funds would be available to pay the withholding taxes. The filing of the election would trigger the payment by JT-LLC of withholding taxes that would not otherwise be payable until the funds flowed from JT-LLC to JTIH-BV. I estimate that the withholding taxes that would be payable by JT-LLC would be approximately $4.3 million in 2023 and $6.5 million annually thereafter. JT-LLC would have no alternative but to attempt to secure financing to pay the withholding taxes, incurring further interest expense and, I am informed by legal counsel to the Applicant that the loan and security documents state, that such cost would ultimately be passed back to JTIM. As a result, JT-LLC and JTIH-BV may determine that it is not in their best interest to make the joint election. Similarly, JT-LLC and JTI-TM may not agree to make the election and JTI-TM may also decide not to make the tax election with JTIM.

38. Neither JTI-TM nor JT-LLC are parties to the Class Actions, the HCCR Actions or the Other Class Actions. Within the next few months, neither of these entities will have sufficient funds to pay their outstanding taxes and will be subject to compounding interest obligations if the payments that are properly due and owing are not paid. In order to pay its outstanding taxes, JTI-TM would require financing in the amount of $2.3 million in 2019 which would grow to $54.5 million in 2023 and JT-LLC would require $3.8 million in 2020 which would grow to $39.2 million in 2023.

39. The Class Action Plaintiffs argue that JTIM should revise their related party security and royalty agreements to eliminate or dramatically decrease the payments of interest and royalties

that would be owing thereunder as they did in the 2004 CCAA Proceedings. This type of arbitrary change is not tax effective as various related party benefit rules could apply to create taxable income for the recipient of the benefit (for example JTIM). The taxable income amount would be the value of the benefit, such as a reduced interest expense. The ITA guidelines require non-arm's length persons to conduct themselves as arm's length persons would as it relates to transactions among them. Thus, absent special circumstances, it is not reasonable for JTIM to expect JTI-TM, JT-LLC, and in turn JTIH-BV to permit reduced payments unless a third party would do likewise in the same circumstances.

40. During the 2004 CCAA Proceedings, JTIM was able to reduce the interest rate owing as it was able to demonstrate that the forbearance of the payment of interest was justified in the circumstances. Each year, the cumulative unpaid interest and royalties was compared to the total cash on hand plus forecasted income for the upcoming year, prior to the charge of any interest. In the years in question, these cumulative amounts exceeded the funds available for additional interest. As a result, only a nominal interest rate applied in those years and JTIM was able to take the position that any further interest amount had no value to JTI-TM as there was no chance of collection. Since the foregone interest had no value, there was no taxable income inclusion for the foregone interest with no value. The financial situation of JTIM was re-evaluated at the end of each year to determine if the forbearance could continue. As a result of the increase in illegal untaxed tobacco products in Canada, the changes in the market and declining sales, JTIM was able to demonstrate that it could no longer support the level of interest that was being accrued. This was worsened again by the ABCP Loss in 2008 which allowed a continued reduction in debt servicing. As stated above, JTIM's earnings from operations deteriorated to $47 million in 2006 and did not improve back to the level of $100 million and above until 2011. Once JTIM's financial

situation improved and the cumulative unpaid amounts were paid, the interest payments eventually resumed at their underlying normal levels in 2013.

41. Unlike during the 2004 CCAA Proceedings, the Applicant does not see any justifiable third-party argument that would permit JTIM to reduce the rate of interest on its indebtedness to JTI-TM that would be satisfactory for taxation purposes at this time. JTIM currently has sufficient cash on hand to service its secured debt as due. As noted above, JTIM's earnings from operations were $207 million in 2018, which can clearly support the royalties and interest expense payments as they come due. Consequently, it is the position of the Applicant that the tax authorities would not support this type of unjustified forbearance by a secured creditor. As noted by Farley J. in the 2006 Endorsement, "the applicant and its various related entities have contractual obligations governing their debt and trademark relationships – I think it too simplistic, with respect, to say that these relationships should be changed as it appears to me that the tax agencies may have some concerns about that *ex post facto* redeployment".

42. If JTIM were to invest the funds that it would otherwise pay to JTI-TM in respect of interest and royalties in term deposits, it would only earn approximately 2% on term deposits at today's current rate. In the event that JTIM does not pay interest and royalties as they come due, interest will continue to compound to the detriment of JTIM and its unsecured creditors. This would result in a net cost of 5.75% (7.75% compounded interest less 2% term deposit returns) in respect of unpaid interest and 3.85% (5.85% compounded interest less 2% term deposit returns) in unpaid royalties. If JTI-TM did not agree to the tax election, JTIM would also lose the tax deduction for interest and royalty expenses which would increase the income tax burden on JTIM by approximately $27 million per year in comparison to a scenario where interest and royalties are paid as due. Paying these taxes would ultimately reduce any amount that may be available to

unsecured creditors in a settlement of the claims against JTIM yet the obligations to secured creditors for interest, compounded interest and royalties would remain.

REPAYMENT AGREEMENT

43. It is the Applicant's position that the Repayment Agreement between JTIH-BV and JTIM (the "**Repayment Agreement**") satisfactorily addresses any concerns with respect to the payment of interest to JTI-TM.

44. JTIH-BV is an entity related to JTIM that owns most of the international tobacco subsidiaries of Japan Tobacco outside of Japan. The Repayment Agreement obligates JTIH-BV to repay JTIM, or cause TM and/or JT-LLC to pay to JTIM, an amount equal to the aggregate of all secured payments received by JTI-TM from JTIM from the date of commencement of these proceedings in the event that it is finally determined that JTI-TM was not entitled to receive the post-filing interest payments.

45. It is the Applicant's position that the Repayment Agreement is sufficient such that there is no prejudice to its stakeholders in the event that JTI-TM's security is successfully challenged and set aside. As appears from its latest public financial statements, JTIH-BV has net assets with a book value of approximately USD $28 billion.

PAYMENT FOR INTERCOMPANY SERVICES

46. As outlined in my Initial Affidavit and in the pre-filing report of the Monitor dated March 8, 2019 (the "**Pre-filing Report**"), JTIM is a party to numerous services agreements and limited risk distribution agreements with related parties, which are required for JTIM's continued operations. As set out in the Pre-filing Report, the Monitor has reviewed the material related party

agreements, including the payment provisions thereunder. The service charges in place have also been audited by CRA and are currently being audited as mentioned above. To date, no adjustments have been proposed by CRA.

47. As with most multi-national companies, JTIM takes advantage of the benefits derived from global group purchasing, financing, management expertise, information technology and licensing agreements. The Pre-filing Report provides a chart summarizing the material receivables and payables (gross annual transactions greater than $1 million) between the JTI Group for the month ended December 31, 2018, a copy of which is reproduced below:

Amounts in '000s				**Balance as at December 31, 2018**	
Related Party	**Description**	**Frequency**	**2018 Annual Receipt (Payment)**	**Due to JTIM**	**Due from JTIM**
TM	Convertible debenture[1]	Monthly	(93,634)	-	1,187,674
TM	Royalty payments[1]	Monthly	(10,640)	429	-
ParentCo	Revolving Line of Credit*	On demand	-	-	-
ParentCo	Demand note	On demand	-	-	8,989
JTI-SA	Tobacco purchases, payments related to contract manufacturing and distribution of certain brands	Monthly in advance except Vantage royalties and distribution of certain brands which are 60 or 90 days	(262,594)	-	54,537
JTI-SA	Contract manufacturing for JTI-SA	Monthly	199,051	23,252	-
JTI-SA	Global IT services from JTI-SA	Monthly in advance	(4,140)	-	-
JTI-SA	Global function services for JTI-SA	Quarterly	4,691	34	-
JTI-SA	Regional IT services	Quarterly	4,475	416	
JTI-SA	Global human resources services	Monthly	5,058	207	
JTIH-BV[2]	Global administrative services	Monthly in advance	(6,688)	-	-
JTI Services[3]	Global human resources services	Monthly in advance	(1,203)	34	-
JTI-US[4]	Regional services provided for JTI-US	Quarterly	3,075	26	-
JTI-US[4]	Regional services provided by JTI-US	Monthly in advance	(632)	-	-
LLC-Cres[5]	Tobacco purchases	Monthly in advance	(2,229)	-	70
JTI-USA[6]	Distribution of brands in USA	Two to three times annually	4,428	1,890	-
JTI-USA[6]	Master Settlement Agreement for distribution of brands in USA	Monthly in advance	(578)	-	-

JTI-BusServ[7]	Global administrative services	Monthly in advance	(1,052)	-	-
JTI CTI[8]	Administrative services	Monthly	174	933	-
Logic[9]	Scientific & regulatory affairs services	Quarterly	1,184	-	-
				27,221	**1,251,270**

*ParentCo Loan Agreement was entered into on June 25, 2015 to replace the facility with Citibank; the principal balance outstanding is nil as at February 28, 2019.
[1]Amounts include both principal and interest accrual and payments. The Forbearance Letter dated August 3, 2017 (as amended on January 26, 2018, April 10, 2018, July 31, 2018, September 28, 2018 and January 8, 2019) between TM and JTIM amended the royalty and interest payment frequency from semi-annually to monthly. The amount owing with respect to royalty payments is net of a deposit of $1.3 million provided to TM, in satisfaction of the terms of the January 26, 2018 amendment.
[2]JT International Holding B.V.
[3]JTI Services Switzerland SA
[4]JTI (US) Holdings Inc.
[5]LLC Cres Neva
[6]Japan Tobacco International USA Inc.
[7]JTI Business Services Ltd.
[8]JTI Canada Tech Inc.
[9]Logic Technology Development LLC

48. In addition to the foregoing, I have attached a schedule, Schedule **"1"**, which summarizes the material service agreements between JTIM and the JTI Group. Many of the payments set out in the contracts between JTIM and the JTI Group have been in place for several years and are regularly reviewed to ensure that they comply with transfer pricing guidelines that are issued by the Organization for Economic Co-operation and Development (the "**OECD**") as updated from time-to-time and adopted by tax authorities of OECD countries, including the CRA, among others.

49. I am informed by the Applicant's legal counsel that counterparties cannot be forced to provide post-filing services for free during a CCAA proceeding. If the members of the JTI Group ceased providing services due to non-payment, it would cause irreparable disruption to JTIM's business. The Applicant would have to attempt to outsource these services from third parties at possibly increased costs, if such services could be replaced at all.

50. As stated in the 2006 Endorsement by Farley J., "the continued operation of the applicant in the ordinary course is beneficial not only to the applicant and its related entities including the head parent [Japan Tobacco], but it is beneficial to is various stakeholders including the employees and the tax collector (including the tax collectors of the various governments suing the applicant

…)."

DELOITTE RESTRUCTURING AS MONITOR

51. It is the Applicant's position that Deloitte Restructuring has no conflict or appearance of conflict in acting as the Applicant's Monitor in these CCAA Proceedings. Contrary to the assertions of the Class Action Plaintiffs, I am informed by legal counsel to the Applicant that Japan Tobacco is not subject to the stay of proceedings as it is not a defendant in any of the affected litigation proceedings. JTIM's profit before tax is less than 2% of Japan Tobacco's consolidated profit before tax.

52. Also contrary to the assertions of the Class Action Plaintiffs, in the Applicant's view, Deloitte Restructuring did not "rubber stamp" the intercompany arrangements currently in place. Deloitte Restructuring and its counsel were given access to all of the material related party contracts. Deloitte Restructuring discussed all of such related party relationships with JTIM to ascertain the nature of the relationship, whether the services performed were critical to JTIM's operations and whether the amounts payable were appropriate.

53. Likewise, Deloitte Restructuring is not the auditor or valuator of JTIM as asserted by the Class Action Plaintiffs in their materials. As outlined in the Pre-filing Report, neither Deloitte Restructuring nor any affiliate of Deloitte Restructuring provides any audit services to JTIM or any of its Canadian affiliates. In Canada, an affiliate of the Monitor, Deloitte LLP, provides audit services to the trustees of the Applicant's pension plans and is retained directly by them, not JTIM.

54. Deloitte Restructuring was retained by JTIM in 2015 after the release of the Trial Judgment. I have been one of the principal contacts for Deloitte Restructuring in connection with

the efforts to prepare for a potential CCAA filing of JTIM. In the course of preparing for its role as Monitor, Deloitte Restructuring has endeavoured to achieve an extensive understanding of JTI's operations, financial structure, intercompany relationships, management and organization. Monitoring and reporting protocols between JTIM and Deloitte Restructuring have been carefully developed and are now well established. The replacement of Deloitte Restructuring would cause unnecessary disruption to the process and lead to additional professional fees as any replacement monitor would have to be brought up to speed, which is not in the best interest of JTIM or its stakeholders.

55. I have read the Pre-filing Report of the Monitor wherein Deloitte Restructuring makes disclosure of various connections which other members of the intentional network of Deloitte Restructuring firms have with JTIM or its related parties. The Applicant does not believe Deloitte Restructuring has any actual or apparent conflicts of interest and agrees with Deloitte Restructuring's conclusion that it does not have any impediment to act as the Monitor. My experience with members of the Deloitte Restructuring team have been such that they have acted with diligence and integrity and I see no reason why they would not continue to do so.

NECESSITY OF THE CRO

56. It is the position of the Applicant that having an experienced Chief Restructuring Officer ("**CRO**") will benefit all of the parties to this proceeding and will facilitate a global resolution of the claims facing the Applicant. The CRO is not intended to be involved in the operations of JTIM, which do not require restructuring. The CRO is intended to lead the Canada-wide negotiations on behalf of JTIM with a view to seeking a workable resolution of all claims. The upcoming challenges in this proceeding requires an expert skillset in negotiating multi-party complex

restructuring deals that no one at the Applicant possesses. The CRO will be able to provide his full attention to the restructuring negotiations whereas senior management of the Applicant are required to remain primarily focused on maintaining the existing business operations.

CONDUCT OF THE APPLICANT

57. The materials of the Class Action Plaintiffs allege an abuse of litigation procedure in the Class Actions by the Applicant, ITL and RBH, which JTIM vigorously refutes. I am informed by the Applicant's legal counsel in the Class Actions, that Justice Riordan ruled orally on September 29, 2014, a copy of the transcript of which are attached as Exhibit "**K**", to suspend the Plaintiffs' allegation of abuse of procedure until after judgment on the merits was rendered. This issue has never been debated since that time and remains pending. A copy of the Applicant's Argument Plan is attached as Exhibit "**L**".

PURPOSE

58. This affidavit is sworn in response to the motion of Class Action Plaintiffs and for no improper purpose.

SWORN BEFORE ME at the City of Toronto, Province of Ontario, on April 1, 2019.	
Commissioner for Taking Affidavits Rachel Bergino	ROBERT MCMASTER

Schedule "1"

Schedule "1"

1. Pursuant to a Limited Risk Distribution Agreement effective January 1, 2014 between JTIM and JT International SA ("**JTI-SA**") (the "**LRD Agreement**"), JTIM acts as distributor in Canada of certain brands of tobacco products in exchange for remuneration as set out therein. JTI-SA authorizes JTIM to use the intellectual property related to these products solely in connection with the marketing and sale of the products in Canada pursuant to the terms of the LRD Agreement. At all times, the intellectual property remains the property of JTI-SA (whether JTI-SA owns it or has a license to use it).

2. Pursuant to a Manufacturing Agreement dated January 1, 2016, as amended (the "**Manufacturing Agreement**"), JTIM agrees to manufacture, produce, process, package and supply certain brands for JTI-SA in accordance with the specifications set by JTI-SA in exchange for a pre-determined percentage mark-up on the cost of manufacturing as set out in the Manufacturing Agreement.

3. Pursuant to a Manufacturing Agreement dated April 1, 2013 (the "**2013 Manufacturing Agreement**"), JTI-SA agreed to manufacture, package and supply to JTIM certain formats of Export "A" and Macdonald Special cigarettes for sale in Canada in accordance with specifications set by JTIM in exchange for a predetermined percentage mark-up on the cost of manufacturing as set out in the 2013 Manufacturing Agreement. The Applicant also has distribution agreements with Japan Tobacco International USA Inc. and JTI Duty-Free USA Inc. effective January 2015 for the sale of Export "A" cigarettes in the US domestic and duty-free markets, respectively.

4. Pursuant to an agreement dated February 9, 2016, JT International Business Services Limited ("**JTI-BSL**") operates a Business Service Centre ("**BSC**"), located in Manchester,

England, that provides services to related-party international tobacco companies outside of Japan ("**JT International**") in respect of various day-to-day finance activities such as payments, collections and general ledger postings. The costs associated with the BSC are allocated across all members of JT International that it services based on each entity's percentage of the total transactions performed by the BSC. The allocation methodology is provided to JTIM in respect of the amount charged each quarter, together with a final true-up for the year in the first quarter of the following year. As compensation for these services, JTIM pays (i) the internal costs incurred with respect to the BSC plus five percent (5%); and (ii) all external costs paid to third parties for the provision of the services.

5. JTIM provides certain services to JTI-SA pursuant to a Services Agreement effective January 1, 2016. The work performed by JTIM for JTI-SA pursuant to the SA Service Agreement relates to: (i) services provided by JTIM employees to other related companies in JT International; and (ii) the Global Service Desk ("**GSD**") that is located at the Plant in Quebec and provides the services described below. As compensation for providing the above services, JTI-SA pays JTIM: (i) the internal costs incurred with respect to the employees plus five percent (5%); and (ii) all external costs paid to third parties for the provision of the services.

6. JT International also maintains two other GSDs around the world (in Russia and Malaysia) that, together with the GSD at the Plant, handle information technology ("**IT**") inquiries across the globe. The locations of the GSDs allow for 24-hour service coverage. The costs of the Canadian GSD, located at the Plant, are governed by the SA Service Agreement and are initially paid by JTIM but are reimbursed in their entirety (plus a 5% mark-up) by JTI-SA and included in the global IT cost base for allocation across all members of JT International. An additional regional

IT security group maintained by JTIM is also reimbursed by JTI-SA and such costs allocated across all members of JT International in the global IT costs.

7. Pursuant to a Service Agreement effective July 1, 2016, JTI (US) Holdings Inc. ("**JTI-US**") provides JTIM with advisory services related to the Canadian market. As compensation for providing the above services, JTIM pays JTI-US: (i) the internal costs incurred with respect to the employees plus five percent (5%); and (ii) all external costs paid to third parties for the provision of the services.

8. Pursuant to a Service Agreement effective July 1, 2016, JTIM provides JTI-US with certain advisory services related to the Americas Region, other than Canada. As compensation for providing the above services, JTI-US pays JTIM: (i) the internal costs incurred with respect to the employees plus five percent (5%); and (ii) all external costs paid to third parties for the provision of the services.

9. Pursuant to a Service Agreement between the Applicant and JTI-SA effective January 1, 2009, certain key IT hardware, software and organization is centralized by JTI-SA. This arrangement is as a result of the infrastructure, personnel and expertise held by JTI-SA in Geneva, Switzerland and avoids duplication of costly IT infrastructures. These infrastructure costs include, among other things, the SAP accounting system, maintenance of the intranet, global purchasing of Microsoft licenses and other key services across JT International. This allows the Applicant to maintain only a small IT department for hands-on-service. The costs of the services provided pursuant to the IT Service Agreement are aggregated by JTI-SA and allocated to members of JT International based on each entity's proportional use of the IT services. The costs are calculated on a cost plus five percent (5%) basis.

10. Pursuant to the Service Agreement between the Applicant and JTIH-BV effective January 1, 2006, various global services and functions are located centrally for use by all members of JT International that are subsidiaries of JTIH-BV (the "**Global Services Agreement**"). The costs are initially transferred to JTIH-BV, which is the main Japan Tobacco international holding company, with the exception of the IT charges as noted above that are maintained by JTI-SA. JTIH-BV then creates an aggregated cost pool for services generally applicable for all JT International entities (such services include global policies and procedures, global human resource compensation and benefits programs/guidelines, quality assurance services, scientific testing of products, packaging and blend development groups, and sales force software systems, among other things). The aggregated cost pool is then allocated across JT International entities based on each entity's proportional use of the services under the Global Services Agreement.

11. Pursuant to a Service Agreement dated January 1, 2007, JTI Services Switzerland SA ("**JTI Services**") provides JTIM with staffing support with respect to the placement in JTIM of highly skilled personnel from JT International. In exchange for such support, JTIM reimburses JTI Services for all costs incurred for each employee assigned by JTI Services to JTIM plus an administration fee.

12. Pursuant to a Service Agreement dated January 1, 2012, JTIM provides JTI-SA with staffing support with respect to the placement in JTI-SA of highly skilled personnel from JTIM. In exchange for such support, JTI-SA reimburses JTIM for all costs incurred for each employee assigned by JTIM to JTI-SA plus an administration fee.

13. Pursuant to a Service Agreement dated September 15, 2017, JTIM provides JTI Canada Tech Inc. ("**JTI-Tech**") with the resources and services described therein, together with access to

and use of the Head Office to the extent required by the business of JTI-Tech. The costs are calculated on a cost plus five percent (5%) basis.

EXHIBIT “A”

This is Exhibit "A" referred to in the
affidavit of Robert McMaster
sworn before me, this 1st
day of April, 2019

K Bergmo
A COMMISSIONER FOR TAKING AFFIDAVITS

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

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 ARRANGEMENTOF **JTI-MACDONALD CORP.**

Applicant

AFFIDAVIT OF ROBERT MCMASTER
(sworn March 8, 2019)

I, **ROBERT MCMASTER**, of the Town of Whitby, in the Province of Ontario, MAKE OATH AND SAY:

I. INTRODUCTION

1. I am a Chartered Professional Accountant (CPA, CA) and the Director, Taxation and Treasury for JTI-Macdonald Corp. ("**JTIM**") and as such, have knowledge of the matters hereinafter deposed to, save where I have obtained information from others. Where I have obtained information from others I have stated the source of the information and believe it to be true.

2. This affidavit is sworn in support of an application by JTIM for an order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), which application has been commenced as a result of the current financial circumstances of JTIM due to recent adverse developments in certain litigation in which JTIM is a defendant.

II. PRESSING NEED FOR RELIEF

3. JTIM, through its predecessor corporations and other related business entities, have been manufacturers of tobacco products in Canada since 1858.

4. As described more fully herein, Mr. Justice Riordan of the Quebec Superior Court rendered a judgment in the Class Actions (as defined herein) against JTIM and the other defendants (the "**Judgment**"), which was publicly released on June 1, 2015, and subsequently amended on June 9, 2015, that awarded a total of approximately $6.8 billion in damages on a collective and solidary basis against the defendants and punitive damages on an individual basis (all of which had an aggregate value of approximately $15.5 billion including interest and an additional indemnity as of the date of the Judgment).

5. JTIM was unsuccessful in overturning the Judgment at the Quebec Court of Appeal for the reasons described in the decision released on March 1, 2019 (the "**QCA Judgment**"). The QCA Judgment substantially upheld the Judgment and requires JTIM to pay an initial deposit of $145 million. There is uncertainty as to whether the QCA Judgment is immediately enforceable, or provides JTIM with a maximum of up to 60 days to make the payment of the initial deposit. The QCA Judgment is 422 pages and is in French only. The English conclusions of the QCA Judgment and an English summary prepared by the Quebec Court of Appeal is attached as Exhibit "**A**".

6. JTIM is an economically viable company that is able to meet its ordinary course obligations as they become due. However, if not stayed, the QCA Judgment will put JTIM out of business and destroy value for its approximately 500 full time employees, 1,300 suppliers and its customers. It would also impact approximately 28,000 retailers that sell JTIM's products and approximately 790,000 consumers of its products. Currently, the federal and provincial governments collect more

than $1.3 billion in taxes annually in relation to the sale of JTIM's products. If JTIM is forced out of business, those collections would stop.

7. JTIM is also the subject of significant health care cost recovery litigation (the "**HCCR Actions**"). The HCCR Actions commenced as a result of legislation passed in each of the ten provinces regarding the recovery of health care costs related to alleged "tobacco related wrongs", as defined in the applicable statutes. The total potential quantum of damages claimed against the defendants in the HCCR Actions, including JTIM on a joint and several basis together with other Canadian manufacturers and certain of their affiliates, is not yet known as some provincial plaintiffs have not specified the amount of their claim. However, to date, I am advised by counsel that over $500 billion has been claimed to be owing by all of the defendants in the five provinces where amounts have been specified in the claims or that have been detailed in expert reports. These claims are vastly in excess of the total book value of JTIM's assets (as disclosed herein) and are vastly in excess of the global asset value of the parent companies of the other defendant Canadian tobacco manufacturers as presented in their most recent Annual Reports.

8. JTIM requires the protections afforded under the CCAA in order to maintain the *status quo* of its operations, to allow for an application for leave and, if successful, to appeal the QCA Judgment to the Supreme Court of Canada and preserve going concern value for all of its stakeholders.

9. Notwithstanding that JTIM continues to assert that it has no liability in respect of the litigation claims asserted against it, in parallel with any appeal of the QCA Judgment, JTIM has decided to seek a collective solution for the benefit of all stakeholders in respect of the QCA

Judgment and the other multi-billion dollar claims currently being pursued against it. The requested stay under the CCAA will allow JTIM time and a platform to achieve such a solution.

III. OVERVIEW OF THE APPLICANT

A. *Corporate Structure*

10. JTIM is a private company that was continued as a corporation under the *Canada Business Corporations Act* in April 2012, and maintains its registered head office in Mississauga, Ontario (the "**Head Office**"). JTIM is owned indirectly by Japan Tobacco Inc. ("**Japan Tobacco**"), a publicly listed company in Japan.

11. A copy of an organization chart of the relevant related-party tobacco companies outside of Japan (such companies, collectively, "**JT International**") is attached as Exhibit "**B**".

12. On May 11, 1999, JTIM, then known as RJR-Macdonald Corp. was acquired by JT Nova Scotia Corporation, an indirectly wholly-owned subsidiary of Japan Tobacco.

13. Following an amalgamation and corporate reorganization in 2012, JTIM is now a direct wholly-owned subsidiary of JT Canada LLC Inc. ("**ParentCo**"), a Nova Scotia corporation and an indirect subsidiary of Japan Tobacco.

14. JTIM is the parent and sole shareholder of JTI-Macdonald TM Corp. ("**TM**"). TM owns many of the trademarks that JTIM uses in its business and is a secured creditor of JTIM. As a result of the Recapitalization Transactions (as defined herein), ParentCo is a secured creditor of TM.

15. On April 13, 2015, ParentCo demanded payment of the secured indebtedness owing from TM to ParentCo, then in the amount of approximately $1.0 billion. TM was unable to satisfy that

demand. Pursuant to the terms of the security agreements granted by TM in favour of ParentCo, on July 9, 2015, ParentCo privately appointed PricewaterhouseCoopers Inc. as the receiver and manager of TM (the "**TM Receiver**"). Subsequent to the appointment of the TM Receiver, each of the directors of TM resigned.

16. TM is not a party in any of the litigation involving JTIM. For that reason, TM is not a part of these proceedings.

B. *The Business*

17. Most of JTIM's senior management are located at the Head Office in Mississauga, Ontario. The Head Office is responsible for all functional areas regarding the sales and distribution of JTIM's products in Canada. Managerial responsibilities for the manufacturing of JTIM's products are carried out at a manufacturing facility located at 2455 Ontario Street East, in Montreal, Quebec (the "**Plant**").

18. JTIM employs approximately 500 full-time employees in Canada. In addition, JTIM leases offices and warehouse space and employs sales representatives and associates across Canada. JTIM has been on the Aon Hewitt Best Employers list for Canadian companies and was recently certified as a Top Employer in Canada by the Top Employers Institute.

19. JTIM is the third largest tobacco company defendant in the Class Actions (as defined herein) based on volume of sales in Canada. JTIM's products consist of cigarettes, fine-cut tobacco, cigars and accessories branded under various trademarks and brand names for distribution throughout Canada and for export. JTIM imports tobacco products for distribution in Canada mainly from JT International SA ("**JTI-SA**"), a foreign sister company to ParentCo.

20. JTIM purchases some processed tobacco from other related party entities, including JTI-SA, but most is purchased from third party suppliers.

21. JTIM's processed tobacco is stored at leased premises near Montreal, Quebec and is shipped to the Plant as needed. The Plant has been in operation since 1874 and is JTIM's only manufacturing facility.

22. JTIM's tobacco products are either manufactured at the Plant or imported by JTIM. Generally, JTIM sells to wholesalers who in turn sell to retailers who sell to consumers. On a lesser basis, JTIM sells tobacco products directly to retailers and consumers.

C. *Pension Plans*

23. JTIM is the plan sponsor and administrator of the following four pension and post-retirement benefits plans: (i) the JTI-Macdonald Corp. Employees' Retirement Plan (the "**ERP**"), (ii) the JTI-Macdonald Corp. Management Employees' Pension Plan (the "**MEPP**"), (iii) the JTI-Macdonald Corp. Executive Supplemental Benefit Plan (the "**ESBP**"), and (iv) the JTI-Macdonald Corp. Supplemental Non-Registered DC Pension Plan (the "**Non-Registered DC Plan**" and collectively with the ERP, the MEPP and the ESBP, the "**Pension Plans**").

24. Based on the most recent actuarial valuations, the Pension Plans had the following degrees of solvency: (i) 99.5% for the ERP, representing a deficiency in the amount of approximately $2.0 million, (ii) 99% for the MEPP, representing a deficiency in the amount of approximately $0.3 million, and (iii) 100% for the ESBP. The concept of a solvency deficiency does not apply to the Non-Registered DC Plan.

25. All employee contributions and solvency deficiency payments are current in respect of each of the Pension Plans.

26. JTIM provides other post-employment benefits ("**OPEBs**") to former salaried and hourly employees (unionized and non-unionized) and their dependants, including drug, medical, dental and life insurance benefits. As of December 31, 2018, the total present value for future OPEB contingent liabilities is estimated at $109.2 million. It is contemplated that these CCAA proceedings will not affect any payments required to be made in respect of the Pension Plans or the OPEBs.

D. *Material Contracts*

<u>i) Trademark Agreement</u>

27. JTIM's market share in Canada is largely attributed to the brands of tobacco products it exclusively sells in the Canadian market. JTIM licenses or has the right to use all of the trademarks with respect to such brands from related parties. If such arrangements were terminated, JTIM's business would effectively cease in its current form.

28. Many of the trademarks that JTIM is permitted to use in its operations are owned by TM. Pursuant to the Trademark License Agreement dated October 8, 1999, as amended from time to time (collectively, the "**Trademark Agreement**"), TM granted to JTIM a non-exclusive, world-wide license to use TM's trademarks in association with the manufacturing, distribution, advertising and sale of the licensed products for the remuneration set out therein.

29. In August 2017 and January 2018, after a default by JTIM under its secured facilities with TM as a result of the issuance of the Judgment (such default is discussed in more detail below), JTIM and TM negotiated amendments to the Trademark Agreement (the "**Trademark**

Amendments") as consideration for TM's agreement to forbear from exercising its enforcement rights against JTIM. The August 2017 amendment changed the frequency of royalty payments paid by JTIM to TM under the Trademark Agreement from semi-annual payments to monthly payments. The aggregate annual amounts payable under the Trademark Agreement remained unchanged. The January 2018 amendment to the Trademark Agreement, which was a condition of the extension of the forbearance arrangement, made the supply of goods and services under the Trademark Agreement solely in the discretion of TM, acting through the TM Receiver, and required JTIM to provide a deposit to TM in an amount equal to 1.5 times the average monthly payment under the Trademark Agreement against which outstanding liabilities could be set-off. JTIM provided TM with a deposit, which as of February 28, 2019 is $1,330,000, in satisfaction of this term of the January 2018 amendment. Attached as Exhibit "**C**" are copies of the Trademark Amendments.

30. The Trademark Amendments were required by ParentCo as part of a forbearance arrangement and in response to the possibility of liquidity constraints on JTIM in the event that the Judgment was upheld. ParentCo. is the senior secured creditor of TM and has enforced its security and appointed the TM Receiver over TM. As a result of the forbearance arrangement, the TM Receiver has agreed to forbear from enforcing on the loan and security granted by JTIM to TM.

31. JTIM is required to continue paying TM pursuant to the terms of the Trademark Agreement. Termination of the right to use the trademarks licensed pursuant to the Trademark Agreement (which license is provided on a discretionary basis) would likely cause the cessation of JTIM's business. Although not every aspect of the business is affected by the TM trademarks,

the remaining lines of business would likely not be viable on a stand-alone basis. These arrangements have allowed JTIM to continue operating in the ordinary course.

ii) Other Related Party Agreements

32. JTIM is a party to numerous services agreements and limited risk distribution agreements (the "**LRD Agreements**") with related parties, which are required for JTIM's continued operations.

33. JTIM also has related party contracts in respect of manufacturing, distribution, leaf sourcing and other miscellaneous agreements.

34. I have been advised by legal counsel that the Proposed Monitor (as defined below) in this proceeding has reviewed the material related party agreements, including the payment provisions thereunder. The service charges in place have also been audited by Canada Revenue Agency ("**CRA**") up to the 2013 taxation year and no adjustments have been required to date. CRA is currently in the process of auditing the 2014-2016 taxation years and, to date, no adjustments have been proposed.

iii) 2018 Amendments and Forbearance of Related Party Agreements

35. Against the backdrop of litigation and related credit risk, JTIM's related-party suppliers expressed concern about their potential exposure in the event that enforcement steps were taken by a judgment creditor resulting in JTIM's need to seek creditor protection. Under the intercompany arrangements then in place, such credit risk was viewed by the related parties as unacceptable. The related party suppliers advised JTIM that the intercompany supply agreements were at risk of termination. Given the unique nature of the goods and services provided, it would not be possible for JTIM to find satisfactory replacement supply arrangements. The agreements

reached with these suppliers were necessary to permit JTIM to continue operating in the ordinary course.

36. In order to maintain the necessary supply of goods and services and avoid a disruption to JTIM's business, JTIM negotiated forbearance agreements (the "**Forbearance Agreements**"), copies of which are attached as Exhibit "**D**", with five of its related party suppliers. Collectively, the Forbearance Agreements increased the frequency of payments (but not the total amount of payments) to monthly in advance (except for the LRD Agreements), required JTIM to provide a deposit capable of being set-off by the related party supplier against amounts owing by JTIM, and/or granted a security interest in all of JTIM's present and after acquired personal property in the form of a general security agreement or moveable hypothec. The following chart summarizes the changes implemented under the Forbearance Agreements:

Supplier	Frequency of Payment	Security	Right to Deposit
JTI-SA	Monthly in advance (save and except the LRD Agreements)	Yes*	No
JT International Business Services Limited ("JTI-BSL")	Monthly in advance	Yes*	Yes†
JT International Holding B.V. ("JTIH-BV")**	Monthly in advance	Yes*	Yes†
JTI Services Switzerland SA	Monthly in advance	No	No
JTI (US) Holdings Inc.	Monthly in advance	No	No

* The security granted was in the form of a general security agreement and moveable hypothec.

**On its own behalf and on behalf of certain of its affiliates.

† A deposit was ultimately not required as payments were, and continue to be, made monthly in advance.

E. *Cash Management*

37. JTIM is part of a globally-integrated business processes and information system known as SAP. The SAP system provides substantial operational benefits to JTIM, including the integration of the supply chain, research and development and finance/treasury information systems, real-time data availability, improved quality control and internal controls, and treasury-related benefits such as reducing the number of bank accounts, automating bank reconciliations, enhancing cash flow forecasting and improving liquidity management.

38. As a result of the SAP system, JTIM's information flows are consistent with its foreign affiliates. In addition, the management of JT International is provided with real-time visibility into JTIM's operational and financial information.

39. Citibank Canada is the banking service provider for those JT International entities operating in North America. JTIM maintains seven bank accounts with Citibank, N.A., Canada Branch ("**Citibank**"), one of which is denominated in USD. JTIM's accounts are comprised of single-purpose accounts for the receipt of tax refunds, for payment of employee benefits, for receipt of funds from direct sales to retailers, for payment of marketing and sales programs to retailers and to hold cash collateral, as further described below. The USD account and one CAD account are used for general operations transactions in those respective currencies.

40. Pursuant to agreements dated November 18, 2016 and February 24, 2017 between JTIM and Citibank, JTIM pledged $900,000 as cash collateral in respect of central travel account card

services and $8 million in respect of certain cash management services which require the extension of credit by Citibank, respectively, in each case as provided by Citibank to JTIM. Attached as Exhibits "**E**" and "**F**" are the two cash collateral agreements.

41. JTIM currently maintains two bank accounts at Royal Bank of Canada, one of which is a high interest savings account and the other is used for collecting sales proceeds from certain retail customers. JTIM also maintains term deposits at Sumitomo Mitsui Banking Corporation, Canada Branch.

IV. LIABILITIES OF THE APPLICANT

A. *Secured Creditors of JTIM*

i) TM Term Debentures

42. On March 9, 1999, it was announced that Japan Tobacco had reached an agreement to purchase the international (non-US) tobacco assets of RJR Nabisco, Inc., R. J. Reynolds Tobacco Company and their affiliates (collectively, the "**RJR Group**") pursuant to the terms of the Purchase Agreement (as defined below). The aggregate purchase price as set out in the Purchase Agreement was USD$7,832,539,000 in cash. The bid process was competitive and the major international tobacco groups participated in it. At the time, Japan Tobacco was a large company in Japan but only had a limited international presence.

43. From the outset, it was understood that, for tax-planning purposes, the acquisition of the Canadian assets would be a leveraged buyout leaving the Canadian operating company with debt and interest that would be deductible from its earnings. However, because of the extremely tight time frame to close the transaction, which ultimately occurred on May 11, 1999, the completion of many of the necessary planning and implementation steps required to integrate this worldwide

acquisition had to be postponed until after closing.

44. To effect a leveraged buyout structure, on November 23, 1999, JT International B.V. ("**JTI-BV**"), an affiliated entity incorporated under the laws of the Netherlands, borrowed $1.2 billion from ABN AMRO Bank N.V. ("**ABN AMRO**"), a third-party financial institution. On the same day, JTI-BV made a secured advance of $1.2 billion to ParentCo. ParentCo then made a secured advance of $1.2 billion to TM and TM made a secured advance of $1.2 billion to JT Nova Scotia Corporation (now JTIM through amalgamation). JTIM then returned capital of $1.2 billion to its then parent, JT Canada LLC II Inc. Through various intercompany transactions, the funds were eventually paid to JTI-BV, who repaid the loan to ABN AMRO (collectively, the "**Recapitalization Transactions**").

45. The Recapitalization Transactions were reviewed in detail during the CCAA proceedings commenced by the Applicant in 2004 as more particularly described herein. The Fourth Report to the Court of the 2004 Monitor (as defined herein) dated February 16, 2005 (the "**Fourth Report**"), a copy of which is attached without exhibits as Exhibit "**G**", provides a detailed overview of the Recapitalization Transactions. My comments on the Recapitalization Transactions are based on my personal knowledge of the Recapitalization Transactions and from my review of the Fourth Report.

46. As a result of the Recapitalization Transactions, the amounts owed by JTIM to TM are: (i) evidenced by ten (10) convertible debentures, governed by the laws of the Province of Quebec, in the total aggregate principal amount of $1.2 billion (the "**TM Term Debentures**"), as amended from time to time, (ii) subscribed for under the Convertible Debenture Subscription Agreement dated November 23, 1999, as amended by the Amending Agreement dated December 23, 2014

(collectively, the "**Subscription Agreement**"), (iii) due on November 18, 2024, and (iv) redeemable at the option of JTIM and convertible into special preference shares of JTIM at the option of the holder. On December 2, 1999, JTIM also delivered a demand debenture to TM (the "**Demand Debenture**"), governed by the laws of the Province of Nova Scotia, granting TM a general and continuing security interest in JTIM's business, undertakings and all of its property and assets, real and personal, movable and immovable of whatsoever kind and nature, both present and future. Copies of one of the TM Term Debentures, the Subscription Agreement and the Demand Debenture are attached as Exhibits "**H**", "**I**" and "**J**".

47. The Judgment triggered an event of default pursuant to section 13.9 of the Subscription Agreement, making the security granted thereunder enforceable by the TM Receiver against JTIM. On August 3, 2017, the TM Receiver and JTIM agreed to the terms of a forbearance letter (the "**TM Forbearance Letter**"). Pursuant to the terms of the TM Forbearance Letter, the TM Receiver agreed, among other things, to forbear from enforcing its rights and remedies against JTIM in consideration of changes to the frequency of royalty payments owing pursuant to the Trademark Agreement, as described above. A copy of the TM Forbearance Letter (without schedules because these schedules are separately attached hereto as Exhibit "**C**") is attached as Exhibit "**K**".

48. The forbearance was extended pursuant to several letter agreements (collectively, the "**Forbearance Extensions**"). Copies of the Forbearance Extensions are attached as Exhibit "**L**".

49. The Forbearance Extensions expired on February 28, 2019. On February 28, 2019, by way of letter, the TM Receiver informed JTIM that in light of the pending QCA Judgment, the TM Receiver was not prepared to formally extend the forbearance period further. However, the TM

Receiver would agree to a day-to-day extension under the same terms and conditions of the TM Forbearance Letter, which day-to-day extension may be terminated at the TM Receiver's sole and absolute discretion. A copy of the letter from TM's counsel is attached as Exhibit "**M**".

50. In accordance with the terms of the TM Forbearance Letter, the TM Term Debentures were amended by an agreement dated August 3, 2017 (the "**TM Debenture Amending Agreement**" and collectively with the TM Term Debentures, the "**Revised TM Term Debentures**") to change the interest payment frequency (but not total amount) from bi-annually to monthly. Currently, JTIM makes interest payments to TM on account of its secured indebtedness in the approximate amount of $7.6 million monthly on the 18th and principal payments of approximately $950,000 in May and November annually. As at February 28, 2019, the amount outstanding under the TM Term Debentures (including accrued interest) was approximately $1.18 billion. A copy of the TM Debenture Amending Agreement is attached as Exhibit "**N**".

51. The Revised TM Term Debentures are secured by, among other things, the Demand Debenture, a Deed of Hypothec dated November 23, 1999, a Supplemental Deed of Hypothec dated December 2, 1999, a Deed of Moveable Hypothec and Pledge of Shares dated December 12, 2000 and a Deed of Confirmation dated May 14, 2015, each as amended (collectively, the "**Hypothecs**") now held by BNY Trust Company of Canada (and in certain cases, formerly held by the Trust Company of Bank of Montreal) ("**TrustCo**") as the attorney for TM. Copies of the Hypothecs are attached as Exhibits "**O**", "**P**", and "**Q**" and "**R**", respectively.

52. I am advised by legal counsel that:

(a) TM directly registered its security interest against the personal property of JTIM in the following jurisdictions and on the following dates:

Registration Number	Jurisdiction	Registration Date	Collateral
856928601	Ontario	November 22, 1999	All classes except "consumer goods".
2399489 / 2417398	Nova Scotia		All present and after-acquired personal property.
681989I	British Columbia	June 23, 2015	
15062337351	Alberta		
301355169	Saskatchewan	June 24, 2015	
201511679902	Manitoba		
26022244	New Brunswick		
3707279	Prince Edward Island		
13031521	Newfoundland		

(b) pursuant to the security interest granted by the Hypothecs, TrustCo registered its security interest, as attorney for TM, in Ontario and Nova Scotia on December 11, 2000 under the Ontario *Personal Property Security Act* and Nova Scotia *Personal Property Security Act*. Copies of the personal property registry searches in each province as at February 28, 2019, are attached as Exhibit "**S**";

(c) as holder of the TM Term Debentures, TrustCo also registered its security interest in Quebec on December 13, 2000 and May 14, 2015 in the Registrar of Personal and Moveable Real Rights (Quebec) (the "**Quebec RPMRR**") in respect of all of JTIM's present and future property, moveable and immovable, real and personal, corporeal and incorporeal, tangible and intangible;

(d) TrustCo also registered a charge against the Plant in the Land Register for the registration division of Montreal on December 3, 1999 under registration number 5 138 944 (the "**Charge**"). There are no registrations against title to the Plant other than the Charge. A copy of the real property subsearch report prepared by Quebec counsel to JTIM relating to the Plant as at February 27, 2019 is attached as Exhibit "**T**".

ii) JTIM Secured Debt to ParentCo

53. Prior to the issuance of the Judgment, Citibank had granted an unsecured credit facility to JTIM, TM and ParentCo as joint borrowers in the principal amount of $60 million (the "**Citibank Loan**"). The Citibank Loan was used as a "smoothing" facility that was necessary as a result of the timing of the payments of substantial monthly federal excise duty and other obligations, such as interest payments, royalty payments and payroll, versus the timing of the collection of the receivables generated by the sale of inventory.

54. On June 25, 2015, after the delivery of the Judgment, Citibank advised that JTIM was no longer authorized to borrow under its credit facility. To ensure necessary cash flow for continued operations, ParentCo agreed to provide a secured borrowing facility to JTIM in the principal amount of $70 million (the "**Cash Flow Loan**") on the terms outlined in the loan agreement dated June 25, 2015 (the "**ParentCo Loan Agreement**"), attached as Exhibit "**U**". Among other things, the ParentCo Loan Agreement allows JTIM to pay the required excise duty as such obligations become due and payable, while also paying trade and employee obligations in the ordinary course.

55. As security for the amounts advanced under the Cash Flow Loan, JTIM granted a hypothec to ParentCo in respect of, among other things, its moveable property located in the Province of Quebec (the "**ParentCo Hypothec**"). The ParentCo Hypothec is attached as Exhibit "**V**". I am advised by legal counsel that ParentCo registered its security interest against JTIM pursuant to the Quebec RPMRR on June 26, 2015.

56. As of February 28, 2019, there are no amounts outstanding under the ParentCo Loan Agreement.

iii) Related Party Security Agreements

57. As noted above, as a result of the uncertainty caused by the Judgment, certain related party suppliers required JTIM to grant security to them in respect of goods and services that are delivered on credit. As at the quarter ended December 31, 2018, the gross amount outstanding to these related party suppliers is approximately $54.6 million and such amount relates almost entirely to JTIM's LRD Agreement with JTI-SA to distribute JTI-SA's tobacco products in Canada. This related party security is described in more detail below.

58. I am advised by legal counsel that,

(a) *JTI-SA Security:* in accordance with the terms of its forbearance arrangement, JTI-SA registered a purchase money security interest ("**PMSI**") against JTIM in all of the provinces (except Quebec) in Canada and a hypothec in Quebec, being the jurisdictions in which the products sold thereunder are located. A copy of the notices issued to effect the PMSI priority and hypothec are attached as Exhibit "**W**";

(b) *JTI-BSL Security:* in accordance with the terms of its forbearance arrangement, JTI-BSL registered its security interest against JTIM in all of the provinces (except Quebec) in Canada and a hypothec in Quebec, being the jurisdictions in which the services may be provided thereunder; and

(c) *JTIH-BV Security:* in accordance with the terms of its forbearance arrangement, JTIH-BV registered its security interest against JTIM in all of the provinces (except

Quebec) in Canada and a hypothec in Quebec, being the jurisdictions in which the services may be provided thereunder.

B. ***Litigation***

i) Quebec Class Actions

59. I am advised by our litigation counsel, François Grondin of Borden Ladner Gervais LLP, that:

(a) on February 21, 2005, a class action was certified against JTIM, Imperial Tobacco Canada Limited ("**Imperial**") and Rothmans, Benson & Hedges Inc. ("**Rothmans**" and collectively, with JTIM and Imperial, the "**Defendants**") in *Cécilia Létourneau* v. *Imperial Tobacco Limitée, Rothmans, Benson & Hedges Inc. and JTI-Macdonald Corp.* on behalf of tobacco smokers in the Province of Quebec for the purpose of claiming, for each proposed class member, moral damages resulting from an alleged addiction to nicotine, as well as punitive damages (the "**Létourneau Class Action**");

(b) on February 21, 2005, a class action was certified against the Defendants in *Conseil québécois sur le tabac et la santé and Jean-Yves Blais* v. *Imperial Tobacco Limitée, Rothmans, Benson & Hedges Inc. and JTI-Macdonald Corp.*, on behalf of tobacco smokers in the Province of Quebec suffering from lung, larynx or throat cancer or emphysema for the purpose of claiming, for each proposed class member, compensatory and exemplary damages (the "**Blais Class Action**");

(c) all of the alleged wrong-doings in the Létourneau Class Action and the Blais Class Action (collectively, the "**Class Actions**") occurred prior to the acquisition of JTIM by Japan Tobacco;

(d) the Class Actions were tried together and concluded on December 11, 2014. The Defendants were found liable for "moral damages" (i.e. non-pecuniary damages including pain and suffering, loss of enjoyment of life, etc.) in the Blais Class Action in the aggregate amount of approximately $6.8 billion ($15.5 billion with interest and the additional indemnity described below) of which JTIM was specifically liable for 13% of that amount totalling approximately $2 billion. However, as all of the Defendants were found "solidarily liable", each Defendant is liable for the full amount of the moral damages awarded and the Judgment can therefore be enforced against each Defendant for the full amount of the said moral damages awarded against all three Defendants. Each Defendant would have a "contribution" claim against the other Defendants for the part of the Judgment owing by them that was paid by such Defendant;

(e) the Defendants were found liable for punitive damages in the Létourneau Class Action in the amount of $131 million, of which JTIM was specifically liable for $12.5 million**.** JTIM was also found to be liable for punitive damages in the Blais Class Action in the amount of $30,000. The "condemnations" in punitive damages were awarded on an individual basis against each Defendant, including JTIM. Attached hereto as Exhibit "**X**" is an excerpt of the conclusions of the Judgment;

(f) the Defendants appealed the Judgment to the Quebec Court of Appeal (the "**QCA**") and brought a motion to strike provisions in the Judgment authorizing the plaintiffs in the Class Actions (the "**Class Action Plaintiffs**") to provisionally execute the Judgment. On July 23, 2015, the QCA released a decision that cancelled those provisions. Attached hereto as Exhibit "**Y**" is a copy of the judgment cancelling provisional execution of the Judgment;

(g) in response, the plaintiffs in the Class Actions filed a motion seeking an order that the Defendants furnish security for the Judgment, which motion was heard by the QCA on October 6, 2015. Prior to the commencement of the hearing, the motion against JTIM was withdrawn by the Class Action Plaintiffs due to the inability of counsel for JTIM and counsel for the Class Action Plaintiffs to find a mutually agreeable hearing date;

(h) a judgment was granted against Imperial and Rothmans only on October 26, 2015, which was later modified on December 9, 2015, ordering Imperial and Rothmans to furnish security to the Class Action Plaintiffs. Security was ordered in the amount of $758 million with respect to Imperial and in the amount of $226 million in respect to Rothmans, each payable by way of equal quarterly instalments until September 30, 2017. Attached hereto as Exhibit "**Z**" is a copy of the judgment ordering Imperial and Rothmans to furnish security;

(i) between November 21 and 30, 2016, the QCA heard the appeal of the Judgment. On March 1, 2019, the QCA released its judgment with respect to the appeal. The QCA Judgment confirmed the Judgment in all respects, but revised certain dates

related to the calculation of interest. The result is that the Defendants remained liable for damages in the aggregate amount of approximately $6.8 billion (approximately $13.5 billion with the revised interest dates and additional indemnity). JTIM remained specifically liable for 13% of that amount, totalling approximately $1.75 billion. Each of the Defendants remained "solidarily liable" for the full amount of the damages awarded to the Class Action Plaintiffs; and

(j) the Defendants remained liable for punitive damages in the Létourneau Class Action in the amount of $131 million, of which JTIM was specifically liable for $12.5 million. JTIM also remained liable for punitive damages in the Blais Class Action in the amount of $30,000. JTIM has up to a maximum of 60 days from the date of the QCA Judgment to pay an initial deposit of $145 million.

ii. HCCR Actions

60. I am advised by internal legal counsel that JTIM is also subject to ten distinct HCCR Actions brought by each province. The HCCR Actions were commenced as a result of legislation enacted in each of the ten provinces exclusively to allow the provinces to recoup the health care costs allegedly incurred, and that will be incurred, resulting from alleged "tobacco related wrongs", as defined in the applicable statutes. The HCCR Actions were commenced against numerous parties, including Imperial, Rothmans and certain of their affiliates, and JTIM.

61. The HCCR Actions have also been brought against R. J. Reynolds Tobacco Company and R. J. Reynolds Tobacco International, Inc. (collectively, "**Reynolds**"). Pursuant to a Purchase Agreement dated as of March 9, 1999 as amended and restated as of May 11, 1999 (the "**Purchase Agreement**"), Japan Tobacco agreed to indemnify the RJR Group as a former parent of JTIM, for

any Damages (as defined therein) incurred by the RJR Group for liabilities or obligations relating to the health effects of any products manufactured or sold by the RJR Group at any time that were consumed or intended to be consumed outside the United States, including products that were sold prior to the purchase of the business by Japan Tobacco. JTIM may have liability for certain claims being made against Reynolds. In order to effect a CCAA stay for JTIM and allow for a collective solution to the HCCR Actions, it is also beneficial to have those claims stayed against Reynolds. A copy of the relevant portions of the Purchase Agreement are attached as Exhibit "**AA**".

62. I am advised by internal legal counsel to JTIM that the status of the HCCR Actions in each of the provinces is:

Location	Status	Defendants
British Columbia	It was commenced in January 2001 against tobacco industry members including JTIM. The claim amount is unspecified. An expert report served by the Province of British Columbia in the proceeding states the value of the claim to be $120 billion. The action remains pending. The pre-trial process is ongoing and a trial date is not yet scheduled.	JTIM, Reynolds, Imperial, Rothmans, B.A.T Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris Incorporated, Philip Morris International, Inc., Rothmans International Research Division and Ryesekks p.l.c.and Canadian Tobacco Manufacturers Council (the "**CTMC**")
Alberta	It was commenced in June 2012 against tobacco industry members, including JTIM. The statement of claim contains allegations of joint and several liabilities among all the defendants but does not specify any individual amount or percentages. The total amount claimed is at least $10 billion. The pre-trial process is ongoing and a trial date is not yet scheduled.	JTIM, Reynolds, Imperial, Rothmans, CTMC, Altria Group, Inc., B.A.T Industries p.l.c., British American Tobacco (Investments) Limited, British American Tobacco p.l.c., Carreras Rothmans Limited; Philip Morris International, Inc., Philip Morris USA, Inc., and Rothmans Inc.

Saskatchewan	It was commenced in June 2012 against tobacco industry members, including JTIM. The claim amount is unspecified. The pre-trial process is ongoing and a trial date is not yet scheduled.	JTIM, Reynolds, Imperial, Rothmans, CTMC, Rothmans Inc., Altria Group, Inc., Philip Morris International, Inc., British American Tobacco p.l.c., B.A.T Industries p.l.c., British American Tobacco (Investments) Limited, and Carreras Rothmans Limited
Manitoba	It was commenced in May 2012 against tobacco industry members including JTIM. The claim amount is unspecified. The pre-trial process is ongoing and a trial date is not yet scheduled.	JTIM, Reynolds, Imperial, Rothmans, CTMC, Rothmans, Inc., Altria Group, Inc., Philip Morris U.S.A. Inc., Philip Morris International, Inc., British American Tobacco p.l.c., B.A.T Industries p.l.c., British American Tobacco (Investments) Limited and Carreras Rothmans Limited
Ontario	It was commenced in September 2009 against tobacco industry members, including JTIM. The statement of claim contains allegations of joint and several liabilities among all the defendants but does not specify any individual amount or percentages within the total claimed amount of $330[1] billion. The pre-trial process is ongoing and a trial date is not yet scheduled.	JTIM, Reynolds, Imperial, Rothmans, CTMC, Carreras Rothmans Limited, Altria Group, Inc., Phillip Morris U.S.A. Inc., Phillip Morris International Inc., British American Tobacco p.l.c., B.A.T Industries p.l.c., and British American Tobacco (Investments) Limited
Quebec	It was commenced in June 2012 against tobacco industry members, including JTIM. The statement of claim contains allegations of joint and several liabilities among all the defendants but does not specify any individual amount or percentages. The total amount claimed is approximately $61 billion.	JTIM, Reynolds, Imperial, Rothmans, CTMC, B.A.T Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc., and Philip Morris International Inc.

[1] On May 31, 2018, the Province of Ontario indicated to the defendants that it intends to amend its Statement of Claim to increase the amount claimed to $330 billion from $50 billion.

	The pre-trial process is ongoing and a trial date is not yet scheduled.	
New Brunswick	It was commenced in March 2008 against tobacco industry members, including JTIM. The claim amount is unspecified. The documents filed by the Province of New Brunswick in the proceeding valued its claim at approximately $18 billion. The pre-trial process is ongoing and the trial is scheduled to begin in November 2019.	JTIM, Reynolds, Imperial, Rothmans, CTMC, Carreras Rothmans Limited, Altria Group, Inc., Phillip Morris U.S.A. Inc., Phillip Morris International Inc., British American Tobacco p.l.c., B.A.T Industries p.l.c., and British American Tobacco (Investments) Limited
Nova Scotia	It was commenced in January 2015 against tobacco industry members, including JTIM. The claim amount is unspecified. JTIM filed a defence on July 2, 2015. The parties entered into a "standstill" agreement whereby all parties agreed to take no further steps in the litigation. Although the standstill has expired, the proceeding continues to be on hold and no significant document production has occurred.	JTIM, Reynolds, Imperial, Rothmans, CTMC, Rothmans Inc., Altria Group, Inc., Philip Morris U.S.A. Inc, Philip Morris International Inc., British American Tobacco p.l.c., B.A.T Industries p.l.c., British American Tobacco (Investments) Limited and Carreras Rothmans Limited
Prince Edward Island	It was commenced in September 2012 against tobacco industry members, including JTIM. The claim amount is unspecified. The pre-trial process is ongoing and a trial date is not yet scheduled.	JTIM, Reynolds, Imperial, Rothmans, CTMC, Rothmans, Inc., Altria Group, Inc., Philip Morris U.S.A. Inc., Philip Morris International, Inc., British American Tobacco p.l.c., B.A.T Industries p.l.c., British American Tobacco (Investments) Limited and Carreras Rothmans Limited
Newfoundland and Labrador	It was commenced in February 2011 against tobacco industry members, including JTIM. The claim amount is unspecified. The proceedings are ongoing and a trial date is not yet scheduled.	JTIM, Reynolds, Imperial, Rothmans, CTMC, Carreras Rothmans Limited, Altria Group, Inc., Philip Morris USA Inc, Philip Morris International Inc., British American Tobacco p.l.c., B.A.T Industries p.l.c, and British America Tobacco (Investments) Limited

iii) Other Ongoing Litigation

63. I am advised by internal legal counsel that JTIM is also subject to the following other unresolved class actions (the "**Additional Class Actions**"):

Action	Brief Description	Defendants
Tobacco Growers Class Action	On April 23, 2010, a class action was commenced on behalf of Ontario flue-cured tobacco growers and producers against JTIM for the alleged failure of JTIM to appropriately pay for tobacco purchased for sale in the Canadian market in the amount of $50 million (plus interest and costs). The proceedings are ongoing.	JTIM, to be heard together with similar class actions filed against Imperial and Rothmans
Adams, Kunta, Dorian and Semple Class Actions	In July 2009, four class actions seeking unquantified damages were filed in Saskatchewan, Manitoba, Alberta and Nova Scotia against JTIM as well as a number of other manufacturers participating in the Canadian cigarette market alleging that cigarettes are a defective product with the potential to cause harm. Apart from the initial exchange of pleadings, no further steps have been taken to advance the claims and are thus, each either expired or dormant.	JTIM, Reynolds, Imperial, B.A.T Industries p.l.c, British American Tobacco (Investments) Limited, British American Tobacco p.l.c, Rothmans, Altria Group Inc., Phillip Morris Incorporated, Phillip International, Inc. and Phillip Morris U.S.A. Inc., Carreras Rothman, Carreras Rothmans Limited, Rothmans Inc., Ryesekks p.l.c. and the CTMC
Bourassa and McDermid Class Actions	In July 2010, two class actions seeking unquantified damages were filed and served in British Columbia against JTIM as well as a number of other manufacturers participating in the Canadian cigarette market. In the class actions, the plantiffs' claim for health related damages on behalf of individuals who smoked a minimum of 25,000 cigarettes designed, manufactured, imported, marketed or distributed by the defendants. Apart from the initial	JTIM, Reynolds, Imperial, B.A.T Industries p.l.c, British American Tobacco (Investments) Limited, British American Tobacco p.l.c., Rothmans, Rothmans, Altria Group Inc., Phillip Morris Incorporated, Phillip International, Inc. and Phillip Morris U.S.A. Inc., Carreras Rothman, Carreras Rothmans

	exchange of pleadings, no further steps have been taken to advance the claims and are thus, each either expired or dormant.	Limited, Rothmans Inc., Ryesekks p.l.c and the CTMC
Jacklin Class Action	In June 2012, a class action seeking unquantified damages was filed in Ontario against JTIM as well as a number of other manufacturers participating in the Canadian cigarette market. In the class action, the plantiffs' claim for health related damages on behalf of individuals who smoked a minimum of 25,000 cigarettes designed, manufactured, imported, marketed or distributed by the defendants. The claims were served on JTIM in November 2012, but no further steps have been taken and are currently dormant.	JTIM, Reynolds, Imperial, B.A.T Industries p.l.c, British American Tobacco (Investments) Limited, British American Tobacco p.l.c., Rothmans, Rothmans, Altria Group Inc., Phillip Morris Incorporated, Phillip International, Inc. and Phillip Morris U.S.A. Inc., Carreras Rothman, Carreras Rothmans Limited, Rothmans Inc., Ryesekks p.l.c and the CTMC

C. *Ordinary Course Obligations*

64. JTIM has approximately 1,300 suppliers and other normal course creditors. All of JTIM's trade, tax and employment obligations are current in accordance with agreed or required payment terms. As at December 31, 2018, the total outstanding pre-filing indebtedness for these ordinary course obligations, excluding related party trade debt, is approximately $108.1 million. Of that amount, approximately $54.6 million relates to outstanding taxes and duties, $12 million is in respect of payroll and benefits (including pension payments), $5 million relates to arm's length trade creditors and $36.5 million relates to accruals and other liabilities including accruals for goods received before invoices in respect thereof are received. JTIM pays its outstanding taxes and duties one month in arrears in accordance with the law and is current on its payments.

65. JTIM proposes to continue to pay its suppliers in the ordinary course and to treat them as unaffected creditors in the CCAA proceeding.

66. Any damage to the ongoing operations of the business would negatively affect JTIM's stakeholders. In the majority of cases, it would be difficult to quickly replace a trade creditor that stopped supply as a result of JTIM's failure to pay its outstanding obligations. The cost of any potential disruption to JTIM's business and the costs that would be associated with any claim identification and determination process involving a multitude of trade creditors for relatively minor amounts as compared to the stated litigation claims would be uneconomical and unnecessary. JTIM's total third party ordinary course trade liabilities represent less than 0.30% of the total liabilities of JTIM as at December 31, 2018, including the QCA Judgment but excluding any other litigation claims. Preservation of going concern value, including by minimizing supply disruption, is in the best interests of all stakeholders.

67. JTIM's employees are paid periodically, usually in arrears through a payroll provider. All payments to employees are being made, and are proposed to continue to be paid, in the ordinary course.

68. JTIM proposes to pay all Pension Plan obligations, including OPEBs, in accordance with applicable requirements and in the ordinary course.

69. JTIM pays substantial amounts in taxes and duties to the various provincial and federal governments. All obligations are current in accordance with required terms and are proposed to continue to be paid in the ordinary course.

70. Pursuant to the Trademark Agreement, the next monthly royalty payment to TM is due, and is proposed to be paid, on April 1, 2019, in the ordinary course. The amount of the royalty payment varies with sales, but has historically been approximately $1 million per month.

V. Financial Situation and Cash Flow Forecast

A. *Financial Statements*

71. As at the close of business on February 28, 2019, JTIM had approximately $90 million in net available cash on hand, after allowing for known payments that were due on that day. As the operations of JTIM have been, and are expected to remain, cash flow positive, JTIM will have sufficient cash to fund its projected operating costs until the end of the proposed stay period. A copy of JTIM's annual financial statements for the year ended December 31, 2017, are attached as Exhibit "**BB**". A copy of JTIM's interim quarterly financial statements for the quarter ended December 31, 2018, are attached as Exhibit "**CC**".

72. As at December 31, 2018, JTIM's assets had a book value of approximately $1.9 billion and JTIM's liabilities, other than the QCA Judgment and the litigation related contingent liabilities, were valued as follows:

	December 31, 2018
ASSETS (CDN$000s)	
Current	
Cash and short term investments	139,195
Accounts receivable	9,643
Inventories	152,528
Other current assets	5,928
	307,294
Non-current	
Properties, plant and equipment	40,886
Investment in subsidiary companies	1,200,000
Other Assets	8,900
Goodwill	304,328
Future income taxes	29,153
Total assets	1,890,561

LIABILITIES (CDN$000s)	December 31, 2018
Current	
Short Term Borrowing	-
Accounts payable and accrued liabilities	103,719
Due to related parties – current	39,932
	143,651
Non-current	
Secured convertible debenture payable to subsidiary	1,183,326
Employee future benefits	102,553
Other liabilities and capital leases	4,394
Total liabilities	1,433,924

73. A majority of JTIM's approximately $1.9 billion book value of assets on its balance sheet relates to JTIM's $1.2 billion equity investment in its subsidiary, TM. This equity interest ranks behind the secured debt owing by TM to ParentCo of approximately $1.0 billion. TM is in receivership and the value of JTIM's equity investment is questionable at best. The remaining assets of JTIM cannot satisfy the secured claims against JTIM, much less the unsecured litigation claims including the QCA Judgment.

74. As at December 31, 2018, JTIM had non-contingent liabilities totalling approximately $1.4 billion, of which approximately $144 million consist of current liabilities, such as accounts payable and accrued liabilities. The majority of JTIM's liabilities consist of the $1.18 billion of secured debt owed to TM, now under the control of the TM Receiver appointed by ParentCo.

75. As described above, JTIM is able to meet its ordinary course obligations as they become due. JTIM is seeking relief, however, because it does not have the financial resources to pay its share of the QCA Judgment, let alone the full amount for which it is solidarily liable. JTIM therefore requires the protections offered under the CCAA to obtain a stay and a period of stability within which to attempt to find a collective resolution.

76. I am advised by legal counsel that it is uncertain whether steps can be taken immediately to enforce the QCA Judgment and that counsel to the Class Action Plaintiffs have refused to confirm that the QCA Judgment is not immediately enforceable, notwithstanding that the QCA Judgment provides for up to a maximum of 60 days for JTIM to provide the initial deposit. Therefore, JTIM is facing the potential for the immediate enforcement of a significant judgment and is also the subject of the pending HCCR Actions, which claims are far in excess of the book value of the assets of JTIM (as discussed above). The total secured and unsecured obligations of JTIM, including the QCA Judgment, greatly exceed my expectation of the realizable value of the assets on a going concern basis**.** I have been advised by external legal counsel that JTIM is therefore insolvent, as that term is understood in the restructuring context.

B. *Cash Flow Forecast*

77. Attached as Exhibit "**DD**" is a statement of the projected 13-week cash flow forecast (the "**Cash Flow Statement**") of JTIM for the week commencing February 25, 2019 to the week ending May 24, 2019. The Cash Flow Statement was prepared by JTIM with the assistance of Deloitte Restructuring Inc. ("**Deloitte**"), the proposed Monitor (in such capacity, the "**Proposed Monitor**"). The Cash Flow Statement demonstrates that if the relief requested is granted, including the staying of the QCA Judgment, JTIM has sufficient liquidity to meet its obligations during the initial 13 week period of a CCAA filing.

VI. RELIEF BEING SOUGHT IN THE CCAA

A. *The Monitor*

78. Deloitte has consented to act as the Court-appointed Monitor of JTIM, subject to Court approval. A copy of Deloitte's consent is attached as Exhibit "**EE**". I am advised by external counsel that Deloitte is a trustee within the meaning of section 2 of the *Bankruptcy and Insolvency*

Act, R.S.C. 1985, c. B-3, as amended, and is not subject to any of the restrictions on who may be appointed as monitor set out in section 11.7(2) of the CCAA.

B. *Treatment of Ordinary Creditors*

i) The 2004 CCAA Proceedings

79. JTIM was in CCAA from 2004 to 2010 (the "**2004 CCAA Proceedings**"). During the 2004 CCAA Proceedings, JTIM was allowed to pay all of its trade creditors in the ordinary course. JTIM seeks the same result in this proceeding. As was the case in the 2004 CCAA Proceedings, the continued payment of all trade liabilities remains an essential part of preserving the value of JTIM's business.

80. By way of background, in response to enforcement and seizure actions taken by the Minister of Revenue for the Province of Quebec (the "**MRQ**") in respect of allegedly unpaid taxes from allegedly contraband activities (the "**MRQ Assessment**"), JTIM obtained protection pursuant to the CCAA by Order of Mr. Justice Farley of the Ontario Superior Court of Justice on August 24, 2004 (the "**2004 Initial Order**"), a copy of which is attached as Exhibit "**FF**". Ernst & Young Inc. was appointed as Monitor (the "**2004 Monitor**").

81. The critical events precipitating JTIM's filing for CCAA protection in 2004 were the issuance of the MRQ Assessment and the related immediate measures taken to collect on the MRQ Assessment by the MRQ. The result of the service of third-party demands for payment issued by the MRQ on all of JTIM's Quebec customers would have diverted approximately 40% of JTIM's revenue. If the collection action had not been stayed by the 2004 CCAA Proceedings, JTIM would likely have been forced to cease operations and its business likely would have been destroyed.

82. At the time of the 2004 Initial Order, many of the litigation claims that are discussed herein were being pursued against JTIM, which posed the threat of enormous judgments against JTIM, among others. However, no claimant, with the exception of the MRQ, had the ability to disrupt JTIM from carrying on business in the ordinary course until a judgment was rendered and execution steps were taken. As discussed herein, the Class Action Plaintiffs have the same ability to prevent JTIM from carrying on business in the ordinary course as the MRQ did in 2004, through enforcement of the QCA Judgment.

83. On April 13, 2010, a global settlement was reached with all government authorities (the "**Global Settlement**") for the resolution of all alleged contraband claims that precipitated the 2004 CCAA Proceedings, and those proceedings were terminated on April 16, 2010. Similar settlements were also previously entered into by the other major Canadian tobacco manufacturers. JTIM has continued operations in the ordinary course since the termination of the 2004 CCAA Proceedings. The Class Actions and the HCCR Actions have also continued in the ordinary course.

ii) Proposed Treatment

84. Consistent with the approach authorized by Mr. Justice Farley in the 2004 CCAA Proceedings, JTIM is of the opinion that certain pre-filing amounts should be paid following the date of the Initial Order as non-payment of these amounts may have a significant detrimental impact on JTIM's business and going concern value. JTIM intends to treat all of its trade creditors equally and fairly.

85. JTIM proposes to pay its suppliers, trade creditors (including intercompany trade payables and monthly royalty payments), taxes, duties and employees (including outstanding and future pension plan contributions, OPEBs and severance packages) in the ordinary course of

business for current amounts owing both before and after JTIM's application to the Court for protection under the CCAA in order to minimize any disruption of its business. Maintaining JTIM's operations as a going concern and avoiding any unnecessary disruption to its business operations is in the best interests of all of JTIM's stakeholders, including the Class Action Plaintiffs.

86. I am advised by legal counsel that it is JTIM's current expectation that its trade creditors and employees would be unaffected by any plan of arrangement that it may file in this proceeding. I have been further advised by internal legal counsel that not paying the outstanding ordinary course payments would significantly and unnecessarily complicate the restructuring proceedings. I am advised by counsel that the Proposed Monitor supports this relief and will provide further comment on this issue in its report to the Court in connection with this application.

C. ***Stay of Proceedings***

87. In addition to the stay of proceedings in respect of JTIM, JTIM is requesting a stay of proceedings in respect of: (i) any person named as a defendant or respondent in any of the Class Actions, HCCR Actions and the Additional Class Actions (collectively, the "**Pending Litigation**"), and (ii) any proceeding in Canada relating to a tobacco claim against or in respect of any member of JT International or the RJR Group. In both cases, JTIM and the Monitor may provide their written consent to allow the stay to be temporarily lifted.

88. I am advised by legal counsel that JTIM requires the extension of the stay of proceedings to any other defendant or respondent in the Pending Litigation to ensure that steps are not taken in the Pending Litigation without JTIM's participation, which may prevent JTIM's ability to reach a collective solution. Further, the RJR Group is named as a defendant in the HCCR Actions. Since

the defence of the RJR Group and JTIM are connected, it would be potentially disadvantageous to JTIM to allow such actions to continue against the RJR Group alone.

D. *Interest on TM Term Debentures*

89. It is the current expectation that JTIM will continue paying the secured monthly interest payments to TM under the TM Term Debentures. The TM Term Debentures have been in place since 1999. There would be potential adverse tax consequences to its senior secured creditor if such payments were suspended for a significant period of time. Further, I have been advised by legal counsel that the Proposed Monitor does not object to this relief.

90. JTIH-BV, a credit-worthy entity related to JTIM, has provided an undertaking to repay any post-filing interest received during these CCAA proceedings (the "**Repayment Undertaking**") in the event this Court (or any applicable appellate court) finally determines that TM was not entitled to receive the post-filing interest payments. As evidence of its credit-worthiness, a copy of the 2017 Annual Report of JTIH-BV is attached as Exhibit "**GG**". A copy of the Repayment Undertaking of JTIH-BV is attached as Exhibit "**HH**".

E. *Administration Charge*

91. JTIM seeks a first-ranking charge (the "**Administration Charge**") on the Property (as defined in the proposed form of Initial Order) in the maximum amount of $3 million to secure the fees and disbursements incurred in connection with services rendered to JTIM both before and after the commencement of the CCAA proceedings by counsel to JTIM, the Proposed Monitor, counsel to the Proposed Monitor and the proposed Chief Restructuring Officer (the "**CRO**"), other than any success fee in respect of the CRO.

92. It is contemplated that each of the aforementioned parties will have extensive involvement

during the CCAA proceedings, have contributed and will continue to contribute to the restructuring of the Applicant, and there will be no unnecessary duplication of roles among the parties.

93. I am advised by legal counsel that the Proposed Monitor believes that the proposed quantum of the Administration Charge to be reasonable and appropriate in view of JTIM's CCAA proceedings and the services provided and to be provided by the beneficiaries of the Administration Charge. I am further advised by legal counsel that the only secured creditors that will be affected by the Administration Charge are ParentCo, TM and certain other secured related party suppliers, each of which support the Administration Charge.

F. *Directors' Charge*

94. To ensure the ongoing stability of JTIM's business during the CCAA proceedings, JTIM requires the continued participation of its directors and officers who manage the business and commercial activities of JTIM. The directors and officers of JTIM have considerable institutional knowledge and valuable experience.

95. There is a concern that the directors and officers of JTIM may discontinue their services during this restructuring unless the Initial Order grants the Directors' Charge (as defined below) to secure JTIM's indemnity obligations to the directors and officers that arise post-filing in respect of potential personal statutory liabilities.

96. JTIM maintains directors' and officers' liability insurance (the "**D&O Insurance**") for the directors and officers of JTIM. The current D&O Insurance policies provide a total of $12.908 million in coverage. In addition, under the D&O Insurance, a retention amount, akin to a deductible, is applicable for certain claims in the amount of $45,178.

97. The proposed Initial Order contemplates the establishment of a second-ranking charge on the Property in the amount of $4.1 million (the "**Directors' Charge**") to protect the directors and officers against obligations and liabilities they may incur as directors and officers of JTIM after the commencement of the CCAA proceedings, except to the extent that the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct. The Directors' Charge was calculated by reference to the monthly payroll, withholding and pension obligations of JTIM totalling approximately $4 million. The payroll obligations of JTIM are paid primarily in arrears which increases the potential director and officer liability.

98. JTIM worked with the Proposed Monitor in determining the proposed quantum of the Directors' Charge and believes that the Directors' Charge is reasonable and appropriate in the circumstances. The Directors' Charge is proposed to rank behind the Administration Charge, but ahead of the Tax Charge (as defined below) and the existing security granted by JTIM in favour of TM and ParentCo. I have been advised by counsel that the Proposed Monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances.

99. Although the D&O Insurance is available, the directors and officers of JTIM do not know whether the insurance providers will seek to deny coverage on the basis that the D&O Insurance does not cover a particular claim or that coverage limits have been exhausted. JTIM may not have sufficient funds available to satisfy any contractual indemnities to the directors or officers should the directors or officers need to call upon those indemnities. It is proposed that the Directors' Charge will only be engaged if the D&O Insurance fails to respond to a claim.

G. *Tax Charge*

100. Of the $1.3 billion of annual taxes and duties payable in connection with its operations and products, JTIM directly pays, on its own behalf, more than $500 million each year to the various provincial and federal governments. The additional $800 million is paid by JTIM's customers and the consumers of JTIM's products.

101. The government agencies to whom JTIM remits its taxes currently hold surety bonds in the approximate amount of $18 million that have been posted as security for such unremitted taxes and duties (the "**Tax Bonds**"). The proposed Initial Order contemplates the establishment of a third-ranking charge on the Property in the amount of $127 million (the "**Tax Charge**") to secure the payment of any excise tax or duties, import or customs duties and provincial and territorial tobacco tax and any harmonized sales or provincial sales taxes (collectively, "**Taxes**") required to be remitted by JTIM to the applicable provincial, territorial or federal taxing authority in connection with the import, manufacture or sale of goods and services by JTIM after the commencement of the CCAA proceedings.

102. The Tax Charge was calculated by reference to the amount of monthly Taxes that JTIM must remit in a month where the highest exposure exists to directors, multiplied by two to reflect the liability that directors actually face (one month in arrears plus an ongoing "stub" period), totalling approximately $136 million, less the amount of such liabilities that would be covered by outstanding Tax Bonds. I have been advised by legal counsel that the Proposed Monitor is of the view that the Tax Charge is reasonable and appropriate in the circumstances.

H. *CRO Appointment*

103. JTIM hopes to achieve a collective solution among its stakeholders. Based on past experience, JTIM believes that achieving such a result will be complicated and time consuming. In order to minimize disruption to the business and the distraction of senior executives away from the task of managing the business and maintaining positive cash flow, JTIM seeks (i) the approval and confirmation of the Court of the retention of an experienced CRO to oversee the stakeholder engagement and negotiation process and (ii) the approval of the terms of the CRO's engagement letter.

104. Pursuant to the CRO engagement letter dated April 23, 2018, JTIM agreed to apply to the Court for approval of: (i) the engagement letter, (ii) retention of the CRO, and (iii) the payment of the fees and expenses of the CRO. Compensation to the CRO includes both a monthly work fee component and a success fee component. A redacted copy of the CRO engagement letter is attached as Exhibit "**II**". An unredacted version of the CRO engagement letter is attached as Confidential Exhibit "**1**" to the Confidential Compendium.

105. JTIM proposes retaining BlueTree Advisors Inc. to provide the services of William E. Aziz as the CRO in accordance with the terms of the CRO engagement letter. Mr. Aziz is a well-known and experienced CRO as evidenced from his *curriculum vitae* attached as Exhibit "**JJ**". I have been advised by legal counsel that the Proposed Monitor is of the view that the relief sought with respect to the CRO is appropriate in the circumstances and consistent with established precedent.

I. *Sealing Order*

106. JTIM will be seeking an order sealing the unredacted copy of the CRO engagement letter. I have been advised by the CRO that the engagement letter contains commercially sensitive terms

of the engagement of the CRO. The CRO has advised me that the disclosure of those commercial terms would have a detrimental impact on the CRO's ability to negotiate compensation on any future engagements.

107. I am advised by counsel that the sealing of the unredacted CRO engagement letter should not materially prejudice any third parties. I have been advised by counsel to JTIM that the Monitor supports the sealing of the unredacted CRO engagement letter.

VII. FORM OF ORDER

108. JTIM seeks an Initial Order under the CCAA substantially in the form of the Model Order adopted for proceedings commenced in Toronto, subject to certain changes all as reflected in the proposed form of order contained in the Motion Record, blacklined to the Model Order. The reasons for the material proposed changes are described herein.

109. By letter dated July 6, 2015, restructuring counsel to the Class Action Plaintiffs wrote to the Court House of Montreal and the Superior Court of Justice requesting seven (7) days prior notice of any CCAA filing in Quebec or Ontario. JTIM did not respond to this request. A copy the July 6, 2015 letter is attached as Exhibit "**KK**".

110. By letter to JTIM's counsel dated March 6, 2019, counsel to the Provinces of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan in connection with the HCCR Actions requested advance notice prior to any CCAA filing. JTIM's counsel did not respond to this request. A copy of the March 6, 2019 letter is attached as Exhibit "**LL**".

111. By letter to JTIM's litigation counsel dated March 7, 2019, counsel to Her Majesty the Queen in right of Ontario requested advance notice prior to any CCAA filing. JTIM's counsel did not respond to this request. A copy of the March 7, 2019 letter is attached as Exhibit "**MM**".

112. As described above, Japan Tobacco is a publicly traded company on the Tokyo stock exchange. In order to manage market responses and prevent potentially opportunistic trading of Japan Tobacco and other tobacco stock, the approach to the application for CCAA relief, including the notice and timing of the filing, has to take into account public market considerations in Tokyo, New York and London. In this regard, a request for a hearing, and disclosure of that hearing, when none of these markets are open were considered to be appropriate steps in the circumstances.

113. This affidavit is sworn in support of JTIM's application for protection pursuant to the CCAA and for no improper purpose.

SWORN BEFORE ME at the City of Toronto, Province of Ontario, on March 8, 2019. Commissioner for Taking Affidavits Mitchell Grossell Barrister & Solicitor LSO# 69993I	ROBERT MCMASTER

EXHIBIT “B”

This is Exhibit ......"B"...... referred to in the
affidavit of ......Robert McMaster......
sworn before me, this ......1st......
day of ......April......, ...2019......

......[signature]......
A COMMISSIONER FOR TAKING AFFIDAVITS

SUPERIOR COURT
(Class Action Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N° : 500-06-000076-980
500-06-000070-983

DATE : May 27, 2015

PRESIDING: THE HONORABLE BRIAN RIORDAN, J.S.C.

No 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

No 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

JR1353

INDEX

SECTION **PAGE**

RÉSUMÉ DU JUGEMENT // SUMMARY OF JUDGMENT 8

I. THE ACTIONS 11

A. The Parties and the Common Questions 11
B. The alleged bases of liability 15
C. The Companies' view of the key issues 18

II. IMPERIAL TOBACCO CANADA LTD. 19

A. Did ITL manufacture and sell a product that was dangerous and harmful to the health of consumers? 19

B. Did ITL know, or was it presumed to know, of the risks and dangers associated with the use of its products? 22

B.1 The Blais File 22
B.1.a As of what date did ITL know? 22
B.1.b As of what date did the public know? 28
B.1.b.1 The Experts' opinions: the Diseases and Dependence 28
B.1.b.2 The effect of the Warnings: the Diseases and Dependence 34
B.2 The Létourneau File 38
B.2.a As of what date did ITL know? 38
B.2.b As of what date did the public know? 39

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? 40

C.1 Is tobacco a product that creates dependence of the sort to generate legal liability for the manufacturer? 41
C.2 Did ITL knowingly market a dependence-creating product? 48
C.3 Did ITL choose tobacco that contained higher levels of nicotine in order to keep its customers dependent? 49

D. Did ITL trivialize or deny or employ a systematic policy of non-divulgation of such risks and dangers? 51

D.1 Credibility Issues 52
D.2 The obligation to inform 53
D.3 No duty to convince 57
D.4 What ITL said publicly about the risks and dangers 59
D.5 What ITL did not say about the risks and dangers 67
D.6 What ITL knew about what the public knew 75
D.7 Compensation 80
D.8 The Role of Lawyers 84

E. Did ITL employ marketing strategies conveying false information about the characteristics of the items sold? 89

E.1 The Voluntary Codes 92
E.2 Light and Mild Descriptors 94
E.3 Did ITL market to under-age smokers? 95
E.4 Did ITL market to non-smokers? 98
E.5 Did the Class Members see the ads? 99
E.6 Conclusions with respect to Common Question E 100

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? 100

F.1 The 1962 Policy Statement 100
F.2 The Role of the CTMC 103

G. Did ITL intentionally interfere with the right to life, personal security and inviolability of the class members? 108

G.1 Liability for damages under the Quebec Charter 109
G.2 Liability for damages under the Consumer Protection Act 110
G.2.a The Irrebuttable Presumption of Prejudice 112
G.2.b The alleged contravention under section 228 CPA 115
G.2.c The alleged contravention under section 219 CPA 116
G.2.d The alleged contravention under section 220(a) CPA 119

III. JTI MACDONALD CORP. 120

A. Did JTM manufacture and sell a product that was dangerous and harmful to the health of consumers? 120

B. Did JTM know, or was it presumed to know, of the risks and dangers associated with the use of its products? 122

B.1 The Blais File 122
B.1.a As of what date did JTM know? 122
B.1.b As of what date did the public know? 124
B.1.b.1 The Experts' opinions: the Diseases and

Dependence 124
B.1.b.2 The effect of the Warnings: the Diseases and Dependence 124
B.2 The Létourneau File 124
B.2.a As of what date did JTM know? 124
B.2.b As of what date did the public know? 124

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? 124

D. Did JTM trivialize or deny or employ a systematic policy of non-divulgation of such risks and dangers? 125

D.1 The obligation to inform 125
D.2 No duty to convince 125
D.3 What JTM said publicly about the risks and dangers 125
D.4 What JTM did not say about the risks and dangers 126
D.5 Compensation 127

E. Did JTM employ marketing strategies conveying false information about the characteristics of the items sold? 127

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? 128

G. Did JTM intentionally interfere with the right to life, personal security and inviolability of the class members? 128

IV. ROTHMANS BENSON & HEDGES INC. 128

A. Did RBH manufacture and sell a product that was dangerous and harmful to the health of consumers? 128

B. Did RBH know, or was it presumed to know, of the risks and dangers associated with the use of its products? 131

B.1 The Blais File 131
B.1.a As of what date did RBH know? 131
B.1.b As of what date did the public know? 135
B.1.b.1 The Experts' opinions: the Diseases and Dependence 135
B.1.b.2 The effect of the Warnings: the Diseases and Dependence 135
B.2 The Létourneau File 135

B.2.a As of what date did RBH know? 135
B.2.b As of what date did the public know? 135

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? 135

D. Did RBH trivialize or deny or employ a systematic policy of non-divulgation of such risks and dangers? 136

D.1 The obligation to inform 136
D.2 No duty to convince 136
D.3 What RBH said publicly about the risks and dangers 136
D.4 What RBH did not say about the risks and dangers 137
D.5 Compensation 137

E. Did RBH employ marketing strategies conveying false information about the characteristics of the items sold? 137

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? 137

G. Did RBH intentionally interfere with the right to life, personal security and inviolability of the class members? 138

V. SUMMARY OF FINDINGS OF FAULT. 139

VI. CAUSATION 139

A. Were the moral damages in the Blais File caused by the Diseases? 141
B. Were the moral damages in the Létourneau File Caused by Dependence? 142
C. Were the Diseases caused by smoking 142
C.1 The evidence of Drs. Desjardins and Guertin 143
C.2 Section 15 of the TRDA 144
C.3 Evidence for each member of the Class 145
C.4 The evidence of Dr. Siemiatycki 147
C.5 The use of relative risk 150
C.6 The Companies' experts 151
D. Was the tobacco dependence caused by smoking 159
E. Was the Blais Members' smoking caused by a fault of the Companies? 163
F. Was the Létourneau Members' smoking caused by a fault of the Companies? 167
G. The possibility of shared liability 168

VII. PRESCRIPTION 171

A. Article 2908 C.C.Q. and the definition of the Blais Class 173
B. *Fin de non recevoir* 176
C. Continuing and uninterrupted faults 177
D. The Létourneau File 179
E. The Blais File under the TRDA 179
E.1 Moral/Compensatory damages with the TRDA 179
E.2 Punitive damages with the TRDA – and without it 180
F. If the TRDA does not apply 181
G. Summary of the effects of prescription on shared liability 181

VIII. MORAL DAMAGES - QUANTUM 182

A. The Létourneau File 186
B. The Blais File 189
B.1 Lung Cancer 190
B.1.a The Size of the Sub-Classes 191
B.1.b The Amount of Damages for the subclass 192
B.2 Cancer of the larynx, the oropharynx or the hypopharynx 194
B.2.a The Size of the Sub-Classes 194
B.2.b The Amount of Damages for the subclass 194
B.3 Emphysema 196
B.3.a The Size of the Sub-Classes 197
B.3.b The Amount of Damages for the subclass 197
B.4 Apportionment among the Companies 198

IX. PUNITIVE DAMAGES - QUANTUM 201

A. The criteria for assessing punitive damages 202
B. Quantification Issues 206
C. The Companies' patrimonial situation 208
D. ITL's liability for punitive damages 210
E. RBH's liability for punitive damages 212
F. JTM's liability for punitive damageS 212

X. DEPOSITS AND DISTRIBUTION PROCESS. 215

XI. DECISIONS ON OBJECTIONS UNDER RESERVE AND CONFIDENTIALITY. 216

A. The admissibility of Exhibit 1702R 217
B. The admissibility of "R" Documents 220
C. The confidentiality of certain internal documents 221

C.1 General Documents, including coding information 222
C.2 Financial Statements 224
C.3 Insurance Policies 225
D. The relevance and confidentiality of the Interco Contracts 226
D.1 Objection as to relevance 227
D.2 Confidentiality of related evidence 227

XII. INDIVIDUAL CLAIMS 228

XIII. PROVISIONAL EXECUTION NOTWITHSTANDING APPEAL 228

XIV. CONCLUDING REMARKS 230

ORDERS 230

SCHEDULE A - GLOSSARY OF DEFINED TERMS 237
SCHEDULE B - IMPORTANT DATES 241
SCHEDULE C - NON-PARTY, NON-GOVERNMENT WITNESSES 243
SCHEDULE C.1 - EXPERTS CALLED BY THE PLAINTIFFS 244
SCHEDULE D - WITNESSES CONCERNING MATTERS RELATING TO ITL 245
SCHEDULE D.1 - EXPERTS CALLED BY ITL 247
SCHEDULE E - WITNESSES CONCERNING MATTERS RELATING TO JTM 249
SCHEDULE E.1 - EXPERTS CALLED BY JTM 250
SCHEDULE F - WITNESSES CONCERNING MATTERS RELATING TO RBH 252
SCHEDULE F.1 - EXPERTS CALLED BY RBH 253
SCHEDULE G - WITNESSES FROM THE GOVERNMENT OF CANADA 254
SCHEDULE H - RELEVANT LEGISLATION 255
SCHEDULE I - EXTRACTS OF THE VOLUNTARY CODES 271
SCHEDULE J - PARAGRAPHS 2138-2145 OF THE PLAINTIFFS' NOTES 273

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%.

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.

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

---

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.

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.

---

[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.

[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,

[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.

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

---

[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.

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

---

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.

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:

---

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.

> **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

---

[23] *Op. cit.*, *Time*, Note 20, at paragraph 200.

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.

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

[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.

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.

---

[26] The full text of these articles is set out in other parts of this judgment, as well as in Schedule "H".

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].

---

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.

> 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.

---

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)

> …
>
> 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):

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

[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.

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

---

[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.

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:

---

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.

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

[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

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.

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

---

[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.

[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

---

[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.

---

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.

[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.

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

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. 40050)	• 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.

[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

---

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.

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

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.

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.

---

70 Exhibit 11.
71 At pdf 5.
72 Exhibit 1395.
73 Exhibit 20063, at page 4.

[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.

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).

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.

---

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.

[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.

> 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*"

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

---

[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).

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."

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

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)

[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

---

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?

---

[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".

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.

---

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.

---

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".

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

[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.

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.

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.

[…]

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.

[…]

[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:

[102] See Exhibit 125D.

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.

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

---

[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.

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]

---

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 D.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.

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*

---

[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

---

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.

> 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:

---

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.

> **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…

> (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

---

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.

---

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).

[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

---

[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.

---

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.

[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]

---

[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.

[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.

---

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.

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".

> 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:

---

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.

> 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.

---

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.

[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. <u>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.</u> 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?
>
> <u>A- I would expect them to convey material information that they had about the risk to public health authorities.</u>[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

[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.

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

---

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.

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:

---

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.

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.

---

[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.

[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]

---

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. <u>La démarche s'inscrit donc dans une logique de</u>

[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.

---

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%.

[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.

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

---

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

---

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.

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

---

[186] See, for example, Exhibit 40362, research published by RJRUS in 1996.
[187] Transcript of September 19, 2013, at pages 273 and following.

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.

---

[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.

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.

[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.

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.

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?

---

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.

---

[201] Transcript of April 2, 2012, at page 137.
[202] See Exhibit 510, Mtre. Meltzer's testimony, at pages 44 and 45.

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:

---

203 See section II.E.4 of this judgment.

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.

---

[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.

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

---

[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.

---

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.

[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]

---

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.

[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:

---

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.

> 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 <u>and</u> an injury – in and of itself – without any legal or factual basis for advancing such a position.

---

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

---

[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.

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].

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

[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.

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.

---

[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.

[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.

---

235 Exhibit 154B-2M.
236 Exhibit 1557, at page 12.
237 Testimony of William Neville: transcript of June 6, 2012, at page 45.

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:

---

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.

---

[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.

[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.

---

242 Exhibit 40347.11, at pdf 22.
243 *Ibidem*, at pdf 25.

[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"?

---

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.

- 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:

---

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*.

---

[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.

[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.

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.

---

[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.

[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,	présente loi, peut demander, selon le cas:
(a) the specific performance of the obligation;	(a) l'exécution de l'obligation;
(b) the authorization to execute it at the merchant's or manufacturer's expense;	(b) l'autorisation de la faire exécuter aux frais du commerçant ou du fabricant;
(c) that his obligations be reduced;	(c) la réduction de son obligation;
(d) that the contract be rescinded;	(d) la résiliation du contrat;
(e) that the contract be set aside; or	(e) la résolution du contrat; ou
(f) that the contract be annulled.	(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.

[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. <u>against the person who engaged in the prohibited practice</u>.[257]
> (the Court's emphasis)

---

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]

---

[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.

[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.

---

[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.

---

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

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

[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.

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.

---

267 *Op. cit., Time*, Note 20, at paragraph 70.

[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

---

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.

[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.

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]

---

[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.

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.

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.

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.

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.

---

[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.

---

[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.

[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. <u>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.</u> 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. <u>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.</u>
>
> I am far more optimistic in answering the Morrison technical questions in the way we have, as a result of this meeting. <u>They have not presented any scientific evidence which need cause us concern</u>, and I consider that the programme that all companies are pursuing, namely of more and more low tar brands is <u>an adequate reflection</u> 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.

[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.

---

[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.

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;

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.

- 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,

---

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.

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.

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

---

[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.

> 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

---

[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

[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.

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.

---

[297] Exhibit 20063, at page 4.

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 I do not think that we may sacrifice their interests on the flimsy evidence which has thus far been presented.
>
> [...]

---

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.

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.

---

[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.

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.

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.

---

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.

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.

---

[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.

[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.

---

[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, […]*".

[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

[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.

---

[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.

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]	*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)	(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.

---

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.

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:

---

[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.

---

[322] Transcript of February 18, 2013, at page 45.

[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.

---

[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] <u>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.</u> 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. <u>That is, whether or not the risk ratio is above 2.0 determines upon whom the evidentiary responsibility falls in determining individual causation.</u> […]
>
> ...
>
> [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.

> 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.

---

[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.

[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.

---

[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.

[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

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.

---

332 Transcript of March 12, 2014 at page 324 and 325.

[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

---

[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

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.

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.

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

---

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,

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

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.

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.

---

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.*"

[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.

---

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".

---

[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.

[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;

---

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.

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

---

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.*

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

[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.

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.

---

[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.

[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:

---

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

---

[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.

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.

[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.

---

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.)

[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, <u>in favour of the group described in the judgment granting the motion</u>. (The Court's emphasis)

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.

In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.

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, <u>en faveur du groupe que décrit le jugement qui fait droit à la requête</u>. (Le Tribunal souligne)

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.

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

---

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.

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?

---

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.

[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.

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]

---

[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*

[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.

---

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.

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

[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.

[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.

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%

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

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.

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.

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

---

[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

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.

---

[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.

[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.

---

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.

[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]

---

[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).

---

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.

[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.

---

[424] Exhibit 40504, at pdf 22.

[425] Transcript of February 18, 2014, at pages 47 and 108.

[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

---

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

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

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*

---

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.

> *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,

[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.

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.

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).

---

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.

[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.

---

[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

---

[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.

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.

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]

---

[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.

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.
>
> 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.

> **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.

[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)

[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.

[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

---

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.

---

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.

[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?

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

---

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

---

[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.

> 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

---

[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.

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.

---

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.

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.

---

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.

[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

---

[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.

---

[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.

[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.

---

[484] Testimony of Michel Poirier, May 23, 2014, at page 108.
[485] *Ibidem*, at pages 108-109.

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

---

[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.

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 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.

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.

---

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.

[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.

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

---

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".

[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].

---

[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.

> [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].

---

[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;

---

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.

- 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.

---

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.

[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

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.

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

[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.

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.

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.

---

[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.

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

---

[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.

---

518 Transcript of November 21, 2014, at page 104.
519 Plaintiffs' Notes, at paragraph 2329.

[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

[520] *Hollinger v. Hollinger* [2007] CA 1051, at paragraph 3.
[521] [1984] Q.J. No. 644 (Superior Court), at paragraphs 154 and following.

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.*

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 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 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 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 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 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;

[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:

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;

[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;

- 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

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

- 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.

- 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

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

	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

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

	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

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

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

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

	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

	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

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

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

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.

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. 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)

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. 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)

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. _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

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

victim knew or could have known of the defect, or could have foreseen the injury.

connaissait ou était en mesure de connaître le défaut du bien, ou qu'elle pouvait prévoir le préjudice.

Nor is he liable to reparation <u>if he proves</u> 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)

Il n'est pas tenu, non plus, de réparer le préjudice <u>s'il prouve</u> 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. 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.

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. 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.

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. 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.

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. 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.

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. 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

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.

causé à autrui, ne soit inégal, auquel cas la contribution se fait proportionnellement à l'intérêt de chacun dans la dette.

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.

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. 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.

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.

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. 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.

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. A presumption is an inference established by law or the court from a known fact to an unknown fact.

2846. La présomption est une conséquence que la loi ou le tribunal tire d'un fait connu à un fait inconnu.

2849. Presumptions which are not established by law are left to the discretion of

2849. Les présomptions qui ne sont pas établies par la loi sont laissées à l'appréciation

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.

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.

In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.

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.

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.

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.

The procedural impropriety may consist in a claim or pleading that is clearly unfounded,

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.

L'abus peut résulter d'une demande en justice ou d'un acte de procédure manifestement mal

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;

(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;

(f) accounting;

(g) alimentary pension or allowance or custody of children;

(h) judgments of sequestration;

(i) (subparagraph repealed);

(j) judgments with regard to an improper use of procedure.

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.

985. The judgment has the authority of *res judicata* only as to the parties to the action and the amount claimed.

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.

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.

1032. The judgment ordering the collective recovery of the claims orders the debtor either to deposit the established amount in

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) de reddition de comptes;

(g) de pension ou provision alimentaire, ou de garde d'enfants;

(h) de sentences de séquestre;

(i) *(paragraphe abrogé);*

(j) de jugements rendus en matière d'abus de procédure.

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. Le jugement n'a l'autorité de la chose jugée qu'à l'égard des parties au litige et que pour le montant réclamé.

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. 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. Le jugement qui ordonne le recouvrement collectif des réclamations enjoint au débiteur soit de déposer au greffe

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.

228. No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

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.

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;

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. Aucun commerçant, fabricant ou publicitaire ne peut, dans une représentation qu'il fait à un consommateur, passer sous silence un fait important.

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. 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;

(c) that his obligations be reduced;

(c) la réduction de son obligation;

(d) that the contract be rescinded;

(d) la résiliation du contrat;

(e) that the contract be set aside; or

(e) la résolution du contrat; ou

(f) that the contract be annulled.

(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.

IV. QUEBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS

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.

He also possesses juridical personality.

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.

9. Chacun a droit au respect du secret professionnel.

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.

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.

The tribunal must, *ex officio*, ensure that professional secrecy is respected.

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.

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,

En cas d'atteinte illicite et intentionnelle, le tribunal peut en outre condamner son auteur

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

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:

(a) a publication that is provided by mail and addressed to an adult who is identified by name;

(b) a publication that has an adult readership of not less than eighty-five percent; or

(c) signs in a place where young persons are not permitted by law.

22(2). Il est possible, sous réserve des règlements, de faire la publicité – publicité informative ou préférentielle – d'un produit du tabac:

(a) dans les publications qui sont expédiées par le courrier et qui sont adressées à un adulte désigné par son nom;

(b) dans les publications dont au moins quatre-vingt-cinq pour cent des lecteurs sont des adultes;

(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.

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.

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.

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

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.

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.

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

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

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

---

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.

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.

	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).

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)

[545] *Ibidem*, at pages 108-109.

EXHIBIT "C"

This is Exhibit "C" referred to in the
affidavit of Robert McMaster
sworn before me, this 1st
day of April 2019

A COMMISSIONER FOR TAKING AFFIDAVITS

[Translation]

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

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-025385-154, 500-09-025386-152 et 500-09-025387-150
(500-06-000070-983 et 500-06-000076-980)

DATE : 1er mars 2019

CORAM : LES HONORABLES YVES-MARIE MORISSETTE, J.C.A.
ALLAN R. HILTON, J.C.A.
MARIE-FRANCE BICH, J.C.A.
NICHOLAS KASIRER, J.C.A.
ÉTIENNE PARENT, J.C.A.

No : 500-09-025385-154

IMPERIAL TOBACCO CANADA LTÉE
APPELANTE / INTIMÉE INCIDENTE – défenderesse
c.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
INTIMÉS / APPELANTS INCIDENTS – demandeurs
Et
JTI-MACDONALD CORP.
ROTHMANS, BENSON & HEDGES INC.
MISES EN CAUSE – défenderesses

DRAFT

Nº : 500-09-025386-152

JTI-MACDONALD CORP.
APPELANTE / INTIMÉE INCIDENTE – défenderesse
c.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
INTIMÉS / APPELANTS INCIDENTS – demandeurs
Et
IMPERIAL TOBACCO CANADA LTÉE
ROTHMANS, BENSON & HEDGES INC.
MISES EN CAUSE – défenderesses

Nº : 500-09-025387-150

ROTHMANS, BENSON & HEDGES INC.
APPELANTE / INTIMÉE INCIDENTE – défenderesse
c.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
INTIMÉS / APPELANTS INCIDENTS – demandeurs
Et
JTI-MACDONALD CORP.
IMPERIAL TOBACCO CANADA LTÉE
MISES EN CAUSE – défenderesses

DRAFT

TABLE DES MATIÈRES

I. CONTEXT 9

1. COLLECTIVE ACTIONS ... 9
1.1. The Blais claim ... 10
1.2. Létourneau claim ... 10
1.3. Description of the Appellants ... 11
A. ITL ... 11
B. JTM ... 11
C. RBH ... 12

2. GENERAL CHRONOLOGY ... 12
2.1. Evolution of perceptions (1950-1972) ... 13
A. Early confrontations ... 13
B. The 1962 statement of principle ... 15
C. Ad hoc Committee of the Canadian Tobacco Industry, Canadian Tobacco Manufacturers Council and the LaMarsh Conference ... 16
D. Report of the United States Surgeon General (1964) and its aftermath ... 16
2.2. Voluntary Adherence* (1972-1988) ... 18
A. Voluntary codes ... 18
B. Warnings ... 19
C. Advertising ... 20
D. Internal information news letters ... 21
2.3. Government Interventions (1988-1998) ... 23
A. Legislative framework ... 23
B. Constitutional challenge ... 24
2.4. Position of the Representatives ... 25
A. Jean-Yves Blais ... 25
B. Cécilia Létourneau ... 25

3. PROCEDURAL HISTORY ... 26
3.1. Superior Court ... 26
A. Applications for Leave to Exercise a Collective Action ... 26
B. Authorization and filing of claim ... 26
C. Hearing and constitution of the evidence ... 27
i. May 2, 2012 Judgment concerning the authenticity of certain exhibits ... 27
ii. July 3, 2013 Judgment on the amendment of definitions of groups ... 27
iii. May 13, 2014 Judgment on access to medical records ... 28
D. Judgment under appeal ... 28

DRAFT

3.2. Court of Appeal 28
A. Application to quash the order for provisional execution 28
B. Application for an order to provide security 29
C. Motion to stay trial proceedings 29
D. ITL motion for particulars 30
E. Hearing of the appeals 30

II. JUDGMENT UNDER APPEAL 31

III. GROUNDS OF APPEAL 35

IV. ANALYSIS 36

1. LIABILITY OF THE APPELANTS UNDER THE GENERAL LAW AND SECTION 53 *C.P.A.* 36
1.1. Preliminary remarks 36
A. Standard of Judicial Review 36
B. Main findings of fact 37
1.2. Regimes of civil liability 52
A. Context 52
B. Civil liability of a manufacturer marketing a dangerous product: general regimes 78
i. Reminder of the impugned judgment in terms of liability 78
ii. General Comments on the Rules of Liability 88
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.* 89
a. Overview of the manufacturer's obligation to provide information pursuant to the *C.C.L.C.* or the *C.C.Q.* 90
b. Specific questions 114
b.1. Articles 1053 *C.C.L.C.*, 1457 *C.C.Q.*, general fault and knowledge defence 114
b.2. Knowledge defence: the extent of the victim's knowledge 121
b.3. Sharing of liability between the user and the manufacturer (art. 1478 *C.C.Q.*) 131
b.4. Burden of proof: a few clarifications 133
iv. Section 53 *C.P.A.* 149
C. Summary of the applicable regimes 163
1.3. Application of the law to the facts: civil liability of the manufacturer under common law and s. 53 C.P.A. 165
A. Appellants' failure to fulfill their duty to inform 165
B. Victims' knowledge of the dangers 195
i. General 195
ii. Apparent danger 198
iii. Real knowledge of the danger by each Class member 198
iv. Presumed knowledge of Class Members 201

DRAFT

a. Was the reputation of the toxic and addictive effects of cigarettes acquired during the 1950s, 1960s or 1970s? 204
b. Were the toxic and addictive effects of smoking well-known in 1980 (diseases) and 1996 (addiction) 212
C. Summary ... *226*
D. Causation ... *227*
i. General treatment of this issue by common law ... 227
ii. Effect of the tobacco-related Damages Health Care Cost Recovery Act ... 232
a. Apparent scope of *T.R.D.A.* 232
b. Appellants' Critique of Section 15 *T.R.D.A.* 236
iii. Challenge related to the first instance ... 246
iv. An aspect of the conduct of the proceedings at first instance ... 250
v. Appellants' grievances regarding evidence of causation ... 260
vi. Evidence of Causation and Its Assessment by the Judge ... 265
a. Medical causation 265
a.1. Blais 266
a.2. Létourneau 278
b. Conduct causation 279
c. Dependence and definition of the Létourneau Class 290
vii. Summary ... 293

2. *CONSUMER PROTECTION ACT* (S. 219, 228 and 272 *C.P.A.*) ... 293
2.1. Context ... 294
2.2. Analysis ... 295
A. Adoption and scope of application of the C.P.A. ... *295*
B. Conditions of implementation of the remedy set forth at section 272 C.P.A. ... *297*
i. Violation of an obligation imposed by Title II of the *C.P.A.* ... 298
a. Failing to mention an important fact (s. 228 *C.P.A.*) 299
b. False or misleading representation (s. 219 *C.P.A.*) 304
c. End of prohibited practises 306
d. Summary 309
ii. Knowledge of prohibited practises ... 309
iii. Contracts subsequent to the prohibited practises ... 310
iv. Sufficient nexus ... 313
C. Scope of the irrebuttable presumption of prejudice ... *316*
D. Penalties imposed upon the Appellants pursuant to section 272 C.P.A. ... *319*
i. Availability of moral damages ... 319
ii. Availability of punitive damages ... 320
2.3. Summary ... 320

3. *CHARTER OF HUMAN RIGHTS AND FREEDOMS* ... 321
3.1. Context ... 321
3.2. Analysis ... 322
A. Field of application and entry into force and effect of the Charter ... *322*

DRAFT

B. Unlawful violations of the right to life, personal security and inviolability ... *324*
i. The rights to life, personal security and integrity ... 324
ii. Unlawfulness of the violation ... 328
C. Intentional violation ... *331*
3.3. Summary ... 335

4. PRESCRIPTION ... 336
4.1. Prescription of compensatory damages ... 336
A. Context ... *336*
B. Analysis ... *337*
4.2. Prescription of punitive damages ... 345
A. Context ... *345*
B. Analyse ... *346*
i. Dossier Blais ... **Error! Bookmark not defined.**
a. Charte **Error! Bookmark not defined.**
b. *L.p.c.* **Error! Bookmark not defined.**
ii. Dossier Létourneau ... **Error! Bookmark not defined.**
a. *L.p.c.* **Error! Bookmark not defined.**
b. Charte **Error! Bookmark not defined.**
4.3. Résumé ... Error! Bookmark not defined.
A. Réclamations de dommages compensatoires ... ***Error! Bookmark not defined.***
B. Réclamations de dommages punitifs ... ***Error! Bookmark not defined.***
5. ALLOCATION AND QUANTUM OF PUNITIVE DAMAGE ... 353
4.4. Main Appeal ... 353
A. Background ... *353*
B. Analysis ... *354*
i. Blais ... 356
ii. Létourneau ... 357
a. Arguments relating to the award of punitive damages 357
b. Arguments related to determining the quantum 360
4.5. Cross-Appeal ... 369
4.6. Summary ... 370

5. INTEREST AND ADDITIONAL COMPENSATION ... 370

6. APPROPRIATE METHOD OF RECOVERY ... 372

7. INTERLOCUTORY JUDGMENTS AND EVIDENCE ... 378
7.1. Background ... 378
7.2. Analysis ... 379
A. Mootness of ground of appeal ... *379*
B. Parliamentary Privilege ... *381*
C. Authenticity and preparation of exhibits ... *384*
D. Solicitor-Client Privilege ... *389*
7.3. Summary ... 389

DRAFT

8. TRANSFER OF THE OBLIGATIONS OF MTI 390
8.1. Background 390
8.2. Analysis 391

9. DESTRUCTION OF DOCUMENTS BY ITL 392
9.1. Background 392
9.2. Analysis 395

V. CONCLUSION 397

SCHEDULES 402

SCHEDULE I: Abbreviations and acronyms used 403

SCHEDULE II: Basis for calculating interest and the additional indemnity 405

SCHEDULE III: Definitions of Blais and Létourneau Classes 408

SCHEDULE IV: Extracts from the "*Special Report on Smoking and Health*", *The Leaflet*, Vol. 5, No. 5, June 1969 (Exhibit 2, p. 1 and ff. – see *supra*, note 580) 410

DRAFT

ARRÊT

[1] La Cour est appelée à trancher le sort de trois pourvois et d'un pourvoi incident formés à l'encontre d'un jugement rendu le 27 mai 2015[1], puis corrigé le 9 juin 2015, par la Cour supérieure, district de Montréal (l'honorable Brian Riordan), dans le cadre de deux recours collectifs[2] dont l'origine remonte à 1998. Le jugement ordonne le recouvrement collectif de la somme de 6 858 864 000 $ en dommages compensatoires en réparation d'un préjudice causé aux membres dans un des recours collectifs ainsi que le recouvrement collectif de la somme totale de 131 090 000 $ en dommages punitifs dans les deux dossiers.

[2] Dans ce jugement, l'honorable Brian Riordan condamne les appelantes, trois cigarettières, à verser des dommages moraux et punitifs en raison des multiples fautes qu'elles ont commises au cours de la seconde moitié du XXe siècle. La responsabilité des appelantes s'y décline sous de multiples rapports, faisant intervenir le régime de responsabilité civile extracontractuelle du droit commun, les dispositions de la *Charte des droits et libertés de la personne*[3] (« ***Charte*** »), celles de la *Loi sur la protection du consommateur*[4] (« ***L.p.c.*** ») et le régime de responsabilité du fabricant. S'y adjoignent les dispositions exorbitantes du droit commun prévues dans la *Loi sur le recouvrement du coût des soins de santé et des dommages-intérêts liés au tabac*[5] (« ***L.r.s.s.d.i.t.*** »), adoptée en 2009 par l'Assemblée nationale. On reproche aux appelantes d'avoir conspiré, pendant près de cinq décennies, pour taire ou minimiser les risques inhérents au tabagisme et d'avoir, sinon créé, du moins entretenu une controverse autour de l'état des connaissances scientifiques afin d'encourager le tabagisme. Cette politique du silence et cette controverse scientifique, entre autres, constitueraient des fautes qui ont causé le tabagisme des membres et, par voie de conséquence, le développement de certaines maladies chez les uns et la dépendance au tabac chez les autres.

[3] Dans le dossier Blais, qui regroupe des dizaines de milliers de personnes qui ont développé certains types de cancer et l'emphysème, les appelantes ont été condamnées à indemniser les victimes de ces maladies par le paiement de dommages moraux (6 858 864 000 $), ainsi que de dommages punitifs symboliques (90 000 $). Dans le dossier Létourneau, qui regroupe des centaines de milliers de personnes ayant développé une dépendance au tabac, le juge a conclu à la responsabilité civile des appelantes tout en refusant l'indemnisation des membres. Il a néanmoins condamné les

[1] *Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382 [jugement entrepris].
[2] L'expression « recours collectif » sera utilisée pour désigner les recours dans les présents dossiers, plutôt que l'expression « action collective » consacrée dans le nouveau *Code de procédure civile*.
[3] *Charte des droits et libertés de la personne*, RLRQ, c. C-12.
[4] *Loi sur la protection du consommateur*, RLRQ, c. P-40.1.
[5] *Loi sur le recouvrement du coût des soins de santé et des dommages-intérêts liés au tabac*, RLRQ, c. R-2.2.0.0.1.

DRAFT

appelantes à payer des dommages punitifs substantiels qui totalisent 131 000 000 $. Dans les deux dossiers, le recouvrement collectif a été ordonné.

[4] Dans leurs pourvois, les appelantes allèguent de nombreuses erreurs qu'aurait commises le juge de première instance. Outre ses conclusions sur la faute, la causalité et l'évaluation du préjudice, les appelantes remettent en cause une série de conclusions contingentes, dont l'application des principes généraux du recours collectif, le recouvrement collectif, la prescription de certaines réclamations, l'applicabilité de la *Charte* et de la *L.p.c.*, le calcul du quantum des dommages punitifs, le point de départ du calcul des intérêts et de l'indemnité additionnelle ainsi que diverses conclusions de fait concernant certains agissements des appelantes et l'admissibilité ou l'utilisation de certaines pièces.

[5] Après avoir attentivement étudié les motifs du juge de première instance et la traduction française qui les accompagne, la Cour a conclu que seule la version anglaise devait faire foi. Dans l'étude de motifs de cette envergure, qui font un emploi abondant d'une terminologie juridique, technique ou scientifique souvent très spécialisée ou peu usitée, il est souhaitable de suivre l'exemple de la Cour suprême du Canada et de s'en remettre à la langue dans laquelle l'auteur des motifs les a rédigés. Comme le signale le juge au paragraphe 1205 de ses motifs, cette langue est l'anglais. Aussi la Cour ne citera-t-elle ici que les motifs déposés en langue anglaise et il en ira de même pour le passage du dispositif du jugement de première instance reproduit dans le dispositif du présent arrêt. Dans les notes de bas de page qui apparaissent au soutien des motifs, les renvois à la jurisprudence (sauf pour le jugement entrepris) et à certaines lois reproduisent systématiquement la référence complète à la source d'origine. En raison de la longueur de l'arrêt, il a semblé préférable, pour la commodité du lecteur, de procéder ainsi, plutôt que par renvois inter-notes *supra* ou *infra*. Les notes renvoyant à la doctrine font cependant exception à cette règle. De manière générale, les mentions de page renvoient à la pagination de la pièce à laquelle il est fait référence; si la pièce est dépourvue de pagination, les mentions de page renvoient à la pagination des annexes conjointes (« a.c. »). Les titres des pièces sont indiqués uniquement lorsque cela apparaît pertinent à la compréhension des motifs.

DRAFT

I. CONTEXT

1. COLLECTIVE ACTIONS

[6] The two collective actions before the Superior Court concern the period from 1950 to 1998 ("**the relevant period**"). Within the framework of each of the actions, the Respondents allege 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 to not cause injury to another (article 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) (art. 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 or manufacturer's duties imposed by the *C.P.A.* The Respondents furthermore allege that the Appellants intentionally took concerted action and cooperated in order to delay the public becoming aware 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. The Blais claim

[8] The Blais claim was filed with the Superior Court in November 1998 and was authorized on February 21, 2005. The group whose members are represented by Mr Jean-Yves Blais ("**the Blais group**") 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 tobacco dose**"). The threshold for this dose was established as being 12 pack-years by the Trial Justice. 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 Justice found the Appellants liable and ordered them to pay moral damages to the members who had received a diagnostic 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 nevertheless concluded 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 solely entitled to 80% of 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 claim

[10] The Létourneau matter was filed with the Superior Court in September 1998 and authorized on February 21, 2005. The group, whose members are represented by Ms Cécilia Létourneau ("**the Létourneau group**"), is estimated to include nearly one million smokers who developed an addiction to nicotine contained within cigarettes manufactured by the Appellants. The Justice defined addiction to nicotine as resulting (i)

DRAFT

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 Justice found that the Appellants had caused the addiction of the members of the Létourneau group. 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. He nevertheless 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 collective 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, in order 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.

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 shares of the Appellants during the relevant period[6]. Today and for a considerable period of time, it has been either owned in part or wholly owned, from time to time, by British American Tobacco ("**BAT**"), a company with headquarters in London.

B. JTM

[15] JTI-Macdonald Corp. ("**JTM**"), in terms of market share, is the smallest of the Appellants, having held on average 19.59% of the market shares of the Appellants during the relevant period[7]. At the time of trial, it was indirectly owned by the company Japan Tobacco.

---

[6] Judgment under appeal, para. 1007.
[7] Judgment under appeal, para. 1007.

[16] Originally, this was a Montréal 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 would eventually be dissolved. Finally, in 1999, R.J. Reynolds Tobacco Company split from RJRM and, in the wake of a succession of agreements within 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 with the trial record creates certain constraints and 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 in complexity most of the 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 under appeal shall be dealt with in order and each of them shall be accompanied by a summary of the evidence which is most relevant to it.

---

8 See exhibit 40000.
9 Judgment under appeal, para. 1007.
10 Judgment under appeal, para. 591-592 and note 289.

DRAFT

[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 Justice 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 public awareness as a result increased. It is during this period that the initial warnings began to appear on cigarette packages. Finally, from 1988 to 1998, the governments intervened in order to oversee the industry both with respect to advertising and warnings. In the following sections, 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] which was 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 which would remain in the annals under the name of *Plaza Hotel Meeting*[12]. The Tobacco Industry Research Committee, which is the 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 which 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 "*to any one of many other aspects of modern life.*"[14] As the founding act of the Tobacco Industry Research Committee, the *Frank Statement* united several American cigarette

---

[11] *Tobacco Restraint Act*, S.C. 7-8 Ed VII (1908), ch. 73.
[12] Robert Proctor Testimony, November 28, 2012, p. 30.
[13] Exhibit 1409.
[14] Exhibit 1409.

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, on the pages of the *Globe and Mail*, published a release which it qualified in the following manner: "*AN ANNOUNCEMENT OF MAJOR IMPORTANCE*"[17]. It stated therein that the Canadian Medical Association, during its annual congress disclosed 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 dealt with various proposals, including the improvement of cigarette filters, solely using tobacco which contained lower tar and nicotine levels (the Virginia) promoting King Size cigarettes, longer cigarettes where the combustion generates less warmth and thus less tar. The company concluded by emphasizing 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 <u>for many years</u> 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

---

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.

DRAFT

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-to-effect. It underlined that the laboratory experiments did not permit for a conclusion related to causation but did allow for the conclusion that several compatible elements pointed towards a form of causation. On dependence and addiction, the report was less explicit: it disclosed popular beliefs – shared by doctors – further to which tobacco created a “*addictive habit*” but was of 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 which might 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 mind would only serve to confuse consumers. This document also contains in a schedule[27] guidelines concerning media interventions by cigarette manufacturers. One reads therein 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.

---

23 Exhibit 545, p. 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.

DRAFT

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 and whose actions would intermittently mark the remainder of the relevant period.

[30] During summer 1963, correspondence[28] between ITL and the Ministry of National Health and Welfare of Canada and the Minister at that time, Ms Judy LaMarsh, allowed one to conclude 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].

[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), in addition to associatons of tobacco farmers, the Canadian Medical Association and the Canadian Cancer Society and various other Intervenors were in attendance[31].

D. Report of the United States Surgeon General (1964) and its aftermath

[32] January 11, 1964 is 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 causation link between smoking and lung cancer among men which increases by a factor of 10 (average smoker) to 20 times (heavy smoker) the risk of contracting lung cancer; (iii) smoking increases the risk of contracting emphysema but the causation link is not established; (iv) smoking "appears" to be linked with other types of cancer (larynx, bowel), but causation is not established; (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

[28] See exhibits 20321 to 20343.
[29] Exhibit 544E.
[30] Exhibit 40118.
[31] Exhibit 20341.
[32] Exhibit 601-1964.
[33] Exhibit 601-1964, p. 33.

DRAFT

coverage in Quebec media outlets[34] and was qualified as being "*seminal*"[35] or a "*bombshell*"[36] by an expert witness.

[33] Several years later, in 1969, in the wake of works 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 any form of tobacco advertising. Several exhibits on the record[40] retraced the debates which were held between the forces in attendance 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 this 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

---

34 Testimony of Prof. David Flaherty, May 21, 2013, p. 78.
35 Testimony of Prof. David Flaherty, May 21, 2013, p. 78.
36 Testimony of Prof. David Flaherty, May 21, 2013, p. 225.
37 Exhibit 1554.4.
38 Exhibit 1554.4, p. 10.
39 Exhibit 20073. The bill was abandoned by the House due to general elections as testified by Mr Marc Lalonde (see testimony of Marc Lalonde, June 17, 2012, p. 38).
40 Exhibits 20068 to 20074.1.
41 Testimony of Prof. David Flaherty, May 21, 2013, p. 96.
42 Exhibit 601-1971.
43 Here Is a definition: "Pathological condition characterised by a decrease in the airways (bronchial obstruction) incompletely reversible habitually progressive and associated with an abnormal inflammatory response in the lungs to toxic gases and particles" [translation] (Exhibit 1382, p. 12).

DRAFT

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 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 as of 1964 by a *Cigarette Advertising Code*[47] which had been published by the Appellants. The Trial Justice saw in this a precursor of the codes of the 1970s but added that as distinguished with these latter codes, the evidence did not allow for a determination as to 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 shall 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

---

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 CTMC and N. J. McDonald, of the public relations firm Public & Industrial Relations.
46 Exhibit 542.
47 Exhibit 40005B-1964.
48 Judgment under appeal, 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 now stated: "*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*

succeeded in 1976, 1984, 1985, 1995 and 1996[53]. The Trial Justice concluded in this regard that the rules limiting advertising that were included in the voluntary Codes scarcely changed from 1972 to 1988[54].

B. Warnings

[41] Thus in 1972 the initial warnings appeared on cigarette packages. The Justice noted that the industry reacted "*under threat of legislation*" [55]. The 1972 Voluntary Code[56] provided at rule 2, that any packaged produced after April 1, 1972 would bear the following statements:

> AVIS: LE MINISTÈRE DE LA SANTÉ NATIONALE ET DU BIEN-ÊTRE SOCIAL CONSIDÈRE QUE LE DANGER POUR LA SANTÉ CROÎT AVEC L'USAGE.

> WARNING: THE DEPARTMENT OF NATIONAL HEALTH AND WELFARE ADVICES THAT DANGER TO HEALTH INCREASES WITH AMOUNT SMOKED.

[42] These warnings were also reproduced in small font letters on cigarette packages apparently on the lateral faces 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 henceforth on packages. They were provided by rule 12 of the new voluntary Code[60] :

> AVIS: Santé et Bien-être social Canada considère que le danger pour la santé croit [sic] avec l'usage - éviter d'inhaler.

> WARNING: Health and Welfare Canada advises that danger to health increases with amount smoked - avoid inhaling.

---

popular events whether through the use of brand of corporate name or logo" (Exhibit 40005G-1975, p. 2).

52 Exhibits 40005G-1975 to 40005K-1975; see also Exhibit 20002.
53 See exhibits 40005B-1964 à 40005S-1996.
54 Judgment under appeal, para. 394.
55 Judgment under appeal, para. 110, note 57.
56 Exhibit 40005D-1972.
57 Exhibit 40005E-1972.
58 Exhibit 40005F-1973.
59 Judgment under appeal, para. 110, note 57. Mr Marc Lalonde, Minister of National Health and Welfare from 1972 to 1977, testified as follows: "This was subject to numerous discussions, 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, p. 53).
60 Exhibit 40005G-1975.

DRAFT

[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] provide the same warnings.

C. Advertising

[46] The Trial Justice 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 or promoting 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[69] and which remained in force and effect thereafter.

[47] Certainly, these prohibitions in the 1984 Code prohibited (i) the promotion of sporting or other sponsors 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 that have just been mentioned, a complete regulation of the Code (*Regulations Re Cigarette and Cigarette Tobacco Advertising and Promotion*). In force since January 1, 1976, states as follows in its January 1, 1985 version[70] :

---

61 Exhibit 40005H-1975.
62 Exhibit 40005I-1975.
63 Exhibit 40005K-1975.
64 Exhibit 40005L-1976, p. II.3.
65 Exhibit 40005M-1984, rule 12.
66 Exhibit 40005N-1985, rule 12.
67 Judgment under appeal, para. 400.
68 Judgment under appeal, para. 398.
69 For the French version, see Exhibit 40005M-1984, p. 173924.
70 Exhibit 40005N-1985, p. III.1.

DRAFT

> 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 scheme that would be implemented by the Canadian Parliament in 1997 and that the Supreme Court of Canada would rule constitutionally valid in 2007. These questions are addressed further on.

D. Internal information news letters

[49] During the relevant period, certain Appellants, the Society for the Freedom of Smokers* ("**SLF**"*) and the CTMC published newsletters addressed to their employees, both active and retired. Here is a glimpse of some of them.

[50] ITL for a certain time published *The Leaflet / Le Feuillet*, a newsletter addressed to employees and their families[71]. Generally, we find a varied range of articles, for example, on employee retirement conditions or 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 Justice concluded that this publication drew a favourable portrait of smoking and cultivated scientific controversy in that regard.[72].

[51] The SLF was initially directed by Mr Michel Bédard, but the effective management of this group appears to have derived in good part from the CTMC[73], in addition to its financing – thus the Appellants. The SLF published its initial issue of the newsletter *Calumet* during winter 1986-1987[74]. Other newsletters would follow. It presented a visual portrait of famous smokers (such as Winston Churchill, John Steinbeck or Simone de Beauvoir). It encouraged readers mail. 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 pursuant to one 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 SLF "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]. We also learn that keeping birds in cages at home was responsible, according to a Dutch study,

---

[71] See Exhibit 2A; all the annual versions of Exhibit 105-AAAA-2m; Exhibit 126A; exhibits 244G to 244M.
[72] Judgment under appeal, paras. 247 and 265.
[73] See for example Exhibit 208, p. 1; Exhibit 208.1, p. 2; Exhibit 433H, p. 5; Exhibit 441, p. 2, point 2.
[74] Exhibits 215 à 215H.
[75] Exhibit 215A, p. 1.

DRAFT

for half of the lung cancers or that a kilogram of meat cooked on a barbecue contains the same number of carcinogens as 600 cigarettes[76]. Finally, in the Spring 1989 edition, we read about an epidemiologist named Siemiatycki (one of the expert witnesses cited by the Respondents at trial) who concluded that bus drivers had 50% more chances of suffering lung cancer due to gas exhaust[77]. The publication of *Calumet* continued until 1989. We find certain samples of the newsletter under its English title *Today's Smoker* in 1993[78].

[52] The CTMC published the *Revue du Tabac / The Tobacco Review*, at least from 1978 to 1980[79]. Then, as of Autumn 1988, the CTMC published the quarterly *Tabacum* "[*a*] *liaison bulletin for the tobacco industry*"[80]. This 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. A portrait was drawn of the 1988 tobacco harvest. In short, the information disclosed was still varied in nature. In Summer 1989, *Tabacum* published the "*Charter of Rights and Freedoms of Smokers*" formulated by the SLF. One reads therein that an adult smoker is entitled, *inter alia*, "to scientific honesty in the addressing of questions related to tobacco*"[82]. During Winter 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] RJRM published for a certain time the review *Contact*, one sample of which appears to have been filed as evidence. In that issue (1979), we learned the position of RJRM : "We were unable to establish any scientific relationship of cause and effect between tobacco and certain diseases."[84]

DRAFT

---

76 Exhibit 215A, p. 2.
77 Exhibit 215E, p. 6.
78 Exhibit 215I.
79 Exhibits 951-197809-2m to 951-198012-2m.
80 Exhibit 975.1, p. 1.
81 *Tobacco Products Control Act*, S.C. 1988, ch. 20.
82 Exhibit 975.3, p. 2.
83 Exhibit 975.6, p. 52771.
84 Exhibit 959-197909, p. 2.

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, which prohibited smoking in various locations including certain zones in public bodies, public transport (metro, ambulance etc.) and certain other locations (judicial institutions, childcares or waiting rooms for health professionals).

[55] In 1988, the Surgeon General published a report titled *The Health Consequences of 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. During the same year, the *Non-smokers Health Act*[88], was adopted that banned smoking in certain forms of public transport 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 characterise 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*" and "*habituation*" or yet again "*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

---

85 *Act respecting the Protection of non-smokers in certain public places*, S.Q. 1986, c. 13, art. 38; R.S.Q., c. P-38.01, art. 8-17, repealed by S.Q. 1998, c. 33, s. 76.
86 Exhibit 601-1988.
87 *Tobacco Products Control Act*, S.C. 1988, ch. 20.
88 *Non-Smokers Health Act*, S.C. 1988, ch. 21.
89 Exhibit 20065.6233; testimony of Prof David Flaherty, May 22, 2013, p. 226.
90 Exhibit 212.
91 The members coming from the following areas: pharmacology, clinical and experimental psychology, epidemiology, law and neuropsychology.
92 Exhibit 212, p. 22-23.

> 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 the same Act determine the scope of this general prohibition. Appellants ITL and JTM (RJRM at the relevant time) challenged the constitutionality 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 Justices of this 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 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 Justices of this Court, the same provisions do 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, less restrictive than the *Tobacco Products Control Act*[97], but which nevertheless contains numerous prohibitions and restrictions in relation to promotion and advertising (*inter alia* "lifestyle" or "attractive for young people") and the sponsors of tobacco products and with respect to the warnings on packages. Chief Justice McLachlin described this new broadly drafted scheme at paragraphs 18 to 31 of the case *Canada (Attorney General) v. JTI-Macdonald Corp*[98]. Once again challenged on constitutional grounds, but this time by the three Appellants currently before the 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*.

---

93 *Tobacco Products Control Act*, S.C. 1988, ch. 20.
94 *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.
95 *Canadian Charter of Rights and Freedoms,* part 1 of the *Constitutional Act of 1982*, comprising schedule B of the *Canada Act 1982* (UK), 1982, c. 11.
96 *Tobacco Act*, S.C. 1997, ch. 13.
97 *Tobacco Products Control Act*, S.C. 1988, ch. 20.
98 *Canada (Attorney General) v. JTI-Macdonald Corp*, 2007 SCC 30.
99 *Tobacco Products Information Regulations*, DORS/2000-272.

DRAFT

[60] As we have already seen, the claims by the Blais and Létourneau groups were filed several years prior to this 2007 Judgment and were authorized by the Superior Court in 2005.

2.4. Position of the Representatives

[61] It is an appropriate time for a few remarks regarding the special 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 this 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' pulmonary function and a progression of COPD[100].

[63] Dr Desjardins concluded that Mr Blais' smoking was the most probable cause of his lung cancer and his advanced COPD[101]. The Trial Justice retained the finding of Dr Desjardins and ruled that the lung cancer of Mr Blais was caused by his smoking[102].

B. Cécilia Létourneau

[64] The Judgment under appeal 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 Justice 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 commenced 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 Application for Leave to exercise a Collective Action.

[100] Exhibit 1382, p. 77 et s.
[101] Exhibit 1382, p. 88.
[102] Judgment under appeal, para. 964.

DRAFT

3. PROCEDURAL HISTORY

3.1. Superior Court

A. Applications for Leave to Exercise a Collective Action

[66] On September 30, 1998[103], Ms Létourneau served an Application for Leave to Exercise a Collective Action against the Appellants[104] on behalf of "any and all persons residing in Quebec who are or have been dependent on the nicotine contained in cigarettes manufactured by the [defendants] and the legal successors and assigns of the persons comprised within the group but who have deceased".

[67] On November 20, 1998, the *Centre québécois sur le tabac et la santé* and Mr Blais served an Application for Leave to Exercise a Collective Action against the Appellants on behalf of[105]

> any and all persons residing in Quebec or are or have been victim of a lung cancer, larynx or throat cancer or who suffer from emphysema after having directly inhaled cigarette smoke for a prolonged period of time in Quebec and the successors, heirs and/or assigns of persons deceased who otherwise would have formed part of the group.

[68] On November 3, 2000, the Court of Appeal ordered the joinder of the two claims for purposes of the hearing at the stage of the Application for Leave[106].

B. Authorization and filing of claim

[69] On February 21, 2005, the Superior Court (the Honourable Justice Pierre Jasmin presiding) authorized the collective actions, defined the groups 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 claims in the Blais and Letourneau matters. These applications were amended on several occasions[109].

---

[103] Judgment under appeal, para. 1, note 1.
[104] Acting at that time under the following names: Imperial Tobacco Ltd., RJRM and RBH.
[105] Judgment under appeal, para. 1, note 1.
[106] *Conseil québécois sur le tabac et la santé v. J.T.I.-MacDonald Corp.*, 2000 CanLII 28985, overturning *Conseil québécois sur le tabac et la santé v. Blais* (2000), AZ-50900627 (S.C.).
[107] The various definitions of the two groups during the proceedings are reproduced as a schedule to this Judgment. See *infra*, schedule III.
[108] *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, J.E. 2005-589, 2005 CanLII 4070 (S.C.).
[109] The most recent amended originating applications are dated March 28, 2014 (Blais file) and February 24, 2014 (Létourneau file).

C. Hearing and constitution 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 Justice rendered numerous interlocutory judgments, including several that were appealed. For the purpose of facilitating the comprehension and the process of the trial hearing it is appropriate to address three of the interlocutory judgments that remain of particular importance.

i. May 2, 2012 Judgment concerning the authenticity of certain exhibits

[73] On May 12, 2012, the Trial Justice ruled on an application of the Respondents seeking production of certain documents in evidence and imposing sanctions on ITL due to its refusal to recognise the genuineness of exhibits pursuant to article 403 a *C.c.p.*[110]. By this application the Respondents sought (i) a declaration that the notices of denial of ITL were abusive, (ii) striking of these notices, (iii) authorization to file as evidence the relevant exhibits and (iv) a statement that his principle may be redeployed at a later time.

[74] The Justice allowed this application in part, declaring ITL's notices of denial an abuse of procedure pursuant to Article 54.1 a. *C.c.p.*, ordered that they be struck and authorized the filing with the Court record of the exhibits governed by such notices.

[75] During the hearing the Justice 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 were calling into question the factual conclusions drawn from certain exhibits admitted pursuant to the principle of this decision.

ii. July 3, 2013 Judgment on the amendment of definitions of groups

[76] On July 3, 2013, following the evidence of the Plaintiffs, the Trial Justice authorized certain amendments to the definitions of the Blais and Létourneau groups[111]. In the definition of the Blais group, the Justice 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

---

[110] *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2012 QCSC 1870.

[111] *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2013 QCSC 4904. The various definitions of the two groups throughout proceedings are reproduced as a schedule to this Judgment. See *infra*, schedule III.

the group. In the course of defining the Létourneau group, the Judge clarified the notion of addiction and added a closing date for membership in the group.

iii. <u>May 13, 2014 Judgment on access to medical records</u>

[77] On May 13, 2014[112], under the pen of Justice Bich, the Court of Appeal overturned in part a decision of the Trial Justice[113]. The Court allowed, *inter alia*, the examination by ITL of successors and assigns 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 group that ITL was authorized to cross-examine.

D. Judgment under appeal

[78] In his May 27, 2015 Judgment, subsequently rectified on June 9, 2015, the Trial Justice allowed in part the originating applications of the Respondents, amended the definitions of the groups and ordered the Appellants to pay eight billion dollars in moral and punitive damages. He ordered them furthermore to pay within 60 days of the Judgment, 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. He ordered 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 under appeal, alleging that it was vitiated by numerous errors in law that justified the intervention of the Court. Leaving aside the management measures ordered by Justice Savard, the procedures in appeal can be summarized in the following manner.

A. Application to quash the order for provisional execution

[80] On July 23, 2015[114], a body of the Court of Appeal allowed the motions of the Appellants seeking to stay the order for partial provisional execution of the Judgment under appeal, and 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 a.*C.c.p*. The Court dismissed the applications of ITL and RBH for the issuance of an order of placing under seal certain documents filed in support of their application.

---

112 *Imperial Tobacco Canada Ltd. v. Létourneau*, 2014 QCSC 944.
113 *Conseil québécois sur le tabac et la santé v. JTI-Macdonald Corp.*, 2013 QCSC 4863.
114 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCSC 1224.

DRAFT

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 under appeal were to be upheld. According to the Justice, the Respondents had demonstrated the existence of a "special reason" as contemplated by article 497 a.*C.c.p*. Without the order for security their rights recognised 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 Justice ($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 trial proceedings

[83] After the quashing of the order for provisional execution of the order against the Appellants, the Trial Justice wrote to the parties in order to ask them at what time and in what manner the Respondents intended on complying with paragraph 1247 of the Judgment under appeal that 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 Justice also initiated a correspondence with the parties related to the holding of a management conference to rule upon (i) the notice required by the a.*C.c.p*., (ii) powers of the Judge with respect to issues not governed by the appeal and (iii) the issue of abuse of procedures.

[84] Within this context, the Appellants ITL and RBH filed a motion to stay proceedings wherein they alleged that the Judge cannot during an appeal take any measures whatsoever or render any decision whatsoever with respect to the execution of the Judgment, the abuse of procedures or the notice required by 1043 a.*C.c.p.*

[85] On November 13, 2015[118], a body of the Court of Appeal dismissed the ITL and RBH motion on the ground that the issues raised were theoretical but reiterated "the

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 audience before Justice Schrager.
117 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCSC 1737, paragr. 44.
118 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCSC 1882.

DRAFT

unequivocal wording of article 497 al. 1" a.*C.c.p*., that stays provisional execution of the Trial Judgment.

D. ITL 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. ITL notably sought to decrease the amount of the two initial instalments of the security deposit on the ground that the Justice 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,[119], Justice Schrager dismissed this 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 this order was tainted by an error, he added, the doctrine of *functius officio* estopped the motion of ITL.

E. Hearing of the appeals

[88] On September 8, 2016, two months prior to the appeal hearing, the deputy coordinator of the Court wrote by email to the Appellants on behalf of the Court in order to specify the terms of the hearing and to ask them to accurately identify the exhibits that 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 desire to challenge the exhibits unless 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 a sample 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 conclusion of this last day of the hearing the Court reserved Judgment and allowed the parties permission to submit observations in writing within 15 days, which was complied with on December 15, 2016.

---

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, paragr. 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).

DRAFT

II. JUDGMENT UNDER APPEAL

[90] This summary of the Judgment under appeal has the objective of presenting a general summary of the reasons and findings of the Trial Justice. In order to avoid repetition, the contextual components mentioned previously, which concern collective actions, the general chronology and the procedural history related to the Judgment under appeal, are for the most part excluded.

[91] Have the Appellants manufactured, marketed and sold a product[123] which was dangerous and toxic for the health of consumers? The Justice responded in the affirmative[124]. He defined as “dangerous” a product causing diseases to members of the Blais group (one lung cancer, one cancer) epidermoid carcinoma (of the throat, i.e. the larynx, the oropharynx or the hypopharynx or emphysema) or causing the addiction of members of the Létourneau group.

[92] In the event of a defect in the safety of property, article 1473 *C.c.Q.* provides however two grounds of defence for the manufacturer, distributor or supplier[125] : (i) the victim knew or could have known of the defect of the property or could have foreseen the injury; (ii) this defect could not have been known at the time the property 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 this latter ground of defence[126]. On the first ground, the Justice 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 solely 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. Their liability may, however, be found with respect

---

123 For the definition of “product”, see Judgment under appeal, para. 8, p. 15.
124 Judgment under appeal, paras. 41-51.
125 See art. 1468 *et seq. C.c.Q.*
126 Judgment under appeal, para. 55-73.
127 Judgment under appeal, para. 74-133.
128 Judgment under appeal, para. 122-142.

DRAFT

to other obligations where they have not been compliant for the entire period covered by the two matters.

[94] Firstly, the Appellants knowingly marketed an addictive product, a fault likely to 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 to not cause injury to others pursuant to 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) any such knowledge could nevertheless trigger 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 assigned priority to their profits to the detriment of the health of users of their products.

[96] The Justice then dealt with the joint question dealing with marketing strategies of the Appellants. Within the precise context of this question he was of the view that one cannot necessarily conclude 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 under appeal: "*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 to be informed of the dangers inherent in 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 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 the *Charter* and the *C.P.A.*[133]. Firstly, pursuant to articles 1, 4 and 49

---

129 Judgment under appeal, para. 143-201.
130 Judgment under appeal, para. 202-378.
131 Judgment under appeal, para. 379-438.
132 Judgment under appeal, para. 439-475.
133 Judgment under appeal, para. 476-544.

DRAFT

of the *Charter*, they intentionally violated the right to life, security and integrity of the members of the Blais and Létourneau groups. Furthermore, the Appellants infringed sections 219 and 228 *C.P.A.* by making, as contemplated by this Act, “false or misleading representations” with respect to the risks and dangers inherent in their products and failing to mention “important facts”. After analysis of the case *Richard v. Time Inc.*[134], the Justice concluded that the irrebuttable presumption of injury arising out of section 272 *C.P.A.* can apply to any and all failures to fulfil the duties imposed by law, including those of an extra-contractual (tort) nature.

[99] After having responded to the three questions of analysis of each of the groups, the Justice concluded that the link of causation was proved between the faults committed by the Appellants and the diseases or addiction suffered respectively by the members of the Blais and Létourneau groups[135]. Within the framework of the collective actions undertaken, the evidence of this link is facilitated by section 15 *T.r.d.h.c.c.r.a.* This provision allows for the establishment of the link of causation by relying solely on the epidemiological or statistical studies of medical and behavioural causation. The proof of existence of this link in law is not as stringent as in the field of scientific research. In order to do so, it is sufficient to demonstrate in accordance with the legal burden of proof on a balance of probabilities as provided at article 2804 *C.c.Q.*

[100] On the other hand, the members of the Blais group who only commenced smoking after 1976 and continued to do so after the date of public knowledge of January 1, 1980, shall bear in accordance with the principles of contributory negligence of the victim (art. 1478 *C.c.Q.*), a share of responsibility with respect to damages incurred. This share is set at 20%[136]. This is also true for members of the Létourneau group who commenced smoking after 1992 and who pursued this activity after the March 1, 1996 date of public knowledge. The Justice nevertheless concluded that these principles are inapplicable to punitive damages as they are not awarded based on the conduct of the victim.

[101] The Trial Justice then examined the issue of prescription[137]. Further to application of the *T.r.d.h.c.c.r.a.*, no claim for moral damages of the members of the Blais group is prescribed, contrary to those related to punitive damages which have been prescribed since November 20, 1995. In the event that this law is declared unconstitutional[138], any claim would be prescribed as of this date (art. 2925 *C.c.Q*), on the issue of both moral or punitive damages. In the Létourneau matter, the application

---

134 *Richard v. Time Inc.*, 2012 SCC 8.
135 Judgment under appeal, para. 647-817.
136 Judgment under appeal, para. 818-836.
137 Judgment under appeal, para. 837-910.
138 While waiting for the outcome of the appeal of the Declaratory Judgment of March 5, 2014, which was dismissed. For the aftermath, see *Imperial Tobacco Canada Ltd v. Québec (Attorney General)*, 2015 QCSC 1554, application for leave to appeal to the Supreme Court of Canada dismissed May 5, 2016, no 36741.

DRAFT

for leave to exercise the collective action was filed on September 30, 1998. Thus, all the causes of action of the members of this group 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 either under the general scheme of the *C.c.Q.* or that of the *T.r.d.h.c.c.r.a.*

[102] On the issue of quantum, in the Blais matter, the Appellants were ordered to jointly and severally pay $6,858,864,000 as moral damages, i.e. $15,500,000,000 with interest and the additional indemnity (art. 1480 and 1526 *C.c.Q.* and 22 and 23 *T.r.d.h.c.c.r.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 fact, the evidence discloses that ITL was the leader within the industry on several fronts, particularly where it concerns designs 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 Justice refused to award such damages since the evidence did not allow for the establishment in a sufficiently precise manner of the aggregate sum of claims for all of the members[140].

[103] The Justice then considered the principles applicable with respect to the award of punitive damages (art. 1621 *C.c.Q.* and 272 *C.P.A.*) [141]. Insofar as the claims pursuant to the *Charter* and the *C.P.A.* arise out of the same wrongful actions and attitudes of the Appellants, they cannot be penalised twice. Consequently, the analysis shall not be undertaken separately for these laws. These damages can solely be quantified based on the market shares of the Appellants as they have to be assessed “in the light of all the appropriate circumstances” (art. 1621 (2) *C.c.Q*). They have to be assessed based on annual pre-tax profits of each of them. If one considers the particularly egregious conduct of ITL during the period covered by the claims in addition to that of JTM to a lesser measure, it is appropriate to increase the sums for which these Appellants are being 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 Justice attributed 90% of the total of the sum to his group and 10% to the Létourneau group. 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 Justice decided to order each of the Appellants to pay a symbolic sum of $30,000 which represents 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 group includes more than one million persons, this sum solely represents $130 per member. Due to the fact that the Justice did not award moral

[139] Judgment under appeal, para. 911-1016.
[140] Judgment under appeal, para. 911-1016.
[141] Judgment under appeal, para. 1017-1112.

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 it would be impractical or too onerous.

[104] The Justice ordered 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 Justice furthermore dismissed the applications for individual claims in the Blais and Létourneau files which furthermore had been discontinued and abandoned by the Respondents[143].

[106] Finally, the Justice ruled on objections taken under reserve and argued during pleadings on the issue of admissibility of exhibits bearing the entry "R" and orders of confidentiality with respect to certain documents[144].

III. GROUNDS OF APPEAL

[107] The Appellants have alleged a series of errors in support 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 of the collective action.

[108] The Respondents have replied to these arguments by their own classification of 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 of an order of compensatory damages being revised downward by the Court of Appeal.

[109] Prior to and during the hearing, the Court furthermore asked the parties to plead on various elements of the appeal including the contractual or extra contractual (tort) basis for collective actions, the exhibits where 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 for 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 law of general jurisdiction and section 53 *C.P.A.*;
2. *Consumer Protection Act*;

---

142 Judgment under appeal, para. 1013-1123 et 1196-1204.
143 Judgment under appeal, para. 1193-1195.
144 Judgment under appeal, para. 1024-1192.

DRAFT

3. *Charters 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 claims of the parties on each of these subjects shall be discussed directly within the analysis.

IV. ANALYSIS

1. LIABILITY OF THE APPELLANTS UNDER THE GENERAL LAW AND SECTION 53 *C.P.A.*

1.1. Preliminary remarks

A. Standard of Judicial 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 be reminded of them[146]. The intervention of an appellate court in this respect hinges on the demonstration of palpable and overriding error, a strict and demanding standard (which, it bears repeating, "is in the nature not of a needle in a haystack, but of a beam in eye", to borrow an image from *J.G. v. Nadeau*[147]).

[113] Nevertheless, the case is such that it is hard to ignore the following passage from *Berthiaume v. Réno-dépôt inc.*, which decided the appeal from the Superior Court judgment[148] rendered at the end of a long trial concerning urea-formaldehyde insulating foam (UFFI) [149]:

[Translation:]

---

[145] Term used by the Supreme Court, per Lamer, CJ in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 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 those of this Court. For a recent example, see, *Martel-Poliquin v. R.*, 2018 QCCA 1931, para 30.

[147] 2016 QCCA 167, para 77.

[148] See *Berthiaume v. Val Royal Lasalle ltée*, J.E. 92-71, AZ-92021018 (published in part in [1992] R.J.Q. 76 (C.S.)).

[149] *Berthiaume v. Réno-dépôt inc.*, [1995] R.J.Q. 2796, pp. 2807 and 2808 (C.A.).

DRAFT

> The duty of restraint regarding a general appreciation of 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 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 of the houses and the physical deterioration of those occupants. […]

[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 therefore out of the question that each of the trial judge's findings will be stated in this judgment. Those findings run at over 200 pages[150] 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 or not 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

[150] And 1,000 paragraphs, excluding everything relating to the distribution process, objections to evidence, confidentiality of certain information, individual claims and provisional execution.

lung and throat cancer[151] and emphysema) as well as a strong addiction preventing or making quitting 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;

(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 must be noted that the first three statements made by the Respondents, coincide with the provisions of various statutes or with various judicial statements in caselaw prior to the judgment of first instance.

[119] Thus, section 3 of the *Tobacco Products Control Act*[153], assented to in June 1988, 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	**3.** La présente loi a pour objet de

[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 v. JTI-MacDonald Corp.*, 2013 QCCS 4904, paras 9-16 and 83).

[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*, para [58].

> provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> *(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;
>
> *(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
>
> *(c)* to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

> 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)* 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)* 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)* 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.
>
> [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,
>
> *(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;

> **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)* 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;

[155] *Tobacco Act*, S.C. 1997, c. 13.

DRAFT

(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 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

---

[156] Dissenting, but not on this specific point.
[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, para 83.
[159] Later on in his decision, La Forest, J. (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).

DRAFT

> 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 [TRADUCTION] [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]

[122] In 2007, in the judgment dismissing the constitutional challenge of the 1997 *Tobacco Act*, the Supreme Court, this time per McLachlin, CJ, 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

160 *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30.

DRAFT

> 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 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*.
>
> […]

DRAFT

> 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]

[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 preponderance, the accuracy of these legislative and judicial findings, reflected in the trial judge's findings.

[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 or 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].

---

161 Exhibit 30217, p. 17. See also Exhibit 1426.1; testimony of Dr. Kenneth Mundt, March 17, 2014, pp. 59-60.

162 As regards 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 p. 27, under the heading "Conclusion" (quoted by the impugned judgment, note infra p. 296). Also, the following remarks are in Exhibit 1398 (pp. 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 impugned judgment):

> 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, that confirm 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 (p. 83). Knowing that the

DRAFT

[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 spell it out in full, it also appears from the judgment[166] – and from 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 would be 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 consumption creates and to relieve the stress of (even temporary) abstinence. Furthermore, 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* <u>*in spite*</u> *of these positive psychological attributes*" (in other words, according to the Mr. Bexon, reduced stress, improved concentration and alleviation of boredom)[168]. This says a lot about the merits of smoking.

[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 to Wayne Knox (then Director of Marketing at ITL)[169] in the following terms:

> 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. […]

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 impugned judgment, specifically para 175 *in fine* and para 179).

164 See impugned judgment, specifically paras 177 to 182 and 830.

165 1988 Report of the Surgeon General of the United States, Exhibit 601-1988, p. 37233 et seq. (j.s.); 2010 Report of the Surgeon General of the United States, Exhibit 601-2010, p. *iii* and Exhibit 601-2010A, p. *iii* and 105; 2012 Report of the Surgeon General of the United States, Exhibit 601-2012, p. 23; 2014 Report of the Surgeon General of the United States, Exhibit 601-2014B, p. 30.

166 Impugned judgment, specifically at para 183.

167 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, para 97.

168 Exhibit 266 (transcribed in Exhibit 266A, p. 1), p. 20603 (j.s.).

169 Exhibit 267, p. 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 (p. 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*" (p. 13)

DRAFT

[129] In 1976, in a note to Anthony Kalhok (Vice President Marketing, ITL), Michel Descôteaux (ITL employee) suggests that the industry should encourage moderation among smokers and adds 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 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 suggests 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

---

170 Exhibit 11, p. 4. Paragraph 135 of the impugned judgment refers to the same passage.
171 Exhibit 1379, p. 2.
172 Exhibit 1379, p. 2.
173 Exhibit 487, p. 26887 (j.s.). Paragraph 466 of the impugned judgment cites the same exhibit.
174 Exhibit 487, p. 26887 (j.s.). See also (just two examples among many): (1) the letter from Mr. Neville to Mr. G.E. MacDonald (Exhibit 694, August 31, 1988, p. 47826 (j.s.)), part of which is quoted in paragraph 467 of the impugned judgment) 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, p. 30).

DRAFT

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].
>
> [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 does 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

---

175 The Appellants' reluctance to use the term "*addiction*" seems to persist, since at trial they were quick 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 notes, the DSM refers to a *tobacco use disorder*, described at paragraph 180 of the impugned judgment).

176 Impugned judgment, 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 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 reduces the risk associated with tobacco by smoking a milder cigarette does not receive the expected benefit (see impugned judgment, 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

DRAFT

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 promotional means to convince people to start or continue using, as the case may be, a product, the toxicity of which been exaggerated, and finally presented smoking as a matter of personal choice and freedom. As the trial judge states, 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 is 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, specifically "*Young Teens*" under the age at which they can legally obtain cigarettes (16 or 18 depending on the relevant year) 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 this would not in itself be unlawful, at least as long as the product remains legal and the advertising is directed at people of a certain age and, which would be the case here, does not contain any misinformation:

for pressure groups such as the "Société pour la liberté de fumeurs/ *Smokers' Freedom Society*"(on this last point, see in particular: impugned judgment, paras 468 and 469), etc.

179 Impugned judgment, para 485.
180 Impugned judgment, para 486.
181 Impugned judgment, para 486.
182 Impugned judgment, para 475.
183 Impugned judgment, para 188 to 201.
184 See also paras 420 to 425 of the impugned judgment.

DRAFT

> [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.
>
> […]
>
> [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 points 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

---

[185] The evidence is too abundant to be usefully referred to, but one could almost randomly select an example that 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, pp. 2 and 3 in 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.
> […]
> <u>Objective</u>

on that subject were accepted by the trial judge[186], but on 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 or not 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 impugned judgment 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

---

> 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
>
> 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 that "*what the smoking young have in mind about smoking*", a detailed eight-point objective 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) (pp. 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, p. 13-14, which is aimed particularly at people under 20 years of age.

186 Impugned judgment, 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, held as follows:

> [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, para 14). Obviously, there is no *res judicata* in this respect.

> 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.

[141] Similarly, the trial judge's comments about the fact that the Appellants complied with regulatory requirements are inconsistent with those he will subsequently make about the misinformation he accuses them of.

[142] But, continuing with 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). As of that date, the trial judge decided that 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 that fact that cigarettes are addictive. His finding is based on the following equation: in September 1994, the *Tobacco Products Regulations*[188] for the first time imposed the obligation on the Appellants to display the following warning on the cigarette packages: "La cigarette crée une dépendance / *Cigarettes are addictive*". 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.
>
> [Words in bold in the 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

---

[188] *Tobacco Products Regulations*, SOR/89-21, enacted December 22, 1988 proclaimed in force January 1, 1989, 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.

DRAFT

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 Letourneau Classes had suffered harm. As a result of their smoking, the Blais Class, developed lung or throat cancer or had 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 Letourneau 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;

- While 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 that 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 January 1. 1980, and its addictive effects were public knowledge on March 1, 1996;

- Because of their smoking, 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 Class members made to smoke or continue smoking.

DRAFT

[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 both Classes. Rather, they challenge the legal treatment of the facts and the resulting liability, mainly in terms of causation, which in their view has not been proven either collectively or individually[189]. They further deny that their breaches led to the decision to start smoking or continue smoking made by 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 it 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 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 do not contest the trial judge's findings either, 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. Context

[153] The Class Period extends from 1950 to 1998, during which time the C.C.L.C. (in force before 1994) has been 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 (which came into force on June 28, 1976), a new C.P.A[190], also public policy legislation, in 1978 (which came into force on April 30, 1980, with some exceptions).

[189] Neither medical causality nor "comportmental causality", to use the Appellants' expression, were established, either individually or collectively.

[190] This act replaces the *Consumer Protection Act*, S.Q. 1971, c. 74, which did not contain any provisions relevant to the present dispute.

DRAFT

[154] The sources (contractual or extracontractual) 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:

<u>Before 1994</u>

- Under the C.C.L.C. and for most of the Class Period, liability was either deal with in contractual terms (art. 1022, 1065, 1506, 1522 et seq. C.C.L.C.) or extracontractual terms[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 are embodied in the “garantie des défauts cachés / *warranty against latent defects*” (today the vendor’s legal warranty prescribed by articles 1506 (2), and 1522 et seq. *C.C.L.C.*[193], a warranty that is 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., imposes 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 knows the risks and dangers of the products in question and their defects;

---

[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 claim on a manufacturer's extracontractual liability instead. This issue of opting between contractual and extra-contractual liability, permissible before 1994, will be examined below.

[193] Article 1522 *C.C.L.C. provided* as follows:

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.	**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.

DRAFT

- 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]);

- Lastly, as of April 1980, section 53 *C.P.A.* gives 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.

<u>After January 1, 1994</u>

- 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, the possibility of opting between recourses being prohibited from 1994 forward[195];

- From a contractual perspective, the legislator modernized the legal warranty against latent defects, now a "quality warranty", enshrined in articles 1716 and 1726 et seq. C.C.Q., expressly imposed on the manufacturer by article 1730[196] and implied in article 1442 *C.C.Q.*; as

---

194 See *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345, paras 119 to 121 (majority reasoning 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 *C.C.Q.* rules of liability). See also *Bou Malhab v. Diffusion Métromédia CMR inc.,* 2011 SCC 9, 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. 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.	**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.

regards implied contractual obligations, articles 1375 and 1434 C.C.Q. replace article 1024 C.C.L.C.;

- From an extracontractual perspective, the legislator, codified and strengthened previous caselaw principles, implemented a specific liability regime in articles 1468, 1469 and 1473 *C.C.Q.*, applicable to manufactures in the event of a safety defect (which includes product failures resulting from the lack of or insufficiency of proper information concerning the thing or its use); article 1457 *C.C.Q.* replaces 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. 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.	**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.
85. Les conditions de la responsabilité civile sont régies par la loi en vigueur au moment de la faute	**85.** The conditions of civil liability are governed by the legislation in force at the time of the fault or act which

---

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.	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.
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.	**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.

[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.R.I.C.C.*").

ou du fait qui a causé le préjudice.	causes the injury.

[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 have 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 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 likely to trigger it 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., the facts giving rise to the dispute having occurred both before and after January 1, 1994, and that it refers concomitantly to the public policy provisions of the *Charter* and the *C.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.), on the provisions of the *Charter* that protect the integrity, freedom and dignity of the person (arts. 1, 4 and 49) and on 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 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, quality warranty or implied contractual obligation to provide information do not arise.

---

[199] Pierre-André Côté and Daniel Jutras, *Le droit transitoire civil*, Cowansville, Yvon Blais, 1994 (loose-leaf pages, Update No, 28, April 18, 2018), p. II/85-1.

[200] For an example of a judgment combining sections 83 and 85 *A.R.I.C.C.*, see *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, 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.I.R.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, para 55.

[202] Respondents' Arguments, para 24. See also the impugned judgment, para 20.

[160] The judgment of first instance, which largely finds for 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 more importantly, 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.C.P.A. having been rejected), provisions that would have been contravened by the Appellants' conduct as of 1976 and 1980 respectively. In all cases, the cornerstone of the trial judge's reasoning is 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, and that their products 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.C.P.A. 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.) rather than under 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.?

---

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 faultless thing 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, Yvon Blais, 2017, para 210, p. 298-299. 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 Thermaclad, 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 smokers and never smoked cigarettes given to them by others, but, given the "pack years" (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.

DRAFT

[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 quality warranty 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?
>
> You will need to address these issues in your respective pleadings at a time that is convenient for you.

[164] The Parties therefore had an opportunity to consider these matters, which will be examined in the following section.

B. Basis of the recourses: extracontractual liability, contractual liability, section 53 C.P.A., subsequent purchaser's situation and election

[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 quality warranty / warranty against latent defects), the result would have been the same. The impugned judgment states as follows:

> [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 the question 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 harm[206] was generally held not to be in a contractual relationship with the 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

---

206 Whether it is dangerous because of a latent defect in the strict sense of the word (i.e. a design or manufacturing defect, etc.) or whether it is an thing or product that is free of 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 accordingly. See *supra*, note 203.

207 For a contrary, cautiously expressed view, see: Pierre Legrand, "Pour une théorie de l'obligation de renseignement du fabricant en droit civil canadien", (1981) 26 *McGill L.J.* 207, p. 263 and note infra p. 231. See also, where the danger of the object is due to a latent defect, the decision in *Gougeon v. Peugeot Ltée*, [1973] C.A. 824 (which the Supreme Court distinquished 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. p. 157, who (in *obiter*) assimilates the sub-purchaser 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, p. 173 and 174; *National Drying Machinery Co. v. Wabasso Ltd.*, [1979] C.A. 279 (at p. 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-purchase of a danger inherent in a product otherwise fee of any particular defect), reversed in *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.), conf. *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 1056 (c) *C.C.L.C.* in the case of damages resulting from a delict or quasi-delict, article 1078.(1) *C.C.L.C.* which applies to the breach of a contractual obligation).

transfer to him of the original vendor'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 Vézina[210] provide the following explanation:

[Translation:]

> The existence of a direct legal relationship between the sub-purchaser and the manufacturer was first raised in the *Ross* case, 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 caselaw, the *Kravitz* decision reversed that position by giving the subsequent purchaser a *contractual* recourse against the manufacturer based on warranties against latent defects. Under this approach, the subsequent purchaser does not exercise his 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*. […]
>
> [Italics in the 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]: would 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

---

209 *General Motors Products of Canada v. Kravitz*, [1979] 1 S.C.R. 790, p. 813-814.

210 Jean-Louis Baudouin, Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th ed., Cowansville, Yvon Blais, 2013, para 760, p. 903.

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.

DRAFT

manufacturing defect? Would 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 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 is a theory that persuaded certain scholarly writer and earned a place in the caselaw. For example, in 1979, in a judgment subsequently overturned by the Supreme Court on another point (National Drying Machinery Co. v. Wabasso Ltd.), Mayrand, J. for the majority, stated the following[213]:

> [Translation:]
>
> 3. This safety obligation is an ancillary one 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 rather 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, its obligation to inform being 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

[212] Paul-André Crépeau, "Le contenu obligationnel d'un contrat", (1965) 53 *R. du B. can.* 1, specifically at p. 16 et seq.

[213] *National Drying Machinery Co. v. Wabasso Ltd.*, [1979] C.A. 279, p. 285. In that case, the buyer had purchased a machine from the manufacturer for processing polyester fibres. The manufacturer had not informed the buyer that the upper part of the machine had to be cleaned regularly and that the accumulation of polyester and cotton deposits was dangerous. The ignition of the combustible deposits caused a fire that destroyed the buyer's plant.

DRAFT

> 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.* as a sub-purchaser, neighbour or employee of the purchaser.
>
> [Emphasis added]

[175] Barely a month later, the Supreme Court rendered judgment in the *Kravitz* case[214], which establishes the rule, we all know. However, if the manufacturer's obligation to inform the buyer of the danger posed by an otherwise non-defective thing is a constructive contractual obligation pursuant to article 1024 C.C.L.C. (now 1434 C.C.Q.), then applying reasoning similar to that of the *Kravitz* decision, could it not be extended to the sub-purchaser[215]?

[176] This point of view does not appear to have been considered by the Court of Appeal in *Royal Industries Inc. v. 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 as follows[217]:

> [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

---

214 The *Kravitz* case was decided January 21, 1979, whereas the *National Drying Machinery Co. v. Wabasso Ltd.* was decided 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 and Benoît Moore, *Droit des obligations*, 3rd ed., Montréal, Éditions Thémis, 2018, para 2309, p. 1380-1381.

216 *Royal Industries Inc. v. Jones*, [1979] C.A. 561. The judgment was handed down November 8, 1979 some 10 months after the *Kravitz* decision.

217 *Royal Industries Inc. v. Jones*, [1979] C.A. 561, p. 563-564.

218 *Royal Industries Inc. v. Jones*, [1979] C.A. 561, p. 566.

> pay Percy Jones additional compensation 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 even seem to have 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* model, of which he was undoubtedly aware.

[179] The 1992 *Bank of Montreal v. Bail Ltée* case[219], 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, thereby giving rise to extracontractual or contractual liability. He notes 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 points out that the manufacturer knows or is presumed to know that the products it produces have risks and dangers or manufacturing defects, 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.

[180] However, after *Wabasso Ltd. v. National Drying Machinery Co.*[222], the question 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

DRAFT

---

[219] *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, p. 585 et s.

[220] *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, p. 585 *in fine*. See also p. 588, in which the Supreme Court stated that “a duty to inform may also arise independently of any contractual relationship”. In this case, where a contractor was sued by a subcontractor, the Court held that there was extracontractual liability.

[221] *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, p. 587.

[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”(p. 580) but that the manufacture was required to inform the purchaser that such maintenance was necessary.

extracontractual liability, an option previously applied by earlier caselaw[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 as regards the following[225]:

> […] the 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.

DRAFT

223 For an overview of the caselaw, see for example André Nadeau and Richard Nadeau, *Traité pratique de la responsabilité civile délictuelle*, 2nd ed., Montréal, Wilson & Lafleur ltée, 1971, paras 44 to 46, p. 28 to 32. For a critique, see Jean-Louis Baudouin, *La responsabilité civile délictuelle*, Montréal, Les Presses de l'Université de Montréal, 1973, paras 21 to 23, pp. 15 to 18.

224 *Wabasso Ltd. v. National Drying Machinery Co.*, [1981] 1 S.C.R. 578, p. 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, p. 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 a 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 in that case of a latent defect, that "[…] *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*"(p. 422).

225 *Wabasso Ltd. v. National Drying Machinery Co.*, [1981] 1 S.C.R. 578, p. 590.

> 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 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 CC., 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] A 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 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 easily 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]:

226 *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554, p. 1567-1568. In this case, an aircraft purchased by the appellant was affected by various defects, which constituted a serious danger. The aircraft's fuel tank had exploded, resulting in 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.

.

DRAFT

> 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]

[184] In 1990, in *Houle v. Canadian National Bank*, L'Heureux-Dubé, 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 the *Wabasso* case, as in the *Air Canada* case, it was the purchaser who exercise 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 is permissible as long as the facts giving rise to the damage would also be considered a fault which, 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 puts 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

DRAFT

227 *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, p. 165.

article 1053 C.C.L.C. Is the coming into force of the C.C.Q. likely to 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.** Toute personne a le devoir d'honorer les engagements qu'elle a contractés.
>
> 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; <u>ni elle ni le cocontractant ne peuvent alors se soustraire à l'application des règles du régime contractualde responsabilité pour opter en faveur de règles qui leur seraient plus profitables</u>.
>
> **1458.** Every person has a duty to honour his contractual undertakings.
>
> 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; <u>neither he nor the other party may in such a case avoid the rules governing contractual liability by opting for rules that would be more favourable to them</u>.
>
> [Emphasis added]

[189] Authors Lluelles and Moore (the latter is now a judge of the Superior Court) write that this "[Translation] exclusion of the 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 leaktight silos and one could not have recourse to the second when one has access to the first. The conditional is used here not because the proposition is contested, but simply because it might not have the very broad scope some might want to attribute to it.

[190] As regards the recourses which are the subject of this appeal, a reading of article 1458 para. 2 *C.C.Q.* raises two questions which we shall 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 in 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 this 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

---

[228] D. Lluelles and B. Moore, *supra*, note 215, para. 2958, p. 1885. See also J.-L. Baudouin and P.-G. Jobin, *supra*, note 210, para. 752, p. 887; 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, Yvon Blais, 2006, 115, p. 122.

DRAFT

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 the 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] This being the case, the preceding conclusion of the Court is confirmed: notwithstanding that they brought their action in 1998 (after the coming into force of the *C.C.Q.*), the Respondents were, in the 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 where 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 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 to the liability – of the Appellants starting on 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 article 1458 para. 2 *C.C.Q.* come into play. Which 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 of legal theory; as for case-law, it is unclear and often adjudicates without addressing article 1458 para. 2 *C.C.Q.* and the prohibition against the option[231], so that the outcome of the litigation would, in many cases, be the same regardless of the path taken[232].

---

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.

231 This was the case, for example, in *Desjardins Assurances générales inc. v. Venmar Ventilation inc.*, 2016 QCCA 1911, in which a malfunctioning air exchanger set fire to 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 it 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.*:

> [4] [Translation] The judge was correct to apply article 1468 *C.C.Q.,* which sets forth 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 [referrence ommitted].

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

DRAFT

[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, against the manufacturer, 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 which enshrines the lessons of *Kravitz*[233] by generalizing them, states that:

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.	**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.

[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 under article 1730 *C.C.Q.*:

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.	**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.

[199] As regards article 1442 *C.C.Q.*, [Translation] "the legal warranty of quality which the manufacturer owes to the first purchaser […], is passed on to any sub-purchaser and confers upon him a direct contractual right against the manufacturer"[234]. The sub-purchaser thus exercises the rights of the first buyer. As regards article 1730, he exercises the personal right which falls to him by reason of the sale entered into with his own seller against any of the participants in the distribution chain, up to and including the manufacturer (initial seller). More precisely[235]:

---

much discussion of, and without reference to, article 1458 *C.C.Q.* See *Ferme Avicole Héva inc. v. Coopérative fédérée de Québec (portion assurée)*, 2008 QCCA 1053, paras. 74-75.

[232] As noted by Prof. Nathalie Vézina in 2006 (*supra*, note 228, pp. 122-123) and it remains correct. See also Nathalie Vézina and 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.* 57-95, p. 75 *in fine*.

[233] *General Motors Products of Canada v. Kravitz*, [1979] 1 S.C.R. 790.

[234] P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 235, p. 341.

[235] P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 236, pp. 344 and 345. In the same vein, see also J.-L. Baudouin and P.-G. Jobin, *supra*, note 210, para. 760, pp. 903 to 905; D. Lluelles and B. Moore, *supra*, note 215, para. 2316, p. 1385. This explanation, which is generally accepted by legal theory,

> [Translation] […] Whereas article 1442 prescribes a transmission 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 to invoke the warranty due by the manufacturer to the first buyer in the chain of successive sales. However, the buyer who invokes article 1730 does not exercise the rights of a previous owner of the product, but his own rights resulting from its *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*.
>
> [Original italics; references omitted]

[200] In brief, the sub-purchaser of a product containing a latent defect may exercise, against the manufacturer, the contractual rights (this classification is generally accepted) conferred upon him 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 which creates or constitutes a danger.

[201] Can he do so as well in the case of a product which, although not containing 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.

---

seems preferable to the one which suggests that the sub-purchaser enjoys the warranty of the last seller as against the manufacturer. On this topic, see for example: D. Lluelles and B. Moore, *supra*, note 215, paras. 2318 to 2320, pp. 1386-1387.

[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 experieced 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*" (p. 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.*. (p. 420). This did not prevent him from concluding (as did his colleague Anglin, 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, p. 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 case-law at the time does not clearly distinguish between dangerous defect and the inherent danger of a non-defective product: the delictual recourse being 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

DRAFT

[203] A few authors, in fact, are of the opinion that this type of failure, as regards the manufacturer/sub-purchaser tandem, comes under the regime of extracontractual liability 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 former law)[238]. If they are right, then article 1458 para. 2 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 one of the forms of latent defects, 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 Québec 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, loss of safety would necessarily be included in loss of use, which 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, article 1458 para. 2 *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 that of 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 is refuted by the Supreme Court decision 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. write that:

---

governed by article 1024 *C.C.L.C.*., this very same duty constituting an obligation governed by article 1053 *C.C.L.C.*. in the case of the sub-purchaser.

[237] See for example P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 157, p. 198 (where they distinguish between dangerous defect and "failure to warn the buyer of an inherent danger," as the basis for the liability regime is not the same), para. 159, p. 201 (as regards the sub-purchaser and subject to article 1442 *C.C.Q.*) and para. 211, p. 299. 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*, mémoire, Faculty of Law, University of Ottawa, January 2004.

[238] See the description of latent defects by Professors Jobin and Cumyn, *supra*, note 203, para. 168, pp. 210 to 214.

[239] Jeffrey Edwards, *La garantie de qualité du vendeur en droit québécois*, 2nd ed., Montréal, Wilson & Lafleur, 2008, para. 322, p. 150 (see generally paras. 318 to 325, pp. 147 to 151). In the same vein, see Mathieu Gagné and 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, Yvon Blais, 2017, pp. 302 ff.

[240] The Supreme Court, in reasons written by LeBel and Deschamps JJ., states 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 CSC 50, para. 31).

DRAFT

47. The legislature has not expressly defined what constitutes a "defect". 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] They further add that:

107. 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.

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.
>
> 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 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

---

[241] In this vein, see also *Gouin Huot v. Équipements de ferme Jamesway inc.*, 2018 QCCA 449, para. 8; P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 168, pp. 210 to 214; Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 8th ed., vol. 2, Cowansville, Yvon Blais, 2014, para. 2-389, p. 400 [*La responsabilité civile*, vol. 2]; Dany Lachance, "La garantie légale revisitée", (2014) 2 *C.P. du N.* 323, pp. 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, Les Presses de l'Université Laval, 1993, para. 150, p. 463.
It should be noted in passing that the legislature imported into article 1469 *C.C.Q.*, at least in part, this definition of "defect" that 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 conservation or presentation", it being understood that, even if it is not affected by such 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 defect related to 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 P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 169, p. 216.

DRAFT

the triggering of the warranty of quality set forth in articles 1522 ff. *C.C.L.C.* or 1726 ff. *C.C.Q.*[243].

[208] Prof. Vézina, whose words are applicable to the manufacturer, writes[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.
>
> 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 article 1458 para. 2 C.C.Q. not inapplicable? In this respect, wouldn't the only

---

243 Former case-law had also made this distinction and, in this vein, we can see, for example, *Royal Industries Inc. v. Jones*, [1979] C.A. 561, pp. 563-564, and *National Drying Machinery Co. v. Wabasso Ltd.*, [1979] C.A. 279, pp. 284 *in fine* and 285 of the majority reasons of Mayrand J. (the Supreme Court, as we know, set aside the Court of Appeal 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, is not viewed as a latent defect.
This is a distinction that was already being made, conceptually, by Prof. Crépeau in his 1965 article (even though he did not focus on differentiating between precontractual and contractual), 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, pp. 16-17. 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, p. 10; P. Legrand, *supra*, note 207, pp. 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, Montréal, LexisNexis Canada, 2014 (loose leaves, update no. 7, August 2018), para. 12, pp. 4/7 and 4/8 [*Droit de la consommation*].

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 have already posed 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 matter, similar to the answer proposed by Prof. Crépeau in 1964, the authors Baudouin, Deslauriers and Moore suggest the following[245]:

> **2-392** – [Translation] […] When the safety defect is derived 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 to provide quality. It is then possible to fall back on article 1434 C.C. in order to graft an implicit obligation to provide information and safety onto the contract of sale or other contract. […]
>
> [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 Moore add the following[246]:

DRAFT

---

245 J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, vol. 2, *supra*, note 241, p. 406. See also J.-L. Baudouin and P.-G. Jobin, *supra*, note 210, p. 406.

246 D. Lluelles and B. Moore, *supra*, note 215, p. 1380. This is a point of view that authors Jobin and Cumyn appear to share: P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 123, pp. 157 to 159, and para. 234, p. 340. See also N. Vézina and F. Maniet, *supra*, note 232, pp. 73 *in fine* and 74.

> [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 on good faith (art. 1375), be as indispensable to property as those stemming from the legal warranty for latent defects? A negative answer would be surprising. Subject to a possible "intuitus 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 to provide quality required of the manufacturer under articles 1726 ff. *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, the product's safety defect would give rise to a contractual recourse based on article 1458 para. 1 *C.C.Q.*, which recourse would be available to the sub-purchaser by reason of article 1442 *C.C.Q.* Article 1458 para. 2 *C.C.Q.* would then deprive the sub-purchaser of the ability to commence an action against the manufacturer on an extracontractual basis, to wit 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 cannot but lead to an extracontractual sanction[247]. Let us consider

[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 formation of the contract does not become part of the contract and is governed by extracontractual liability," which "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, p. 363). In their book on sale in which they address the seller's obligation (the seller may be a manufacturer) to provide its direct buyer with instructions on use, maintenance and conservation, 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 (P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 122, p. 157). Regardless of this distinction, they nevertheless place the seller's

DRAFT

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., already cited, "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 come under article 1434 *C.C.Q.* and does not easily tie in with article 1442, which is a provision which pertains to the effects of the contract, but it agrees naturally with the extracontractual regime of articles 1468, 1469 and 1473 *C.C.Q.*

[216] In brief, a safety defect which is not the result of a product defect 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 ff. *C.C.Q.* and does not trigger the warranty of quality (whether by way of article 1730 or of article 1442 *C.C.Q.*). Furthermore, as the nature of the defect in the instant 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 may therefore not invoke contractual liability on the part of the manufacturer and no other contractual path is open to him. This being the case, article 1458 para. 2 *C.C.Q.*, even presuming that it concerns the sub-purchaser, is wholly inapplicable and cannot preclude him from having recourse to the rules of the extracontractual regime.

[217] Finally, note that article 1458 para. 2 *C.C.Q.* does not apply to recourses set forth in the *C.P.A.*, which function in a completely autonomous framework (of public order) [250]. Article 270 *C.P.A.*[251] leaves no doubt about this:

270. Les dispositions de la présente loi s'ajoutent à toute disposition d'une autre loi qui accorde un droit ou un	**270.** The provisions of this Act are in addition to any provision of another Act granting a right or a recourse to a

obligation to warn its buyer of an inherent danger of the product in the realm of the implicit contractual obligation of article 1434 *C.C.Q.* (para. 123, p. 157-158).

248 For other examples of the obligation to inform as a precontractual obligation, see *Option Consommateurs v. Infineon Technologies, AG*, 2011 QCCA 2116, para. 30 to 32 (decision 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 CSC 59). Also see *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 impugned judgment takes note of the precontractual 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, p. 587.

250 D. Lluelles and B. Moore, *supra*, note 215, paras. 2311 to 2314, pp. 1381 to 1384; J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, vol. 2, *supra*, note 241, para. 2-359 ff., p. 376 ff.; Luc Thibaudeau, *Guide pratique de la société de consommation*, t. 2 (*Les garanties*), Cowansville, Yvon Blais inc., 2017, para. 8, pp. 5-6, and 19, p. 11.

251 This provision has not been amended since its adoption in 1978 and coming into force in 1980.

DRAFT

recours au consumer.	consumer.

[218] A consumer may therefore, at his option, base his action solely on this Act or, concurrently, on the *C.C.L.C.* or the *C.C.Q.* This form of cumulation is allowed, even though, this goes without saying, the plaintiff may not cumulate the compensatory damages associated with the harm incurred[252]. Therefore, there is 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 allowing this juridical framework.

B. Civil liability of a 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 is ultimately blaming 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 to say about this? If we examine things in the light of section 53 *C.P.A.*, are the same conclusions justified?

[222] However, before addressing these questions, we should take a detailed look at the legal treatment which the trial judge applied to the various questions at issue.

i. <u>Reminder of the impugned judgment in terms of liability</u>

[223] We should note, preliminarily, that nowhere 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.

[252] P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 243, pp. 358-359; J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, vol. 2, *supra*, note 241, particularly in para. 2-359, p. 376.

DRAFT

[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 shows clearly that we are not in the realm of the lack of use 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 the instant case, is with the information relating to such harmfulness.

[225] And, on that subject, the trial judge first holds 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 the mere marketing of such a product or simply promoting the consumption thereof are intrinsically wrongful acts, which 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 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

[253] Stenographic notes of November 30, 2016 (Sténofac), p. 112.
[254] Impugned judgment, paras. 221 to 226, 384 and 482.
[255] This term means a product or objet which is not in any way defective but which, by its very nature, is dangerous.
[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" (P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 123, p. 159). They also write (specifically citing the impugned judgment) 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" (para. 211, p. 289 – See also para. 227, p. 331).
[257] *Alliance Assurance Co. v. Dom. Electric*, [1970] S.C.R. 168, p. 174.
[258] *Alliance Assurance Co. v. Dom. Electric*, [1970] S.C.R. 168, p. 174.

DRAFT

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. continues by emphasizing that some potentially dangerous products – and 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 weigh”[262], which of course implies that she 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

---

[259] Writing the majority opinion for the Supreme Court.

[260] *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674. In this case, HIV-contaminated sperm was administerd to the appellant as part of artificial insemnation 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 P.-G. Jobin and M. Cumyn, *supra*, note 203, paras. 219 and 227, pp. 315 *in fine*, 316 and 331. 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, pp. 328 ff. 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*, 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, p. 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 most of the usual objects, though considered harmless, present some danger or potentiel danger based on the use they are put to, from the smallest LEGO® brick (which

DRAFT

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 "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 to be specifically examined. It cannot be a general rule. Furthermore, in the instant case, the centuries-old history of tobacco consumption, of 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 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 or 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 intrinsically 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.

---

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). Even Mayrand J., in *National Drying Machinery Co. v. Wabasso Ltd.*, [1979] C.A. 279 at 285, observed in passing that many medications are dangerous if not properly dosed. This 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, Yvon Blais, 2014, para. 1-162, p. 163 [*La responsabilité civile,* vol. 1]. If marketing a product which 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 which would not otherwise exist. Some view this as an objective fault (See Geneviève Viney, *supra*, note 261, p. 330), others see it as the affirmation of an irrebuttable presumption of fault. but this is not the issue in this appeal.

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"), p. 129 ff.

DRAFT

[234] As to the question of whether it can 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 as 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 finds, about not disclosing 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 case-law rules in force before 1994.

[236] But there is more. According to the trial judge, not only did the Appellants fail to fulfil their obligation to inform, they also committed a gross fault (faute caractérisée) 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 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 finds that this same behaviour is 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].

---

267 More precisely, the trial judge writes:

> [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 non-smokers.

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 implicitly to indicate that the Appellants violated the right enshrined in this provision (see impugned judgment, for example, 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*, para. [867] ff.

DRAFT

[238] Furthermore, as we have also seen, the trial judge finds 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]. In the wake, the trial judge dismisses the argument to the effect 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, dismisses the same argument in respect of paragraph 220a) *C.P.A.*[273]. Other counts of fault are ruled out, which 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 intrinsically dangerous (although not defective) product, a failure which comes under articles 1468 and 1469 *C.C.Q.* and the corresponding former law, based on 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 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 notes 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 indissociable moral harm; 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 creates moral harm.

[241] The trial judge finally addresses the question of causality between the Appellants' faults and the harm incurred by the members of the Blais and Létourneau classes. Considering what he terms a "*multi-link chain involving several intermediate steps*"[274], he concludes 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]

---

270 See *supra*, note 177.
271 Impugned judgment, particularly at paras. 353 to 356.
272 Impugned judgment, particularly at paras. 412 and 413.
273 Impugned judgment, para. 542 to 544.
274 Impugned judgment, para. 647.
275 Impugned judgment, para. 791 ff.
276 Impugned judgment, 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 shall be determined by the judge based on epidemiological evidence and incorporated into the final description of the two classes (paras. 1208 and 1233 of the dispositif of the impugned judgment).

DRAFT

and which constitute bodily harm, to which substantial moral harm is closely related (moral and physical pain and suffering, loss of life expectancy, loss of quality of life, worries, troubles and inconveniences related both to the diseases and the treatment thereof[278]). The Appellants' faults may therefore be held to be the cause of this moral harm and this causality (causality by transitivity, we might say[279]) is sufficiently direct to result in their civil liability.

[242] The trial judge resorts to the same type of reasoning in respect of the Létourneau class: the Appellants' faults caused the consumption of cigarettes by the members of 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 a bodily harm (of a physico-psychological nature) to which is closely related substantial moral harm (fear of contracting a fatal disease, curtailed life expectancy, social reprobation, loss of self-esteem, humiliation[282]). The causality between the Appellants' faults and the harm caused to the members of the Létourneau class is thus established.

---

[277] Paragraphs 668 ff. of the impugned judgment address the question of medical causality 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 concludes that the consumption of cigarettes is, generally speaking, the main cause of the diseases at issue and of the addiction to tobacco; he further concludes that it is the main cause of the disease or addiction of each member.

[278] Paragraphs 657 to 663 of the impugned judgment explain, disease by disease, the moral harm caused to the members of the Blais class.

[279] The Court will return to this issue as regards causality, the principal ground for appeal, and the various theses prevailing in Quebec case-law, particularly that of adequate causality (see *infra*, para. [660] ff.).

[280] Impugned judgment, para. 810 ff.

[281] Tobacco dependence, which the impugned judgment defines more precisely in paras. 770 ff. 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 proposes a "*"workable definition" of tobacco dependance*" (para. 771), which he establishes after analysing 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.
>
> […]
>
> [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.

This will lead to a redefinition of the Létourneau class (para. 1233 of the dispositif of the impugned judgment).

[282] Paras. 665 to 667 of the impugned judgment give a detailed description of the moral harm caused by addiction to cigarettes.

[243] It should be noted that by deciding in this way, the trial judge dismissed two of the Appellants' main arguments in connection with causality:

> 1° the argument relating to the absence of preponderant proof of medical causality: 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 causality 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.
>
> (2) the argument relating to the absence of preponderant proof of behavioural causality: proof was not made that, but for the Appellants' faults, the members of the class would not have started 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 preponderance of evidence that each smoked because of the faults for which the Appellants are being blamed.

[244] With regard to the Blais class, the trial judge excludes 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 *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 it allows him to find an individual medical causation on the basis of epidemiological evidence[284]. However, he concludes, this evidence was made[285], according to the standard of preponderance as 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 dismisses the Appellants' claim concerning medical causation, as tobacco dependence cannot, as he points out, result from a factor other than the consumption of this product[288].

---

[283] *Quebec (Public Curator)* v. *Syndicat national des employés de l'hôpital St-Ferdinand* [1996] 3 SCR 211.
[284] Judgment in appeal, paras 678 to 694.
[285] Judgment in appeal, paras 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 (paras 719 et seq.). Moreover, the judge takes into account the criticisms made by the latter and will adapt the findings he will draw from the report and from the expert Siematycki's testimony (particularly with regard to the level of consumption).
[286] Jugdment in appeal, namely at paras 724 to 730.
[287] Judgment in appeal, para 767.
[288] Judgment in appeal, paras 768 et 769.

DRAFT

[246] With respect to conduct causation, the trial judge concludes 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 have failed to rebut that presumption. Admittedly, he writes, 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.
>
> [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.
>
> (…)
>
> [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 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.
>
> (…)

289 Judgment in appeal, para 806.

DRAFT

> [817] Consequently, the question posed is answered in the affirmative: the Létourneau Members' smoking was caused by a fault of the Companies.
>
> [Bold type in original]

[247] In brief, the trial judge finds 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, harm and the causal connection between the two have been established, the Appellants' liability with regard to the members of both classes ensues, and this regardless of their liability under general law (article 1053 *C.C.L.C.*; 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, would have of the risks and dangers associated with smoking exonerate the Appellants from this liability? The trial judge answers this question in the negative. It was not until January 1st, 1980, he concludes, 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 1st, 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 a 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 attributes a fraction of the 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 for some of the members of the Blais class, in a corresponding decreasing reparation for the moral damages of each.[292]. In the case of the Létourneau class, solely punitive damages being awarded, this contributory fault has no impact and does not diminish the reparation, "*given the continuing faults of the Companies and the fact that awards of this type are not based on the victim's conduct*"[293].

---

[290] Judgment in appeal, paras 773 to 776.
[291] Judgment in appeal, paras 818 to 836.
[292] As such, in the case of members with lung or throat cancer, the $ 100,000 indemnity shall be reduced to $ 80,000 for members who started smoking as of January 1st, 1976; for members with emphysema, the $ 30,000 indemnity shall be reduced to $ 24,000.
[293] Judgment in appeal, para 836.

[251] Was it necessary to conclude that such a contributory fault existed and, consequently, a partition of liability? One may disagree (and the Court shall revisit this matter), but it should be noted again 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 concerning a certain confusion of the genres, and even some errors, it remains however that there is no reason to intervene, and nothing which goes beyond rectification, a rectification that does not go against the main conclusions of the decision or its findings.

[253] What relates to general law shall be examined first, then, secondly, the *C.P.A.* and, finally, the *Charter*.

[254] It should be noted that the following pages shall generally refer 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 materialise only as a result of the

[294] One must recall that the Appellants are challenging these dates, which they allege to be much earlier.
[295] P. Legrand, *supra*, note 207, pp. 224 et seq.
[296] P. Legrand, *supra*, note 207, pp. 224 et seq.
[297] P. Legrand, *supra*, note 207, p. 230.
[298] P. Legrand, *supra*, note 207, pp. 230-231.

DRAFT

> inadequate use of the product. If the provided instructions are accurate and complete, with adequate warnings, the purchaser does not have to fear these dangers that are qualified as potential. They become threatening only in the event where the instructions prove to be erroneous or insufficient. The materialisation 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 materialisation, 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 *dangerous products* 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 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. <u>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.*</u>

[257] Whether under the *C.C.L.C.* or the *C.Q.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-

[299] This is a distinction that Professor Jobin 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, para 183, p. 221.

[300] The manufacturer is, of course, obliged to disclose the defects of 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 namely *Ross* v. *Dunstall*, [1921] 62 SCR 393, particularly at pp. 400 and 403 (Anglin, J.), as well as at pp. 419-420. See also *General Motors Products of Canada* v. *Kravitz*, [1979] 1 SCR 790, pp. 797-798.

DRAFT

contractually[301], depending on the circumstances. Secondly, even in the case where the product is free of a 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, extra-contractually, for the harm resulting from the materialisation of the danger and to repair the damage caused to the user.

[258] As one knows, the present case concerns the second part of this obligation of safety and concerns 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 shall 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 extra-contractual 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:

C.C.L.C.

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.

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.

Civil Code of Quebec

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

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

[301] One may think here of a third party who would be harmed by a defective product used in his presence by the purchaser.

par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.

such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

Il n'est pas tenu, non plus, de

Nor is he bound to make reparation

DRAFT

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.	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 of the defect.

[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 harms 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 was such as to trigger its extra-contractual liability towards the user who suffered harm in relation to such danger.

[262] The case was so well-established that in 1992, the Supreme Court, as 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 says, by "several decisions of this Court"[302], including *Ross* v. *Dunstall*[303], rendered in 1921.

[263] The situation has not changed with the coming into force of the *C.C.Q.*, including articles 1468, 1469 and 1473 *C.C.Q.* which embeds the previously acknowledged obligation to provide information while, as shall be seen, strengthening the liability regime of the manufacturer who breaches it.

[264] Let us see what happens, starting with the law prior to 1994.

[265] The *Ross* v. *Dunstall* decision 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 this 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 confirms the manufacturer's liability "*if he negligently manufactures and puts into circulation a mischievous thing which may or may be trapped in people using it*", he adds that this same statement "*is, in my*

[302] *Bank of Montreal* v. *Bail Ltée*, [1992] 2 SCR 554, p. 585.
[303] *Ross* v. *Dunstall*, (1921) 62 SCR 393.
[304] *Ross* v. *Dunstall*, (1921) 62 SCR 393, p. 395.
[305] *George v. Skivington*, [1869] L.R. 5 Ex.1.

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 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.
>
> […]

DRAFT

306 *Ross* v. *Dunstall*, (1921) 62 SCR 393, p. 396.
307 *Ross* v. *Dunstall*, (1921) 62 SCR 393, pp. 399-400 and 403.

> 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. <u>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</u>.
>
> [Our underline]

[268] We know that Anglin J. is hesitant regarding the characterisation 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, regardless of any defect (it would be a latent danger, characteristic of the weapon)[308]? That, however, does not prevent him from concluding that, regardless of this characterisation, the manufacturer is under an obligation to provide information in both cases and to remedy the harm caused by this “latent source of danger”.

DRAFT

[308] See *supra*, note 236.

[269] Mignault J. does not say otherwise[309]:

> 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>.
>
> [Our underline]

[270] Admittedly, he writes, "*I have no intention to hold that every manufacturer or vendor of machinery must instruct the purchaser as to its use* […]", but he immediately specifies 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 follows until 1994, when the *C.C.Q.* entered into force, sealed the manufacturer's duty to provide information and the liability of the person who breaches it[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.

---

309 *Ross* v. *Dunstall*, (1921) 62 SCR 393, pp. 420-421.
310 *Ross* v. *Dunstall*, (1921) 62 SCR 393, p. 421.
311 The obligation to inform and the ensuing liability may not yet be very well conceptualized (see P.-G. Jobin, *supra*, note 299, paras 181 et seq., pp. 216 et seq.), but they are nevertheless acknowledged and implemented, although, until the 1970s and even 1980s, the case law is not particularly abundant (like the doctrine which is scant).
312 *Gauvin* v. *Canada Foundries and Forgings Ltd.*, [1964] C.S. 160, p. 162. In this 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.

[272] Without being necessary to review each of these decisions, one may summarize the lessons as follows [313]:

- the manufacturer is presumed to know not only of the defects, but 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 which it cannot normally avoid by establishing that it was ignorant of the dangers in question[314];

- it must inform the users and potential users, in other words with regard to this subject providing truthful (which goes without saying), understandable and sufficient information to understand the existence of the danger and how to avoid or remedy it, as well as 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 materialisation 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 defense;

---

[313] Regarding the duty to provide information or the obligation to inform incumbent on the manufacturer under the *Civil Code of Lower Canada*, one can consult in particular: P.-G. Jobin, *supra*, note 299, paras 181 et seq., pp. 216 et seq.; Pierre-Gabriel Jobin, *La vente dans le Code civil du Québec*, Cowansville, Yvon Blais, 1993, paras 144 and 146, pp. 112 and 114-115; Thérèse Leroux and Michelle Giroux, "La protection du public et les médicaments: les obligations du fabricant", (1993) 24 R.G.D. 309, pp. 324 et seq.; Lise Côté, "La responsabilité du fabricant vendeur non-immédiat en droit Québecois", (1975) 35 R. du B. 3, pp. 16 et seq. See also: Jean-Louis Baudouin, *La responsabilité civile*, 4th ed., Cowansville, Yvon Blais, 1994, paras 1114 et seq., pp. 581 et seq., and namely at para 1127, pp. 591-592, which includes a summary; Claude Masse, "La responsabilité civile", in the Barreau du Québec et Chambre des notaires du Québec, *La réforme du code civil*, vol. 2 (Obligations, contrats nommés), Ste-Foy, Les Presses de l'Université Laval, 1993, pp. 235 et seq., para 73, p. 297 [*La responsabilité civile*].

[314] It should be noted that the courts have not always applied this factual presumption, despite the *Ross* v. *Dunstall* decision. 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 dangerous defect, which is not at issue in this case where the impugned fault is one of information (C. Masse, *La responsabilité civile*, *supra*, 313, para 70, p. 292). See, however, what he writes regarding the failure to [Translation] "inform purchasers and users of the latent dangers that may arise from the usual use of its product" (para. 73, p. 298).
Moreover, it is clear that the manufacturer who, *in fact*, knows the danger of its product and is silent, commits a fault triggering its civil liability if damage is caused by the materialization of that danger (unless it can free itself by establishing that the victim also knew of the danger).

[315] This is a subject dealt with in the *Royal Industries Inc.* v. Jones, [1979] C.A. 561 decision, noting that the 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.

DRAFT

> - as for the rest, the specific obligational content or, if you will, 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 done with it, the identity of the clientele for which it is intended, the more or less apparent magnitude and character of the danger, the seriousness of the harm likely to result from its materialisation, etc.

[273] However, the manufacturer is not left without grounds of defense. Obviously, it is entitled to the general means available to defendants sued under extra-contractual liability: it can thus attempt to establish that, notwithstanding its own failure, the harm of the plaintiff results from a *force majeure* or from the causal fault of the victim of the harm (who would have himself failed in his 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 no fault[317] (i.e., demonstrating that sufficient information, warnings and instructions were provided[318]), the absence of harm, or absence of causal link between fault and 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: the *Ross* v. *Dunstall* decision 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 points 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

[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, pp. 209 *in fine* et seq. (majority reasons of Anglin, J.), although this 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 (this is not a manufacturer in the strict sense of the term, but an elevator installer; the Supreme Court finds that, given the nature of the knowledge available at the time when the elevator was installed and the rules of the art 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, para 72.

DRAFT

defense, the evidence revealing 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 materialisation were known to the user or entirely foreseeable and, as implied, accepted by it, which is an obstacle to what would be otherwise its liability, or free it from liability. Without mentioning the situation where the manufacturer has provided all necessary information to the user, thus informed of the danger (or who had at his disposal all the means to be so), this knowledge can also result from the fact that the user is a professional himself 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 taking precautions[324], or because it is a common knowledge characteristic, which cannot be ignored by an ordinary and 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 being thus established, it is appropriate to pay a little more attention to the intensity of the duty to inform imposed

---

[323] See, for example, *Inmont Canada Ltd.* v. *National Insurance Company of Canada*, J.E. 84-884 (C.A.). In this case, the Court exonerates the manufacturer who did not affix a warning on containers of a highly inflammable product subject to spontaneous combustion, characteristics which it considers, should have been known to the purchaser, itself a manufacturer of furniture and a professional and regular user of the product in question.

[324] See, for example, *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, said:

> [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 must 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. (p. 164)

The judge also considers 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." (p. 165).

[325] See for example *Fortin* v. *Simpsons-Sears*, [1978] C.S. 1154 (the judge finds 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: "Everyone knows that by stretching an elastic object, there is a danger, when released, that a rapid return movement causes pain or injury"(p. 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.

DRAFT

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.* v. *La Garantie, compagnie d'assurance de l'Amérique du Nord*. The facts are the following: the insured purchased an inflammable glue which, 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 inflammable 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., writing for the majority, wrote[329] :

> [Translation] Surprisingly, this file is, for all intents and purposes, identical to *Lambert* v. *Lastoplex Chemicals Company Limited*, [1972] SCR 569.
>
> In both cases, a fire broke out when the highly inflammable vapors 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 the Lambert case, bore, in four (4) languages, the following warning: "Caution, inflammable - do not use near open flame or while smoking. Ventilate room during use"; 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 an engineer in mechanical engineering and Mr. Laniel, the insured of La Garantie, 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 "(p.575), writes Laskin, J.
>
> The Supreme Court, therefore, nine years prior to the accident of Mr. Laniel, 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 manifest that it did not comply with the lessons of the courts. Its conduct constitutes, therefore, in my opinion, a fault.
>
> With respect for the opposite 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

[327] Beyond the essence of the provided information, there is also the question 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 litigation and it shall not be necessary to delve further into the subject.

[328] *Mulco inc.* v. *Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68, p. 69.

[329] *Mulco inc.* v. *Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68, pp. 70-71.

DRAFT

> 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) "The impugned conduct must have been contrary either to the standard imposed by the legislator or to that recognized by the case law. It is thus the infringement of 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, p. 54, no 87.

[278] The *Lambert* v. *Lastoplex Chemicals* decision[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 extra-contractual rules found in civil law and resonated in some judgments of the Quebec courts, in addition to the *Mulco* decision[331]. Here are some excerpts[332] :

> 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

330 *Lambert* v. *Lastoplex Chemicals*, [1972] SCR 569. Reference to common law responds here to a concern for comparison, in the mind of Gendreau, J., and not for 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, Montréal, Les Éditions Thémis, 2017.

331 See for example *Fortin* v. *Simpsons-Sears Ltée*, J.E. 78-998, [1978] C.S. 1154; *Didier* v. *G.S.W. Ltée* (1981), J.E. 81-781 (C.S.); *Plamondon* v. *J.E. Livernois Ltée*, [1982] C.S. 594 (conf'ed for reasons somewhat different: *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, pp. 574-575. See also, in the same vein, *Rivtow Marine Ltd.* v. *Washington Iron Works*, [1974] SCR 1189, in which the Supreme Court, as written by Ritchie, J., acknowledges the manufacturer's "liability for breach of the duty to warn" who markets a machine that is, to his 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 reasons of the majority delivered by Ritchie, J. are founded in part on *Ross* v. *Dunstall*. It should also be noted that the minority, in the words of Laskin, J., are of the same opinion on this point, differing solely in their opinion on the issue of compensation for economic loss.

DRAFT

> 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.
>
> [Our underline]

[279] The *Mulco* decision of our court, 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, whose arm, brought into contact with a wire, caused the user to be electrocuted. In a context where the amount of information provided by the manufacturer was not insignificant, however, Monet J., writing for the Court, noted that[334] :

> [Translation] Regarding the obligation to provide information, including the conditions of use of the thing, obligation imposed on the manufacturer, we can read with interest the notes of Geneviève Viney [referral omitted] and Philippe Malinvaud [referral omitted].
>
> Not only this duty to provide information was not respected but, in addition, the information provided by the manufacturer is itself misleading and likely to "sedate" the user into a false 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 how to avoid such danger. However, during the demonstration made by his representative to the employees of *B.G. Checo*, which was attended by the Respondent, it was not even mentioned. (See testimony of a companion of the Respondent, M. Lafontaine: M.A. 920.) Moreover, drawing and instructions are silent on this point;

DRAFT

---

[333] *O.B.* v. *Lapointe*, [1987] R.J.Q. 101.
[334] *O.B.* v. *Lapointe*, [1987] R.J.Q. 101, pp. 106-107.

> there seems to be more interest in spare parts than in the user. These are factual findings of the judge (supra: pp. 6 and 7).
>
> For the user, considered in the light of the traditional "bon père de famille" concept , the danger of the arm was not obvious. Indeed, the morning of the accident, the Respondent used it without any problem. (See Lafontaine's testimony: MA 816-819.) It goes without saying that if the situation, in the Respondent's opinion, could reasonably lead him to suspect a danger, he would not have then, not any more than before (MA 893-894), acted recklessly or even carelessly. What the Respondent knew, because the Appellant's product clearly showed him, was that the yellow color meant safety. This was not the case however. This, the Appellant had to know but the "bon père de famille" was not, under the circumstances, required to know.
>
> [Our underline]

[280] Let us also quote *Royal Industries Inc.* v. *Jones*[335] :

> [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 a product on the market presenting some danger has the obligation to inform its purchaser, as well as the potential user who may acquire it [referral 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.
>
> 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 that it poses intensify the obligation of the manufacturer [referral omitted].
>
> The Appellants point out that their device is not intended for laymen but for car maintenance professionals. An experienced car mechanic, the Respondent should have realized, according to them, the risk involved in his use of it. Just as the obligation of the specialized seller is more onerous than that of the ordinary seller (C.C. article 1527, the obligation to inform decreases according to the knowledge of the product and its dangers that the purchaser or the user may have. However, despite his experience as a mechanic, 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; [...]

[335] *Royal Industries Inc.* v. *Jones*, [1979] C.A. 561, pp. 563-564.

DRAFT

[281] On this point, the Quebec law of the time generally aligns with that of the other provinces. Thus, in *Hollis* v. *Dow Corning Corp.*, LaForest J., writing for the majority of the Supreme Court, writes as follows[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 breast implants at issue in this appeal, the standard of care that manufacturers must satisfy in terms of adequate consumer warnings is necessarily high. Medical products are often designed to be ingested or implanted by the body, and risks arising from improper use are clearly important. Courts in this country have long recognized that manufacturers of products that are intended to be ingested or consumed by the organization or otherwise placed there, and therefore have a high likelihood of causing harm to consumers, are therefore subject to a standard of care elevated by the law of negligence; see Shandloff c. City Dairy, [1936] 4 D.L.R. 712 (Ont.A.A.), at p. 719; Arendale c. Canada Bread Co., [1941] 2 D.L.R. 41 (Ont. 41 and 42; Zeppa c. Coca-Cola Ltd., [1955] D.L.R. 187 (Ont. 191 to 193; Rae and Rae c. T. Eaton Co. (Maritimes) Ltd. (1961), D.L.R. (2d) 522 (NS), at p. 535; Heimler c. 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 concomitant risk to the consumer, the manufacturers of this type of product will almost always carry the heavy burden of providing clear, complete and up-to-date the dangers inherent in the normal use of their products.
>
> […]

[336] *Hollis* v. *Dow Corning Corp.*, [1995] 4 SCR 634.

DRAFT

> 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".
>
> [Our underline]

[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 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 case of the latter, as exemplified by the *Lapointe*[340] or *Jones*[341] cases, 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 not insignificant.

[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

---

[337] Along these lines, see also *J.E. Livernois Ltée* v. *Plamondon*, J.E. 85-619, AZ-85011206, p. 4 (C.A.) (namely : [Translation] "[t]he danger of the product, in the context of its use, imposed here a particularly heavy [information] obligation to Livernois"). Generally, see J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 2, *supra*, note 241, para 2-342, para 2-354, p. 370; P.-G.-Jobin and M. Cumyn, *supra*, note 203, para 227, p. 332.

[338] See *Livernois Ltée* v. *Plamondon*, J.E. 85-619, AZ-85011206, p. 4 (C.A.), p. 4. See, generally P.-G.-Jobin and M. Cumyn, *supra*, note 203, para 228, p. 330 *in fine* and 331.

[339] This is a distinction that underlies the 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 this case, the Respondent markets a product distributed on one hand to the general public and on the other hand to hair care professionals. Containers intended for the public are accompanied by precise information and instructions indicating use and the problems to which the user is exposed. Information for professionals is less detailed. Concerned about its liability to individuals, the Respondent seeks to prevent the Appellant from selling to the public the containers he has purchased himself 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.

DRAFT

for the user to fully understand the danger and risk associated with the use of the product, as well as its possible consequences and to know what to do (or not to do) to avoid them or, if necessary, remedy them. The decisions *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 a general idea of the danger and consequently does not assess it correctly cannot be found to possess knowledge if he was not adequately informed[342].

[284] The reason is that 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, <u>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</u>. 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.
>
> [Our underline]

[285] Inequalities 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 and which is not affected with any defect in the strict sense of the term, a fundamental theme in *Ross* v. *Dunstall*, but also in the *Lambert*, *Hollis*, *Mulco* and *Lapointe* decisions, to name just a few. It is this inequality that justifies the manufacturer, except when the exception regarding scientific and technical knowledge applies, usually assuming the risk associated with bringing its manufactured product to market.

---

342 As was the case, for example, in *Mulco inc.* v. *Garantie (La), Compagnie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68 and *Lambert* v. *Lastoplex Chemicals*, [1972] SCR 569 or in the case of *J.E. Livernois Ltée* v. *Plamondon*, JE 85-619, AZ-85011206 (C.A.), whereas knowledge that the user could have had of the dangers of the product, namely 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 (C.S.).

343 *Bank of Montreal* v. *Bail Ltée*, [1992] 2 SCR 554, p. 587.

DRAFT

[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***"), but also from s. 53 *C.P.A.* (which shall 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 impose, therefore, on the manufacturer a heavy liability, without fault [345], of the nature of a safety guarantee [346].

[287] The manufacturer, as prescribed by article 1468, 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 "Code civil français" (*French Civil Code*)[348]) conveys at first "a material imperfection, an alteration"[349], it is not restricted to it [350] :

> [Translation] [...] Within the meaning of this text, a product in perfect condition may be "defective". To be defective, it is sufficient to show that "it does not present the safety that can legitimately be expected".

---

344 The regime created by these provisions is similar to that, with regard to latent defects, of the regime created in the contractual context by articles 1726 and 1730 *C.C.Q.*

345 See *Desjardins Assurances générales inc.* v. *Venmar Ventilation inc.*, 2016 QCCA 1911, para 5.

346 The terms "safety guarantee" or "guarantee against safety defects" are used by the doctrine. See for example Mathieu Gagné and Mélanie Bourassa-Forcier, *supra*, note 239, p. 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 "Code civil français" (*French Civil Code*):

> A product is defective within the meaning of this Title if it does not provide the safety that one is entitled to expect.
>
> To determine the safety that one is entitled to expect, one must take into consideration all the circumstances and in particular the presentation of the product, the use that one can reasonably expect to make of it, and the time when the product was put into circulation
>
> A product should not be considered defective solely because another improved product has been put into circulation later on.

349 G. Viney, *supra*, note 261, p. 340.

350 G. Viney, *supra*, note 261, p. 340.

DRAFT

[288] And this is 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 one 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, a poor preservation or presentation of the thing (this is 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], the issue of this litigation. However, it is not the origin of the defect that matters[353], no more than the issue as to 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 it is in the negative that the legislator here establishes the manufacturer's obligation to inform: 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 the liability provided for under article 1468 *C.C.Q.* The result is a positive obligation to provide such information, without which the product shall not offer the safety to which one is normally entitled to expect, pursuant to 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 the 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 reflects the nature and seriousness of the danger, the risk of its materialisation and the importance of the harm that may result.

[290] And how to determine whether or not the product offers the safety one is normally entitled to expect? We are not concerned with the victim's particular and personal expectation of safety, but rather that the reasonable expectation 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

---

[351] With regard to the non-exhaustive nature of the causes of the safety defect defined by this provision, see, *inter alia*, J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, vol. 2, *supra*, note 241, paras 2-377, p. 389.

[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 a "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 G. Viney, *supra*, note 261, p. 340.

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, but which is not affected by any defect, it is information flaws that cause the safety defect: one, therefore, uses the same measure to determine the adequacy of information (in this case the manufacturer fulfills its obligation) or inadequacy (which causes the safety defect).

[291] When discussing the intended use of the product or to which it may lend itself, it must be specified that the expectation of safety is based on the normal use of the product. This is, however, a flexible concept 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 is 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, 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 of 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 and, failing which it shall be liable under article 1468 *C.C.Q.*, the product not providing the safety to which one is normally entitled to expect.

[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 relying on *force majeure* or the causal fault of the victim or of a third party. However, if the circumstances do not lend themselves to these grounds of defenses or if they fail and the safety defect is established, as well as causation, the

---

[354] *Bombardier inc.* v. *Imbeault*, 2009 QCCA 260, paras 25 and 26.

[355] *Bow Valley Husky (Bermuda) Ltd.* v. *Saint John Shipbuilding Ltd.*, [1997] 3 SCR 1210, 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 Ltée* v. *Plamondon*, J.E. 85-619, AZ-85011206 (C.A.), p. 11 (in which the manufacturer's obligation to inform the lay user of the danger of misuse of the product is 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, ON, Canada Law Book, 2001 (looseleaf, update No. 21, October 2017), L3: 10.20, pp. L3-7).

DRAFT

manufacturer is liable, subject however to the two means of exoneration available to it under article 1473 *C.C.Q.*:

> 1° (article 1473 (1)) the victim knew or could have known of the defect, or could have foreseen the injury, or
>
> 2° (article 1473 (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 defense, 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 it (presumed knowledge), the manufacturer is not required to remedy the harm resulting from safety defect in the product. Dealing with a means of exoneration intended to free the manufacturer from liability under article 1468 *C.C.Q.*, article 1473 para 1 must be interpreted and strictly applied. Once again, as a corollary to the duty to provide information, one speaks 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 defense (lack of knowledge) aims to share the risks associated with technological innovation[359]. Again, as a means of releasing the manufacturer of its liability, strictness is required. The manufacturer cannot simply show

---

[357] This is what is called the development risk defense, 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 conceived 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, p. 902 (article 1458 *C.C.Q.*). This is an exception which also exists under article 7, para c) of the *European Directive*. See also P.-G. Jobin and M. Cumyn, *supra*, note 203, paras 230 to 233, pp. 334 et seq.; J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, vol. 2, *supra*, note 241, paras 2-384, pp. 395-396; 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, Yvon Blais, 2012, p. 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-Claude Lafond (ed.), *Mélanges Claude Masse : en quête de justice et d'équité*, Cowansville, Yvon Blais, 2003, p. 435 et seq. [*Mélanges Claude Masse*].

DRAFT

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 keep 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 shall be liability. [...]
>
> [Italics in the 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 art or science at the time which it was required to know.

[297] The second part of this same ground of defense (continuous information) confirms a rule that adds to the manufacturer's obligation and that the Supreme Court already endorsed in 1995 in *Hollis* v. *Dow Corning Corp.*[361], a common law case which, like the *Lambert* decision, corresponds to Quebec law. On behalf of the majority, La Forest, J., wrote that [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; 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

[360] P.-G. Jobin and M. Cumyn, *supra*, note 203, para 225, pp. 325-326. See also *Desjardins Assurances générales inc.* v. *Venmar Ventilation inc.*, 2016 QCCA 1911. See also P.-G. Jobin, *supra*, note 313, para 157, p. 125 (the comment deals with the dangerous latent defect but applies to the danger inherent in the product which is not affected by any defect).

[361] *Hollis* v. *Dow Corning Corp.*, [1995] 4 SCR 634.

[362] The dissent of Sopinka, J. (concurred by McLachlin, J.) is not on this point. On the contrary, Sopinka, J. writes that he "agree[s] with Justice La Forest in his analysis of the principles relating to the duty to warn [...]" (para 64). Their divergence relates to causation.

DRAFT

> 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.).
>
> [Our underline]

[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] It is once more the inequalities of information, as well as the nature of the implicit trust relationship between the manufacturer and the users that justifies such an obligation. Let us quote here, once again, 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.
>
> [Our underline]

[300] This is also the reason why articles 1468 and 1469 *C.C.Q.* should be interpreted and applied broadly and liberally, which favours the implementation the protection objective put forward by the legislator, which is reflected both in the provisions themselves and in the comments of the Minister[364], in the work of the “Office de révision du Code civil” (*Civil Code Revision Office*)[365] as well as in parliamentary debates[366] and,

---

363 *Hollis* v. *Dow Corning Corp.*, [1995] 4 SCR 634.
364 *Commentaires du ministre de la Justice*, *supra*, note 359, p. 896 et seq.
365 Office de révision du Code civil, Comité du droit des obligations, *Rapport sur les obligations*, Montréal, 1975, pp. 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, p. 349, online:

which is consistent with the evolution of the law since the case *Ross* v. *Dunstall*. Conversely, article 1473 *C.C.Q.* shall be interpreted and applied in a rigorous manner, thus avoiding neutralizing the 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 how to avoid it. The information so provided must be not only 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 which 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 manufacturer can escape liability if it proves that "the state of knowledge" 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:

---

http://digital.library.mcgill.ca/ccro/files/Rapport_ORCC_v1_Projet_de_code.pdf (page consulted on January 17th, 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, pp. 633-634, online: http://digital.library.mcgill.ca/ccro/files/Rapport_ORCC_v2t2_commentaires_livres_5-9.pdf (page consulted on January 17th, 2019).

[366] See, for example, Assemblée nationale, Sous-commission des institutions, *Journal des débats*, 34e lég., 1re sess., 19 septembre 1991, p. 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 17th, 2019); Assemblée nationale, Sous-commission des institutions, *Journal des débats*, 34e lég., 1re sess., 9 octobre 1991, p. 573, online: http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/SCI-34-1/journal-debats/SCI-911009.html#Page00573 (page consulted on January 17th, 2019); Assemblée nationale, Sous-commission des institutions, *Journal des débats*, 34e lég., 1re sess., 5 décembre 1991, p. 1223, online: http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/SCI-34-1/journal-debats/SCI-911205.html#Page01223 (page consulted on January 17th, 2019); Assemblée nationale, Sous-commission des institutions, *Journal des débats*, 34e lég., 1re sess., 10 décembre 1991, p. 1339, online: http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/SCI-34-1/journal-debats/SCI-911210.html#Page01339 (page consulted on January 17th, 2019).

DRAFT

[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

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.

DRAFT

[References omitted]

b. Specific questions

[305] A few specific questions must still be addressed, which will take the above reflection further, on certain specific points. Those questions are the following:

> 1. Can a 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 to approach the problem of the apportioning of liability among the manufacturer and the victim?
>
> 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 knowledge defence

[306] Can 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 would also contravene 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 knowledge defence which 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 questions result from certain passages of the impugned judgment.

[307] In reading it, 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., firstly, the particular regime of articles 1468, 1469 and 1473 *C.C.Q.* or the former case law rules and, secondly, 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 article 1473 par. 1 *C.C.Q.* did not allow a manufacturer to escape that parallel general

liability (although there could be a sharing of liability among the wrongful manufacturer and the user who knew of the danger)[367]. The judge writes:

> [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 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

[367] See in particular paragr. 828 and 832 of the impugned judgment. According to the judge, the knowledge users could have of the danger of smoking as of 1980 (disease) or 1996 (addiction) can also not release the Appellants from the liability incumbent upon them under the *Charter* or the *C.P.A.*

DRAFT

> 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:
>
>> [Translation] As soon as a person is informed of the existence of a particular risk and does not take the usual precautions to avoid it, he must, in the absence of fault by the person who had control of a situation, bear the consequences of his actions. (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 trigger concomitantly 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 the 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 case law rule established previously. If it shows that the conditions for its application are met, it is released from the liability it would have incurred as a result of its breach, without one being able to set up separate liability against it based on section 1457 *C.C.Q.* or 1053 *C.C.L.C.*

[313] However, the impugned judgment is unclear in this regard. Other passages suggest instead that the judge distinguishes 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

DRAFT

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 a judge to set aside the effects of the knowledge he attributes to users as of the "knowledge dates" which he also sets: 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 which 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 which is the subject of that disinformation not be relied on by the wrongful manufacturer?

[316] One should instead conclude that the second fault which 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 which 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, the information that was provided by the manufacturer was misleading and likely to "lull" the user into a false sense of security"[368]. The manufacturer can therefore breach its duty because it did not give any information, because the information provided was insufficient, or because it gave misleading information.

[368] *O.B. v. Lapointe*, [1987] R.J.Q. 101, p. 106 (passage reproduced *supra*, at paragr. [279]).

[318] This is confirmed by *Bank of Montreal v. Bail*[369], decided at the time of the *C.C.L.C.* Gonthier, J. (who mentions in passing articles 1469 and 1473 *C.C.Q.*) states 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.** 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, <u>notamment</u> 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.

> **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, <u>particularly</u> 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.

[Emphasis added]

[319] The use of the term "particularly", which precedes the list of breaches which 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 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.

---

[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, p. 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 (T. Leroux and M. Giroux, *supra*, note 313, p. 330). There is no doubt that a manufacturer who "skews the information" it is required to give breaches its duty to inform.

[371] See *supra*, note 351.

DRAFT

[320] All this was just as true under article 1053 *C.C.Q.*, although the jurisprudence does not provide an example of it.

[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 outside the scope of article 1469 *C.C.Q.*, and consequently of articles 1468 and 1473, the disinformation strategies used by the Appellants during the Class Period. 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 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 ruled, one 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 it 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 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).

[372] *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554, p. 587.

[373] See *Placement Jacpar Inc. v. Benzakour*, [1989] R.J.Q. 2309 (C.A.), p. 2318, reiterated in particular in *Verville v. 9146-7308 Québec inc.*, [2008] R.J.Q. 2025 (C.A.), paragr. 44. See also P.-G. Jobin and M. Cumyn, *supra*, note 203, paragr. 173, p. 227-228. See also Thérèse Rousseau-Houle, *Précis du droit sur la vente et du louage*, 2nd ed., Sainte-Foy, Les Presses de l'Université Laval, 1986, p. 133-134.

DRAFT

[325] At any rate, if we were to see, as the judge did, in the disinformation practiced 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 in direct proportion 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 which the user ingests and which could cause significant harm.

[328] As a corollary to that obligation, which we have also seen, one cannot say that a user has *knowledge* of the danger a product creates if he only has a general idea about it and cannot assess it adequately because he has not received the necessary information (or, one might add, because he has suffered the effects a campaign of disinformation). One can only say there was "knowledge" if the user understands the nature of the danger (i.e., what about the product threatens or jeopardizes his 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 so one can set 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?

DRAFT

[330] One cannot answer that question without first considering article 1477 *C.C.Q.*[374]. This general provision, which entrenches a rule previously recognized by the jurisprudence and doctrine[375], is found, like article 1473 *C.C.Q.*, in a division of the *Civil Code* entitled "Certain cases of exemption from liability". 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 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. 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.	**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.

[332] This provision, like the previous rule which 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, exoneratory); 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].

---

[374] Authors Baudouin, Deslauriers and Moore allude to this relationship between article 1473 par. 1 and article 1477 *C.C.Q.: La responsabilité civile*, Vol. 2, *supra*, note 241, paragr. 2-384, p. 395.

[375] *Comments of the Minister of Justice*, *supra*, note 359, p. 905.

[376] *Comments of the Minister of Justice*, *supra*, note 359, p. 900.

[377] See for example *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 for example *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 for example *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).

DRAFT

[333] As authors Baudouin, Deslauriers and Moore explain[381]:

> [Translation] **I-209** – *Assumption of risks* –The theory of the assumption of risk also allows the author of harm to fully or partially escape the consequences of his liability. However, there must be clear proof that, firstly, the victim voluntarily agreed to participate in an activity involving certain risks and, secondly, that the nature and extent of those risks were clearly disclosed beforehand. Lastly, 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., 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.
>
> [References omitted]

[334] Professor Tancelin, recalling the prior law as described in two cases in particular of the Privy Council relating to Quebec matters, states the following[382]:

> [Translation] **819.** *Application of the notion of wilful misconduct* – 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:
>
> > "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-part: 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 allowed 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 points 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. by [1926] A.C. 725; A. MAYRAND, "L'amour au volant et la rule volenti non fit injuria", (1961) 21 *R. du B.* 366. (To a willing person, injury is not done).
>
> 1712. Supra, p. 316.

[335] The decision of the Judiciary Committee of the Privy Council in *Letang v. Ottawa Elec. R. Co.* is particularly interesting. In that case, the victim lost her footing in passing

---

[381] J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, Vol. 2, *supra*, note 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.

over 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:
>
>> "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 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

[383] *Letang v. Ottawa Elec. R. Co.*, [1926] A.C. 725, p. 730-732.

DRAFT

> 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 cross a rather rudimentary bridge belonging to the respondent which 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 were 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 business, unless it is established that he 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

---

[384] *Beauchamp v. Consolidated Paper Corporation Ltd.*, [1961] S.C.R. 664, p. 668.

[385] *Beauchamp v. Consolidated Paper Corporation Ltd.*, [1961] S.C.R. 664, p. 669. The Supreme Court thus confirms the decision of the Superior Court, which had held 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.

DRAFT

> until the sanding operations had been completed. These security measures were necessary; the respondent's employees had a duty toward the Tassé's, 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 which may ensue, which is much more onerous. As authors Nadeau and Nadeau write[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 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 rules is also found in *Doucet v. Canadian General Electric Co. Ltd.*[388]:

> [Translation] […] One must not apply the maxim *volenti non fit injuria* with the same rigour it can have under common law. <u>In our law, the victim's mere</u>

---

[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, describes 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" (p. 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"* (p. 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] A. Nadeau and R. Nadeau, *supra*, note 223, paragr. 551, p. 515 (see, generally, paragr. 551 to 554, p. 515 to 518).

[388] *Doucet v. Canadian General Electric Co. Ltd.,* [1975] R.L. 157 (P.C.), p. 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 rendered *Kravitz* yet).

DRAFT

> knowledge of the danger is not sufficient to exonerate a third party unless the knowledge of the risk is such that one can infer free and knowing acceptance of the danger to the victim. Most of the time 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] The jurisprudence has undoubtedly not always been faithful to the severity of the rule and there are a few judgments which are too flexible in applying the theory of the assumption of risk. However, that occasional toning down of the rule is not in accordance with the law and, as Professor Karim notes, there can only be assumption of the risk 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 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 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 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 those 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] It is by taking account of this general framework that article 1473 par. 1 *C.C.Q.* (or the prior rule to the same effect) must be interpreted and applied. That provision provides for the exoneration of the manufacturer where the victim knew of or is deemed to know of the safety defect of the product or the harm likely 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 article 1473 par. 1 is an illustration.

[343] However, one might object 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 article 1473 par. 1, the victim's knowledge – and therefore the assumption of risk – fully exonerates the

---

[389] Vincent Karim, *Les obligations*, 4th ed., Vol. 1 "Articles 1371 to 1496", Montreal, Wilson & Lafleur, 2015, paragr. 3370, p. 1444-1445 [*Les obligations*, Vol. 1].

DRAFT

manufacturer. As authors Jobin and Cumyn write, [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 which makes it the functional equivalent of an assumption of risk leading to 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 to make a free and informed choice in this regard and he must in fact have expressed his wish to fully accept that risk as well as the harm that might ensue, thereby renouncing his right to sue.

[345] On this point, one can apply to article 1473 *C.C.Q.* the words of MacLachlin, J. in *Bow Valley Husky (Bermuda) v. Saint John Shipbuilding*[391]*:*

> 22 <u>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</u>. 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. <u>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 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</u>: *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

---

390 P.-G. Jobin and M. Cumyn, *supra*, note 203, paragr. 225, p. 326 *in fine*.

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 other than on the issue of the contractual relational economic loss (see the reasons of Iacobucci, J., paragr. 112).

392 *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, paragr. 23.

DRAFT

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 be able to conclude that he 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. writes on behalf of the Supreme Court 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 by our court, Gendreau, J. notes that[395]:

> [Translation] In short, to be released from the consequences of its fault, Mulco had to 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 which 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.

DRAFT

---

393 *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, paragr. 23.
394 *Lambert v. Lastoplex Chemicals*, [1972] S.C.R. 569, p. 576.
395 *Mulco inc. v. Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68, p. 72.

> In this case, the appellant therefore cannot avoid its obligation to make good the damages.
>
> [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 that 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 able to be exonerated – i.e. completely released – from liability for the harm caused by the safety defect of the product, it must therefore establish, firstly, a clear danger and risk and, secondly, 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 (which, it is a truism, 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 pre-supposes 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 was informed of the steps to be taken to deal with or avoid them, if any[397]. If there is no such means, the manufacturer must also establish that the victim was informed of that fact, which allows him to realistically assess the risk and accept it.

---

[396] Although the regime established by articles 1468, 1469 and 1473 *C.C.Q.* is one 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.

[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 for example *Cominco Ltd. v. Canadian General Electric Co.* (1983), 147 D.L.R. (3d) 279, [1983] B.C.J. No. 2339 (B.C. C.A), paragr. 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 L. G. Theall, *supra*, note 356, paragr. L3:10.20, p. L3-7 ("*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*").

[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, so 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 article 1473 par. 1 *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 called for regarding the sharing of liability between user and 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.*, a general provision, states:

1478. Lorsque le préjudice est causé par plusieurs personnes, la responsabilité se partage entre elles en proportion de la gravité de leur faute respective.	**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.

[398] Knowledge is a question of fact in that it involves an assumption of risk. This was recalled by Mayrand, J. in *Larivière v. Lagueux*, [1977] C.A. 245, p. 247.

DRAFT

La faute de la victime, commune dans ses effets avec celle de l'auteur, entraîne également un tel partage.	The victim is included in the apportionment when the injury is partly the effect of his own fault.

[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] of an injury caused by the safety defect of a product, we would point out firstly that, in theory, the grounds of defence prescribed by article 1473 *C.C.Q.* entail the complete exoneration of the manufacturer. Thus, a manufacturer which, in accordance with article 1473 par. 1 "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 which would otherwise be incumbent upon it.

[358] In other words, even when it breached the duty to inform incumbent upon it pursuant to article 1469 *C.C.Q.*[400], leading to the safety defect which caused the injury, the manufacturer can clear itself pursuant to article 1473 par. 1 *C.C.Q.* if it establishes the victim's knowledge equivalent to a renunciation of any recourse resulting from the safety defect, indicating his wish to bear the entire risk. The only exoneration which 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 one might also be able to find that the victim was at fault (for example: if he was imprudent or made mistakes in the use of the product, used it for another purpose, etc.) or the aggravation of the harm due to inappropriate conduct (for example: he 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 his obligation to mitigate damages according to article 1479 *C.C.Q.*). There are a few examples of such a situation and, accordingly, such a sharing in the jurisprudence, including in that of this Court[401].

---

[399] As prescribed by 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 which is not at issue in this appeal and will not be discussed.

[400] And it is the only hypothesis which we will discuss, given the nature of this appeal.

[401] See for example *Royal Industries Inc. v. Jones*, [1979] C.A. 561; *Provencher v. Addressograph-Multigraph du Canada Ltée*, J.E. 85-510, AZ-85011176 (C.A.); *J.E. Livernois Ltée v. Plamondon*, J.E. 85-619, AZ-85011206 (C.A., aff. *Plamondon v. J.E. Livernois Ltée*, [1982] C.S. 594); *Baldor Electric Company v. Delisle*, 2012 QCCA 1004, aff. *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 prescribed by

[360] Nevertheless, an important clarification should be made.

[361] It should be understood that one cannot blame a victim, who does not have the required information the manufacturer should have provided him with, for failing to take the precautions that would have been necessary if he had been duly informed. He 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 confirms the conclusion of the trial judge, according to whom the victim had not 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 in fact where the user of a product uses it inadequately or does not take the steps that the safety defect would call for, where the manufacturer has breached in this regard its obligation to provide information and the victim ignores the danger to which he is exposed. This remark, however, is a matter of common sense

[362] In short, subject to article 1473 par. 1 *C.C.Q.*, the application of which leads to complete exoneration, there may therefore, pursuant to article 1478 par. 2 *C.C.Q.*, be a sharing of liability between the manufacturer who must answer to a safety defect caused by the beach of its duty to inform and the user who committed a fault in using a product subject to such a defect. However, the user does not commit a fault if he fails to take the precautions that would have been required of him if the manufacturer had adequately informed him or, for the same reason, if he uses the product in an imprudent or inappropriate manner[403]. The courts must therefore be especially prudent 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 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 article 1468 par. 1 *C.C.Q.*, which describes the conditions for

---

paragr. 8(2) of the *European Directive* (paragr. 8(1) concerning the apportioning between the manufacturer and a third party).

[402] *O.B. v. Lapointe*, [1987] R.J.Q. 101.

[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.

DRAFT

a manufacturer's liability, and in articles 2803 and 2804, general provisions respecting civil evidence.

[365] In accordance with article 2803 par. 1 *C.C.Q.*, the plaintiff must establish his right – in this case that of obtaining compensation pursuant to article 1468 par. 1 *C.C.Q.* – and prove according to a preponderance of the evidence (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 jurisprudence and the doctrine agree[405]. Other than its obligation to establish, where applicable, the facts which extinguish, modify or reduce its obligation and to 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 article 2803 par. 2 *C.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 should show that the product did not afford "the safety which a person is normally entitled to expect" and, accordingly, indicate 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

[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 P.-G. Jobin and M. Cumyn, *supra*, note 203, paragr. 225, p. 324; J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, Vol. 2, *supra*, note 241, paragr. 2-385, p. 397; V. Karim, *Les obligations*, Vol. 1, *supra*, note 389, paragr. 3190 to 3193, p. 1367-1368.

[406] As Professor Karim writes: [Translation] "[…] Thus, if the thing can, among other things, 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 […]" (V. Karim, *Les obligations*, Vol. 1, *supra*, note 389, paragr. 3193, p. 1368). We also have in mind 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.

DRAFT

considered to be affected by a safety defect due merely to the fact that another more sophisticated one came onto the market later[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, he has that burden: if he establishes that the danger was greater than that which he would normally be entitled to expect in law, he 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 which 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 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 by a preponderance of the evidence, in that it "does not afford the safety which a person is normally entitled to expect". However, does that require that he 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

---

[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, p. 85-87, although the law has evolved since then. See also Article 6, paragr. 2 of the *European Directive*.

[408] *Baldor Electric Company v. Delisle*, 2012 QCCA 1004, aff. *Camirand v. Baldor Electric Company*, 2010 QCCS 2621.

[409] *Plamondon v. J.E. Livernois Ltée*, [1982] C.S. 594, aff. by *J.E. Livernois Ltée v. Plamondon*, J.E. 85-619 (C.A.).

DRAFT

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.

[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 takes the trouble to indicate 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

---

[410] This issue is also alluded to in J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, Vol. 2, *supra*, note 241, paragr. 2-383, p. 394.

DRAFT

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 him the burden one wanted to remove from him 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 writes 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 with regard also to the inherent costs of that proof, which very often requires consultation with and testimony of experts.

[377] He continues further on, commenting on article 1469 *C.C.Q.*[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 which does not afford the safety which a person is normally entitled to expect. <u>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</u>.
>
> It also appears from these two articles that the third party which is the victim of a safety defect will henceforth have <u>a less onerous burden of proof than before since he will not have to prove the defendant's fault</u>. He will thus have more effective protection of his rights.
>
> All the victim would have to do for the defendant to be liable would be to establish, other than 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.

---

[411] *Minister's Comments*, *supra*, note 359, p. 897.
[412] *Minister's Comments*, *supra*, note 359, p. 898.

> 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 he can, the existence of the defect of design or manufacture of the product or the poor preservation or presentation of it (or other reason), which will only strengthen his claims. But he 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 article 1473 par. 2 *C.C.P.* [*sic*]). 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* [Quebec Civil Code Revision Bureau] testify to this wish to make it easier for the user and, accordingly, to enhance the protection he 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 they are proven (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 for exoneration of article 1473 *C.C.Q.* (or, potentially, article 1470 *C.C.Q.*). This is how *Desjardins Assurances générales inc. v. Venmar Ventilation inc.*[414] describes it:

---

[413] See in this regard P.-G. Jobin and M. Cumyn, *supra*, note 203, paragr. 225, p. 324; J. Edwards, *supra*, note 239, paragr. 315, p. 146. 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 collab. of Patrick Canin, *Les produits défectueux*, Paris, Litec, 2000, p. 99-100.

[414] *Desjardins Assurances générales inc. v. Venmar Ventilation inc.*, 2016 QCCA 1911. See also P.-G. Jobin and M. Cumyn, *supra*, note 203, paragr. 225, p. 326; N. Vézina and F. Maniet, *supra*, note 232, p. 92.

> [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] It is interesting to compare in this regard 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. 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.	**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.
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.	**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.
La personne qui se sert de l'animal en est aussi, pendant ce temps, responsable avec le propriétaire.	A person making use of the animal is also, during that time, liable therefor together with the owner.
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.	**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.

[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 can prove that he did not commit any fault[415] by establishing that [Translation] "he 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 talk about either fault or lack of fault. In addition, as we 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.*

DRAFT

---

[415] J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, Vol. 1, *supra*, note 265, paragr. 1-973 and 1-974, p. 893-894.

[416] J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, Vol. 1, *supra*, note 265, paragr. 1-982, p. 898.

[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 the doctrine, 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 his lack of knowledge of the defect nor his lack of fault are sufficient to exonerate him, 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 the 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 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 the one 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 article 1473 par. 2 *C.C.Q.*), or the lack of fault.

[388] It can be acknowledged, however, that, with respect to a safety defect resulting from "the lack of sufficient indications as to the risks and dangers it involves or the

---

[417] *Ross v. Dunstall*, (1921) 62 S.C.R. 393.

[418] J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, Vol. 1, paragr. 1-996 and 1-1015 and s., p. 911 and 921 and ff. (owner of a building), as well as paragr. 1-1020, 1-1040 and 1-1042 à 1-1046, p. 926, 936 and 937-938 (owner of an animal).

[419] J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, Vol. 1, paragr. 1-996, p. 911.

DRAFT

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 which 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 it 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] However, upon reflection, the *burden* of that demonstration, i.e. the *burden to convince* 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 him 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 may do so). As mentioned above, his 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 he 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 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

DRAFT

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], *Cohen v. Coca-Cola Ltd.*[421], *Lambert v. Lastoplex Chemicals*[422] or *Mulco inc. v. 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 used by all[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 by a preponderance of the evidence the fault of the Respondents [*sic*], namely the breach of the manufacturer's duty to inform. That ends our discussion of this point.

[394] We will turn now to the issue of causation. What burden is 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.** 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 <u>le préjudice causé</u> à un tiers <u>par le défaut de sécurité du bien</u>.

> **1468.** The manufacturer of a movable thing is bound to make reparation for <u>injury caused</u> to a third person by <u>reason of a safety defect</u> in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.

[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 explosible bottle exploded and glass fragments embedded themselves in the user's face and arms; after

---

420 *Ross v. Dunstall*, (1921) 62 S.C.R. 393.
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. v. Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68, aff. *Garantie (La), Cie d'assurance de l'Amérique du Nord v. Mulco Inc.*, [1985] C.S. 315.
424 Claude Masse, *La responsabilité civile*, *supra*, note 313, paragr. 70, p. 292.

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 the manufacturer therefore becomes liable.[425]

[399] As noted earlier, the same type of causation is required under articles 1466 and 1467 *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] To say this, however, is not to say that proof of injury and proof of default 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 default 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. Therefore, it does not mean that, 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 can establish the causal connection between the (assumed) safety defect of the thing and the development of a cardiovascular disease or type 2 diabetes, diseases 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 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

[425] See N. Vézina and F. Maniet, *supra*, note 232, p. 92.

DRAFT

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 that the Respondents had to demonstrate.

[403] This assertion is particularly important 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 extra-contractual civil liability. Let us examine why.

[406] We have just seen that, 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 article 1457 para. 2 *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 is fee 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 proven is thus not the causal connection between the injury and the fact (any defect, 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, by a preponderance of evidence, 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 thoroughly examined the question of whether the judge erred in reaching this conclusion, but that is another matter.

[409] However, according to the Appellants, the evidence of such medical causation, assuming that it was made (which they disputed), 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 argued 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 doctor, for example, or otherwise), he may possibly not give up smoking, in which case the decision could no longer be 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. However, it is the very existence of this safety defect, insofar as it causes the injury, 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 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

[426] Once again, the plaintiff can, of course, establish that he was unaware of the dangers of the product he consumed, but he is not required to do so.

DRAFT

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 article 1473 para. 1 *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] Thus, 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, they would demonstrate 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 that it would not in any way change their liability, unless, of course, they were able to demonstrate, by a preponderance of evidence, one or the other 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 force majeure or the fault of a third 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.

[427] Panlobular emphysema can indeed result from a genetic predisposition associated with a α1-antitrypsin (a protein) deficiency.

[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 jurisprudence at the time showed 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 comprising a defect or danger of which the user has not been informed) and the injury. This was the case, for example, in *Mulco*,[428] *O.B. c. Lapointe*[429] and *Royal Industries Inc. c. Jones*[430] or *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 c. Dunstall*,[432] *Royal Industries inc. c. Jones*,[433] *O.B. Canada Inc. c. Lapointe*,[434] *Mulco*[435] and other cases

---

[428] *Mulco inc. c. Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68, conf. *Garantie (La), Cie d'assurance de l'Amérique du Nord c. Mulco Inc.*, [1985] S.C. 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 tort case concerns the presumed defect of a thing, but its intent is 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" (pp. 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] S.C. 25.

[432] *Ross v. Dunstall*, (1921) 62 S.C.R. 393.

[433] *Royal Industries Inc. c. Jones*, [1979] C.A. 561.

[434] *O.B. c. Lapointe*, [1987] R.J.Q. 101.

DRAFT

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, such person would normally have behaved in such a way as to avoid the danger and protect himself 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 viewed from 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 extra-contractual 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, by a preponderance of evidence, that the Appellants' actions determined the behaviour of the members of both classes, including at the individual level.

---

435 *Mulco inc. c. Garantie (La), Cie d'assurance de l'Amérique du Nord*, [1990] R.R.A. 68, conf. *Garantie (La), Cie d'assurance de l'Amérique du Nord c. Mulco Inc.*, [1985] S.C. 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 Article 1478 para. 2 *C.C.Q.*

DRAFT

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 prescription that subsequently disappeared with the *T.R.D.A.*, adopted in 2009 and the constitutional validity of which was subsequently recognized. They stated nevertheless 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 behaviourally) 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, which 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 extra-contractual remedy of the *Civil Code* – consistency requires it",[442] concluding that [Translation] "the consumer therefore has a clear option here".[443] The consumer may also base his claim

438 Stenographic notes of November 24, 2016 (Sténofac), p. 155.
439 Stenographic notes of November 24, 2016 (Sténofac), pp. 151 ff.
440 In the same manner as the parties to a proceeding, if they were subject to Article 1458 para. 2 *C.C.Q.*, could not circumvent the prohibition of the option and choose the extra-contractual 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 P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 243, p. 359 *in fine*.
443 P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 243, p. 359 *in fine*.

on *both* articles 1468 and 1469 *C.C.Q.* and on section 53 *C.P.A.*, just as he could concurrently invoke articles 1726 and following *C.C.Q.* and section 53 *C.P.A.*, if the situation so requires (article 1458 para. 2 *C.C.Q.* does not prohibit multiple contractual remedies).[444] The same is true with respect to the former law, which permits accumulation.

[425] The following was the wording of section 53 when the *C.P.A.* was adopted (1978) and came into force (1980):

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.	**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.
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 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.
Ni le commerçant, ni le manufacturier ne peuvent alléguer le fait qu'ils ignoraient ce vice ou ce défaut.	The merchant or the manufacturer shall not plead that he was unaware of the defect or lack of instructions.
Le recours contre le manufacturier peut être exercé par un consommateur acquéreur subséquent du bien.	The rights of action against the manufacturer may be exercised by any consumer who is a subsequent purchaser of the goods.

[444] The jurisprudence 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 and following *C.C.Q.*, given that in both cases the actions are based on a latent defect. See, for example, *Fortin c. Mazda Canada inc.*, 2016 QCCA 31, paras 57 to 60 (citing *Martin c. Pierre St-Cyr Auto caravanes ltée*, 2010 QCCA 420). However, in the light of section 54 *C.P.A.*, it seems that the remedy provided for in section 53 para. 1 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 J. Edwards, *supra*, note 239, para. 387, pp. 183-184; L. Thibaudeau, *supra*, note 250, para. 577, p. 280, and para. 645, p. 316; Pierre-Claude Lafond, *Droit de la protection du consommateur : théorie et pratique*, Montréal, Yvon Blais, 2015, para. 436, pp. 185-186. The jurisprudence 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 only be based on the second paragraph of section 53 *C.P.A.*

DRAFT

[426] The following is the current wording, which came into force in October 1999 and which differs from the previous one only in that the legislator has replaced "*manufacturier*" with "*fabricant*" in the French version, while the English version has remained unchanged:

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.	**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.
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 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.
Ni le commerçant, ni le fabricant ne peuvent alléguer le fait qu'ils ignoraient ce vice ou ce défaut.	The merchant or the manufacturer shall not plead that he was unaware of the defect or lack of instructions.
Le recours contre le fabricant peut être exercé par un consommateur acquéreur subséquent du bien.	The rights of action against the manufacturer may be exercised by any consumer who is a subsequent purchaser of the goods.

[427] This provision, like all the provisions of the C.P.A., must be interpreted broadly and generously to ensure achievement of the objectives pursued by a legislator concerned with correcting an economic and information imbalance between consumers and merchants or manufacturers, from a social justice perspective.[445]

[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, for example, *Richard v. Time Inc.*, 2012 SCC 8; *Dion c. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333; *Nichols c. Toyota Drummondville (1982) inc.,* [1995] R.J.Q. 746 (C.A.). P.-C. Lafond, *supra*, note 444, in particular at paras 1 ff., pp. 3 ff.; Nicole L'Heureux and Marc Lacoursière, *Droit de la consommation*, 6th edn, Cowansville, Yvon Blais, 2011, in particular at para. 15, pp. 21 ff.; Patricia Galindo da Fonseca, "Principes directeurs du droit de la consommation", in *Droit de la consommation et de la concurrence*, fasc. 1, JurisClasseur Québec, Montréal, LexisNexis Canada, 2014 (looseleaf, update no. 7, August 2018), paras 1 ff., pp. 1/3 ff.; Claude Masse, *Loi sur la protection du consommateur : analyse et commentaires*, Cowansville, Yvon Blais, 1999, p. 94 [*C.P.A.: analysis and comments*].

DRAFT

[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 and following *C.C.L.C.* or 1726 and following *C.C.Q.*; they also offer him a direct remedy against the manufacturer. 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: just as in the first paragraph, a consumer, whether purchaser or subsequent purchaser, who exercises a right specific to him,[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 extra-contractual 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 section 53 para. 2 *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.* extra-contractual liability that reflects the regime of section 53 para. 2 *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

---

[446] On the qualification of warranty, see in particular L. Thibaudeau, *supra*, note 250, paras 635 ff., pp. 309 ff.

[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 P.-G. Jobin and M. Cumyn, *supra*, note 230, para. 238, p. 349 *in fine* and 350; P.-C. Lafond, *supra*, note 444, para. 432.

[448] On the qualification of the warranty attached to the second paragraph of section 53 *C.P.A..*, see in particular L. Thibaudeau, *supra*, note 250, paras 852 and 854, pp. 429-431, and para. 861, p. 434. On the extension of this warranty to the safety defect, see also N. Vézina and F. Maniet, *supra*, note 232, p. 77.

[449] 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.*

DRAFT

correctly measure and accept the danger and the risk of injury to which he is exposed.[450]

[430] The third paragraph of section 53 *C.P.A.* adds that the manufacturer cannot plead that it 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 qualification of "warranty" under section 53 *C.P.A.*) and, unlike under the general law, it does not have the right to apologize 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 article 1473 para. 2 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 article 1473 para. 2 *in fine 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 section 53 para. 2 *C.P.A.*? Section 272 *C.P.A.* offers a range of options:[453] specific performance of the opposing party's obligation, the reduction of his 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) as well as 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

---

450 See *supra*, in particular paras [301] and [326] ff. With respect to section 53 *C.P.A.*, see also N. Vézina, *Droit de la consommation*, *supra*, note 244, para. 27, pp. 4/18 to 4/20.

451 On this absolute presumption of knowledge, see *Véranda Industries inc. c. Beaver Lumber Co.*, [1992] R.J.Q. 1763 (C.A.), pp. 1768-1769.

452 In this regard, see P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 124, pp. 159-160, para. 212, pp. 300-301, para. 238, p. 350, and para. 243, p. 358; N. Vézina, *Droit de la consommation*, *supra*, note 244, para. 31, p. 4/23; N. Vézina, *Mélanges Claude Masse*, *supra*, note 359, pp. 448-449. See also *Fédération, compagnie d'assurances du Canada c. Joseph Élie ltée*, 2008 QCCA 582, paras 39 to 42 (on the absolute nature of section 53 para. 3 *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.), p. 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.

DRAFT

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 of the first paragraph, but also to the safety defect of the second paragraph, which is caused by a breach of the manufacturer's duty to inform.[457]

[433] Let us now take a closer look at the requirements for the consumer's remedy under this warranty and the burden of proof 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 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

---

455 *Véranda Industries inc. c. Beaver Lumber Co.*, [1992] R.J.Q. 1763 (C.A.), p. 1769.

456 See N. Vézina, *Droit de la consommation*, *supra*, note 244, para. 30, p. 4/22.

457 On the warranty provided by section 53 para. 2 *C.P.A.* in the event of a safety defect resulting from insufficient or non-existent information, see in general P.-C. Lafond, *supra*, note 447, paras 466 to 468, pp. 195-196; P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 207, p. 293, and para. 243, p. 358; L. Thibaudeau, *supra*, note 250, paras 850 ff., pp. 428 ff.

458 Regarding the "consumer / *consommateur*" for the purposes of the *C.P.A.*, see in general P.-C. Lafond, *supra*, note 444, paras 118 ff.

459 Such a contract of purchase/sale is a "consumer contract / *contrat de consommation*" within the meaning of article 1384 *C.C.Q.*

460 According to *Véranda Industries inc. c. Beaver Lumber Co.*, [1992] R.J.Q. 1763 (C.A.), p. 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 offer a remedy to such third party). However, the controversy seems to persist. See P.-C. Lafond, *supra*, note 444, para. 468, pp. 195-196.

461 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, note 444, para. 133). With respect to the notion of "merchant / *commerçant*", see Nicole L'Heureux and Marc Lacoursière, *supra*, note 445, para. 37, pp. 47-51; L. Thibaudeau, *supra*, note 250, paras 597 ff., p. 289 *in fine* ff.; P.-C. Lafond, *supra*, note 445, paras 133 ff., pp. 64 ff.

462 See, for example, *Richard v. Time Inc.*, 2012 SCC 8, paras 104 and 105.

DRAFT

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 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 section 53 para. 2 *C.P.A.*, the manufacturer can establish that the danger was apparent 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 proven (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 section 53 para. 2 *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

---

[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 force majeure, the action of a third party or the fault of the consumer himself.

[464] D. Lluelles and B. Moore, *supra*, note 215, para. 114, p. 55.

[465] We can draw an analogy here with *Martin c. Pierre St-Cyr Auto caravanes ltée*, 2010 QCCA 420, where, in an action based on section 53 para. 1 *C.P.A.* and articles 1726 and 1730 *C.C.Q.*, the seller and the manufacturer succeeded, with their rebuttal evidence, in rebutting 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 confirms this finding.

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. 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.	**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.

[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 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 who is 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:

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 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.

[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 proven the danger, it is for the manufacturer to demonstrate that he could have become aware of it himself, in particular owing to the instructions he was given or otherwise, or that he 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 section 53 para. 1: the consumer has the burden of proving the basis of his right (the existence of the danger) and the manufacturer that of the exception (the danger was apparent or the consumer knew it).

DRAFT

[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 jurisprudence clearly shows the connections between the three regimes (despite the extra-contractual 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]

[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 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 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 jurisprudence developed pursuant to article 1726 para. 2 *C.C.Q.,* a reasonable purchaser, normally prudent or diligent, will pay attention to the

---

466 See, in particular, J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, vol. 2, *supra*, note 241, paras 2-359, p. 376.

467 It is true that in *Fortin c. Mazda Canada Inc.*, 2016 QCCA 31, 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 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 the passage of a doctrinal work indicating that it is for the seller or manufacturer to prove that the defect was known to the purchaser at the time of purchase (T. Rousseau-Houle, *supra*, note 373, p. 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.

468 P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 124, pp. 159-160: [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".

object he purchases and will therefore examine it before purchasing it. However, the examination he 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 article 1473 para. 1 *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. 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 concerned itself 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

[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.), pp. 2315-2316, the teachings of which apply to article 1726 *C.C.Q*.

[470] *Richard v. Time Inc.*, 2012 SCC 8.

DRAFT

a representation constitutes a prohibited practice. There are no reasons, 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.
>
> [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).
>
> [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.
>
> [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.
>
> [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.

---

[471] According to Thibaudeau, the standard of the credulous and inexperienced person applies to the examination conducted under the first paragraph of article 53 *C.P.A.*: L. Thibaudeau, *supra*, note 250, para. 682, pp. 337-338. It cannot be any other way for the purposes of the second paragraph of this provision.

> [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] 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—and which he therefore accepts—if he 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 general law regarding safety defects and latent defects.

[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

[472] N. L'Heureux and M. Lacoursière, *supra*, note 445, para. 92, p. 109.

DRAFT

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 purchased the goods;
>
> - even if the consumer has purchased the goods for personal use, he regularly uses goods of the same kind in his 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 widely known, i.e., [Translation] "known in an absolutely certain manner and 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 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 can observe such characteristics logically implies knowledge of the danger associated with them as well as knowledge of how to protect himself 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 from such general knowledge the inference that the danger as well as the means to protect oneself from it are subjectively

---

[473] *Le Grand Robert de la langue française*, Paris, Dictionnaires Le Robert, 2017, digital version, 4.1, "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.

DRAFT

known—or more accurately, are presumed to be known—to a consumer who sues a manufacturer, an inference 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 want 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 extra-contractual 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 force majeure. It should be noted that, as in the case of extra-contractual 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 extra-contractual liability regime discussed above.

DRAFT

---

[476] On the presumption of normality, see Jean-Claude Royer, *La preuve civile*, 5th edn by Catherine Piché, Montréal, Yvon Blais, 2016, paras 156 ff.; Léo Ducharme, *Précis de la preuve,* 6th edn, Montréal, Wilson & Lafleur, 2005, paras 120 ff.

[477] On the application of the standard of "ordinary examination" in the second paragraph of section 53 *C.P.A.*, see P.-G. Jobin and M. Cumyn, *supra*, note 203, para. 124, p. 159 *in fine* and 160.

C. 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 engaged 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 extra-contractual route, given that the choice between contractual and extra-contractual was permitted at the time.

[465] However, as of January 1, 1994, with the coming into force of the *C.C.Q.* and its article 1458 para. 2, 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 extra-contractual 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' extra-contractual 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 and following *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 causes to the [Translation] "other

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 precontractual obligations and therefore justifies only an extra-contractual 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 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 for 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 contest 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 force majeure.

[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.* as well as articles 1 and 49 of the *Charter*, are discussed below.[478]

[478] See *infra*, paras [841] ff. (*C.P.A.*) and [957] ff. (*Charter*).

DRAFT

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 criticized the Appellants for a failing to fulfill their duty to inform under *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 criticizes 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 faults identified by the Judge and the harm suffered by the Class Members, 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, which will discuss them 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 therefor 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, the 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 the *Lambert*[479] or *Mulco Inc.* [480] decisions, 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:

> [Translation] - relying particularly on *Inmont Canada Ltd. v. Canadian National Insurance Co.*[482], they criticized the Judge for having used a contemporary standard of assessment in evaluating their conduct. However, this standard, 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. Dusntall,*[484] 1921: the manufacturer must disclose to its customers or potential customers, through

---

479 *Lambert v. Lastoplex Chemicals, [1972] S.C.R. 569.*
480 *Mulco Inc. v. 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.*
482 *Inmont Canada Ltd. v. Canadian National Insurance Company, J.E. 84-884 (C.A.).*
483 Stenographic notes of 23 November 2016 (Sténofac), p. 62.
484 *Ross v. Dunstall*, (1921) 62 S.C.R. 393.

DRAFT

understandable and complete information about the dangers of the product it is putting on the market and the means to prevent the danger or protect against it, an obligation whose intensity 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. v. 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, 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 he 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 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. v. 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 inflammability 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 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.

---

485 *Inmont Canada Ltd. v. 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 M*ulco Inc. v. 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. v. Garantie (La), North American Insurance Co.,[1990] R.R.A. 68 (C.A.), p. 71.*

490 See also the judgment of the Court of Appeal in National Drying Machinery Co. v. Wabasso Ltd.,[1979] C.A. 279, and in particular the reasons of Judge Mayrand. As we know, this decision was subsequently overturned by the Supreme Court, but not on this point. See also, at the same time and by 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 this case).

DRAFT

[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 standard in question are those of the Appellants, who dominate the Canadian and Québec 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, whereas the standards and rules adopted by the Appellants and to which they voluntarily submitted are far below what the law (extra contractual or contractual, including article 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 responsibility that might fall to them in the event of failure to comply with that duty. This is a principle[491] This is a principle 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 law, the "distributor/*négociant*" includes the "manufacturer/*fabricant*" (art. 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:
(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;

491 On this principle, see for example T. Leroux and M. Giroux, supra, note 313 at 329:"[T]he statutory obligation to provide information is not the same as the equivalent obligation in civil law". The authors discuss the drug requirements of the Food and Drugs Act, but their compliance is of general value.
492 *Tobacco Act, S.C. 1997, v. 13.*
493 *Tobacco Act, S.C. 1997, v. 13*

DRAFT

(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 tobacco products or from their emissions

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 consommateurs des dangers pour la santé et des effets sur celle-ci liés à l'usage du produit et à ses émissions.

[Emphasis added]

[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

[494] *RJR-MacDonald Inc. v. Canada (Attorney General),[1995] 3 SCR 199.*

DRAFT

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], since 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 Québec 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 principal was discussed above. It may be possible for a manufacturer who complies with government labelling or advertising standards to avoid liability by proving that it adequately informed, regarding 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 as 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 person, who for example, markets a product while not complying with labelling requirements prescribed by law is committing a fault that gives rise to his liability. This is subject of course to existence of harm and causation.[496] And this fault may aggravate his failure to fulfill his 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 they duty to inform nor is that person released from any liability if the information provided, although complying with standards, does not accurately, understandably and completely reveal the inherent danger produced. As professors Jobin and Cumyn write;[498]

---

[495] *Canada (Attorney General) v. JTI-Macdonald Corp., 2007 SCC 30.*
[496] Analogically, see Morin v. Blais,[1977] 1 S.C.R. 570.
[497] Morin v. Blais, [1977] 1 S.C.R. 570, in particular at the end of pp. 579 and 580.
[498] P.-G. Jobin and M. Cumyn, supra, note 203 at paras. 227, pp. 330-331.

DRAFT

> [Translation […]] compliance with administrative or criminal requirements, does not ensure immunity from liability where the Court considers that in the case being tried, the standard of reasonable prudence exceeds that set by administrative law; this is a sound understanding of civil liability.

[492] This principal 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 for appeal. The Trial Judge allegedly 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 this type of cigarette to the public. [501] It maintained a close relationship with their lobbyist the CCFPT 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 argued that the government officials knew the dangers of tobacco as well as they did[503] contrary to what the Trial Judge found.[504]

---

499 *Tobacco Act, S.C. 1997, v. 13.*

500 *Tobacco Act, S.C. 1997, v. 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, paras. 2.10 et seq. and 7.126 et seq.
In R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42, para. 49, the Supreme Court even refers 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, v. 13.*

503 See stenographic notes of 23 November 2018 (SténoFac), p. 84 et seq.

504 Judgment undertaken, para. 235.

[495] But whether the government erred or failed in acting, or abstained from acting and may, by assumption, incurred some civil liability in this respect[505] is immaterial and does not relieve the Appellants of their own liability nor does it mitigate the faults alleged against them. Nothing in the government's action or inaction was anything that would alter, modify or weaken the Appellants duty to inform regarding the dangers of the products they are marketing during the period in question. Or to excuse them for having failed in that duty. In ITL's and JTM's briefs is an allusion to the fact that the federal government played the role of the "*learned intermediary"* here, which assuming this document is applicable in Québec law,[506] is obviously not the case.[507]

[496] Because 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 other 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 aligns will mainly focus on the first aspect of the Appellants fault while occasionally referring to the counter discourse they maintained during the period in question. Not that the second aspect of the fault is less important than the first, it's just as important. The most striking elements of this counter discourse however, have been

---

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 teaching in R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42. See also 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. v. Venmar Ventilation Inc., 2016 QCCA 1911, para. 20; however, Prs Jobin and Cumyn succinctly express the view that "nothing objects to its [the doctrine of the competent intermediary] also being implemented in civil law" (P.-G. Jobin and M. Cumyn, supra, note 203, para. 220, p. 317).

507 The rule of the competent intermediary (especially applied to the field of medicine, without being restricted) is well described by the Supreme Court of Canada in Hollis v. Dow Corning Corp.,[1995] 4 S.C.R. 634, paras. 27 et seq. Paragraphs 28 ("In general, the rule applies either in the case of a product with a high technical content, intended for use only under expert supervision, or in the case of a product such that it is unrealistic to expect the consumer to receive a direct warning from the manufacturer before using it") and 29 ("However, it is important to remember that the "competent intermediary" rule is only an exception to the general obligation of the manufacturer to warn the consumer") are particularly enlightening and clearly show the inapplicability of this theory to the present case: cigarettes are not a product with a high technical content and, in any case, it is perfectly realistic to expect callers to notify users directly of their product. 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. v. Venmar Ventilation Inc., 2016 QCCA 1911, para. 20. See also Pfizer Inc. v. Sifneos, 2017 QCCA 1050 (single j.); Thibault v. St. Jude Medical Inc., J.E. 2004-1924 (S.C.).

DRAFT

recalled in second 1.2 and are obviously part of the relevant factual framework without the need to repeat them here. As for the specific question regarding the Appellants conduct in advertising, which is part of their counter discourse-it 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 common law requirements for in terms of the duty to inform as well as requirements 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 à 1988, the year the *Tobacco Products Control Act*[508] was passed.

[499] It can be said that 1950 et 1972, there was near silence excluding a momentary bout of honesty at Rothmans International and Rothmans of Pall Mall Canada Limited (authors of the Appellant RBH), whose president, Patrick O'Neill-Dunne, publicly acknowledged the link between smoking and lung cancer before quickly skating 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 momentary bout 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].

---

[508] *Loi sur le tabac*, L.C. 1997, ch. 13.

[509] See Judgment 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, will put forward the thesis that the 1958 declaration 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.

(Testimony of Steve George Chapman, October 22, 2013, p. 97)

DRAFT

[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 « *entente cordiale* » 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 respondent's remedies. 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 sets out in twelve points the main principals that the Appellants agreed to respect. For example, their cigarette advertising will be directed to adults and not people under age 18,[511] the advertising will 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 will also not «suggest that smoking is essential to romance, prominence, success or personal advancement»[513] (a commitment that will be repeated in subsequent codes and from which, however, the Appellant will systematically deviate in their « lifestyle advertising »[514]).

[503] The code in question is not very restrictive and while it states that the Appellants will not claim that cigarettes have beneficial health affects (a rule that they also repeatedly violate), it does not provide in any way that they must inform the public or the users of their brands of the dangers and risks associated with tobacco consumption, which dangers and risks they themselves already know, at least in large part and certainly enough to warn smokers.

[504] It was in 1972 that, still concerned about avoiding government intervention, (in 1971 the Minister of Health and Welfare introduced a draft, a bill, to among other things limit tobacco advertising and require a warning on the packaging[515]), the Appellant 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”.

---

[511] Exhibit 40005B-1964FR.
[512] Exhibit 40005B-1964FR.
[513] Exhibit 40005B-1964FR.
[514] The Supreme Court will itself find 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, will prohibit it.
[515] Bill C-248, June 10, 1971.
[516] Exhibit 40005C-1972; Exhibit 40005D-1972.

[505] The warning is as vague as it is ambiguous: what is excessive smoking, which may be – the verb 'to be' being used here as a semi-auxiliary[517] – hazardous to your health? This is certainly not true, understandable and complete information in accordance with the requirements that were imposed on the Appellants at that time,[518] 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.

[506] In this first version of their 1972 code, the Appellants also reiterate some of their previous commitments, including the ones who limit 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 will be 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 never the less significant, and that the warning is no longer attributed to the Appellants themselves as their previous version might have suggested, but to the department of Health and Welfare Canada, as it was then known.

---

517 That is, it is used "to express the modality of the possible": Le Grand Robert de la langue française, supra, note 473, "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 affirms 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 sufficient.

519 It is not certain that this reference has ever been 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, p. 21; Exhibit 20063, para. 49; Exhibit 40494, para. 41).

520 Exhibit 40005C-1972FR.

521 Exhibit 40005D-1972.

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 is hardly likely to inform the public, and 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 him 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. The Appellants (or their authors), as early as 1962, 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).

[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.

---

522 This is stated by expert W.K. Viscusi in his report, Exhibit 40494, para. 42.
523 See supra, para.[28].
524 Exhibit 40005G-1975.

DRAFT

[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 to 55% of fellow citizens were smokers,[525] he would mostly learn 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 will only be used "*in connection with brand advertising and not in connection with the advertising of sponsorship events*"[526]). It is further provided that rule 15 will apply "*as soon as possible after January 1, 1975 in print media advertising and on packages, but in any event not later that 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 not the text of the warning:[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.

[525] According to a study by the Department of Health and Welfare, this is the rate of smokers in the Québec 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] Pièce 40005G-1975, « Warning notice – Instructions for Use in Print Media ».
[527] Exhibit 40005G-1975, p. 4, para. 8.
[528] Exhibit 4005K.1-1975.
[529] Exhibit 4005K-1975, p. 4.

DRAFT

[517] Rule 15 remained.

[518] The January 1, 1976 code repeats 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 includes 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*" is 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, which a descendant of Rule 11 of the first code in 1972 and which is reproduced in more or less the same terms, and all the codes adopted since that date, states the following:

> 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 and one of those regulations 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

---

[530] Exhibit 40005L-1976, Section II.
[531] Exhibit 40005L-1976, p. III.5.

> 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 contains some minor adjustments, but the main gist does not change, while the warning remains 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 will appear 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 1072, 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 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 advised 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 which would allow the user to know what danger he is in and how to protect himself from it.

---

[532] Exhibit 40005M-1984.
[533] Exhibit 40005N-1985.
[534] *Tobacco Products Control Act, S.C. 1988, v. 20.*
[535] *Tobacco Products Regulations, SOR/89-21.*
[536] Except for the fleeting 1958 statement by the president of the company from which the RBH Appellant originated.
[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").

DRAFT

[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 findings clearly arise from the evidence: the Appellants provide no real information about the dangers of smoking (dangers that they don't claim that they never knew and that, in fact, they did know[539]), thus failing to fulfill their duty to inform as required by law under s. 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] already mentioned above, already coincide with Québec law on the subject for the period in question. The Appellants' voluntary warnings clearly do 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 on their products and to minimize the dangers and risks, thus undermining the warnings they placed on their packaging and 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] date of the Supreme Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General).*[543] We must therefore give it our attention.

---

538 See supra, note 517.

539 As noted in the judgment undertaken, para. 70.

540 *Hollis v. Dow Corning Corp.,[1995] 4 S.C.R. 634, para. 22.*

541 *Tobacco Act, S.C. 1997, v. 13.*

542 The Supreme Court refused to suspend the Tobacco Products Regulations, which prescribed 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.*

DRAFT

[529] Without banning cigarettes or tobacco products, this act, which came into force on January 1, largely prohibits advertising them, and section 9 prohibits selling them unless their packaging contains a message, determined by regulation, outlining in the "health effects of the product" and the list and quantity of toxic substances it contains and that are released in its smoke.

[530] Section 11 of the Tobacco Products Regulations,[544] in its initial version, provides for the following warnings to be placed on all cigarette packages:

> (i) "L'usage du tabac réduit l'espérance de vie. Smoking reduces life expectancy."
>
> (ii) "L'usage du tabac est la principale cause du cancer du poumon. Smoking is the major cause of lung cancer."
>
> (iii) "L'usage du tabac est une cause importante de la cardiopathie. Smoking is a major cause of heart's disease."
>
> (iv) "L'usage du tabac durant la grossesse peut être dommageable pour le bébé. Smoking during pregnancy can harm the baby."

[531] Any sign used to advertise cigarettes or cigarette tobacco must also carry the following warning (s. 4):

> "L'usage du tabac cause le cancer du poumon, l'emphysème et la cardiopathie. Smoking causes lung cancer, emphysema and heart disease."

[532] Some warnings are also provided for cigar or pipe tobacco (ss. 4 and 12) and smokeless tobacco (ss. 4 and 13). The regulation also prescribes all the details of placing 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 appear in 1993 or that will be adopted under the *Tobacco Act*[545] of 1997, which will replace 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 do not add anything to them from 1988 to 1995. During that period, the advertising they are authorized to do by law is also significantly reduced by section 4 of the 1988 act, although promotional activities are still permitted, although well defines (s. 6).

DRAFT

---

[544] *Tobacco Products Regulations, SOR/89-21.*
[545] *Tobacco Act, S.C. 1997, v. 13.*
[546] *RJR-MacDonald Inc. v. Canada (Attorney General),[1995] 3 S.C.R. 199.*

[534] It should also be noted that, during the ministerial consultation process prior to the adoption of the *Tobacco Products Regulations*, the Appellants, through the CCFPT, 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 know for a fact, the Appellants are not prepared to recognize the dangers and risks of the product they are marketing: they are probably resigned to the fact that the Department has mandatory warnings on cigarette packaging, but they dispute the accuracy of the warnings, which they do not agree are "scientifically correct". In this respect, the Appellants are continuing their strategy of disinformation and counter discourse that they agreed on and have practiced 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 disease (which may also, they argued, may result from other conditions) and that science had not yet discovered, if any, the mechanism for developing cancer or lung disease. However, even if that were true, it would not alter their duty to inform on this point. Commenting on *Hollis v. Dow Corning Corp.*,[548] the authors Baudouin, Deslauriers and Moore write:[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

[547] Exhibit 841-2m, Letter dated 28 November 1988 from Norman J. McDonald, President of the Canadian Tobacco Manufacturers' Council, to the Minister of Health and Welfare, p. 5.

[548] *Hollis v. Dow Corning Corp.,[1995] 4 S.C.R. 634.*

[549] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 2, supra, note 241, para. 2,355, pp. 372-373.

DRAFT

> of these unexplained ruptures should have alerted the manufacturer and made it easy for him 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 feel within the scope of their obligation to inform users.

[538] At the same time, their representatives' comments in 1988, in the letter an extract of which appears above, also reveal the Appellants astonishing conception of the manufacturer's duty to inform since they claim acknowledging the accuracy of those statements, and therefore the existence of the danger and potential harm, would force them to condemn their own product. However, seeing the manufacturer's obligation to disclose the danger inherent in the product he is marketing as a form of self-denigration or self-sabotage shows a poor understanding of his duty and obligation to inform. And even if, in fact, disclosing the danger could 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 – though only in part – and only under the constraint of a particular law.

[539] Despite the Appellants'' reluctance, s. 11 of the *Tobacco Products Regulations* came into force in 1989.

[540] In 1993, said regulations were substantially amended, in particular with respect to cigarette warnings, for which new version was proposed:[550]

> (i) "La cigarette crée une dépendance" "Cigarettes are addictive",
>
> (ii) "La fumée du tabac peut nuire à vos enfants" "Tobacco smoke can harm your children",
>
> (iii) "La cigarette cause des maladies pulmonaires mortelles" "Cigarettes cause fatal lung disease",
>
> (iv) "La cigarette cause le cancer" "Cigarettes cause cancer",
>
> (v) "La cigarette cause des maladies du cœur" "Cigarettes cause strokes and heart disease",
>
> (vi) "Fumer durant la grossesse peut nuire à votre bébé" "Smoking during pregnancy can harm your baby",
>
> (vii) "Fumer peut vous tuer" "Smoking can kill you",

[550] *Tobacco Products Regulations - Amendment, SOR/93-389.*

DRAFT

> (viii) "La fumée du tabac cause chez les non-fumeurs des maladies pulmonaires mortelles" "Tobacco smoke causes fatal disease in non-smokers".

[541] These warnings, which were to be placed on packages of September 1994, differ from the 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 take a look at this for a few moments.

[542] We recall that the Appellants long refused to recognize this characteristic, and that they strongly opposed – with success 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 Regulations*, the President of the CCFPT sent a letter to the Department of Health and Welfare explaining its Members opposition too the proposed changes, particularly with regard to the addictive nature of cigarette:[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, let us also remember that, as early as 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 put under the rug while challenging this reality in public.

---

[551] Exhibit 845, pp. 5-6.

DRAFT

[544] Let us give the example of the *Spokesperson's Guide – June 1990* by 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"

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

---

[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, pp. 35-39.

DRAFT

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 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:

DRAFT

> **— 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 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."
>
> [Bold type in the original; cross-references omitted]

[545] These instructions – like all those contained elsewhere in this guide[554] – are a good illustration of the way the Appellants generally addressed the claims relating to

---

[554] For example, on the association between smoking and lung cancer, this guide, which, it should be recalled, is from 1990, states 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.

DRAFT

this 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 Regulations*, including the one related to addiction, are 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 of a breach of the *Canadian Charter*, and the Appellants, once again through the CCFPT, 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 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 are 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."

- 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?

[…]

[555] Exhibit 40005O-1995, Cigarette Advertising Code of the Tobacco Manufacturers, pp. 1 and 2.

[556] Exhibit 40005O-1995, pp. 4-7. Additional warnings are provided for cigars and pipe tobacco or tobacco that is not intended for smoking (sections 6.2 and 6.3 of the Code).

(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.”
>
> 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:

DRAFT

> “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 to be repeated in the 1996 code, with the exception of a few minor details,[557] are accompanied by various rules relating to the positioning formats, 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 quite smoking, and indicate 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 is 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 53 paragraph 2 *C.P.A.*). Although they did display the information prescribed by the 1988 Act and the 1989 *Tobacco Products Regulations,*[561] on cigarette packaging, however, until 1994, 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

[557] Exhibit 40005S-1996, ss. 7.1 and 8.1, pp. 7 and 8.
[558] See also infra, paras.[845],[893] and[903] et seq.
[559] Tobacco Act, S.C. 1997, v. 13.
[560] *Tobacco Products Information Regulations, SOR/2000-272.*
[561] *Tobacco Products Regulations, SOR/89-21.*

DRAFT

information on the dangers inherent in the normal use of the product they were placing on the market. As the Trial Judge notes:

> [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 common 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, must we repeat, it was not the Appellants who disclosed this on their own, while under the voluntary codes of 1995 and 1996, they did not remove the reference to it from their packaging.

[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?
>
> Me THOMAS CRAIG LOCKWOOD:
>
> 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

---

[562] *Tobacco Products Regulations - Amendment, SOR/93-389.*

[563] Stenographic notes of 25 November 2016 (SténoFac), p. 186-187.

> 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.
>
> Me THOMAS CRAIG LOCKWOOD:
>
> Yes.
>
> THE COURT (MARIE-FRANCE BICH):
>
> But the manufacturers didn't have a duty?
>
> Me THOMAS CRAIG LOCKWOOD:
>
> Well, that's...
>
> THE COURT (MARIE-FRANCE BICH):
>
> Whatever the government might do or not do?
>
> Me 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.

[564] Stenographic notes of 25 November 2016 (SténoFac), pp. 187-189.

DRAFT

> 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 use 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]

> Me 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 Québec law in this regard and, to close this chapter as we began it, this is what section 9 of the *Tobacco Products Control Act*[566] and section 16 of the *Tobacco Act*[567] clearly indicate.

---

565 The judgment undertaken, 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, v. 13.*

567 *Tobacco Act, S.C. 1997, v. 13.*

DRAFT

[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, 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 what we have 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 which they only applied since 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] Between 1950 and 1998, therefore, 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, art. 1053 *C.C.L.C.* and 1457 *C.C.Q.*.; duty to inform users of the dangers of a product that is not otherwise by any defect in design, manufacture, conservation, or presentation, art. 1468 and 1469 *C.C.Q.*and prior praetorian law; guarantee of security, art. 53 *C.P.A.* (in the latter case, from 1980 onwards). This failure, in all its forms, constitutes a fault under the meaning of 1053

C.C.L.C. and, even if it is not necessary to qualify the appellant's conduct as faults under art. 1468 and 1469 *C.C.Q.* or art. 53 *C.P.A.*, we can however, without hesitation, find that it is within the meaning art. 1457 *C.C.Q*...

[564] Even 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 a 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.

[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" [cross-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. <u>General</u>

[568] The Appellants' position could be summarized by this shock phrase from the appellant JTM's brief: JTM: "*the manufacturer* […] *does not have to warn the warned*".[568] The knowledge of the user is, in fact, at the heart of the regimes

---

[568] Argument of the appellant JTM, para. 96.

DRAFT

established by Art. 1473 *C.C.Q.* or Art. 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 his 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 group 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. So they were known to the Members of the Blais Group or, failing that, 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 be known to all [and therefore to 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 1473 para 1 *C.C.Q.* as well as the corresponding prior law, the Appellants cannot be held liable for damages caused by the smoking of group 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.*;
>
> - However, the Members of the Blais Group who began smoking on or after January 1, 1980, 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 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 group 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 would be entirely exonerated from their

liability by virtue of Art. 1473 para 1 *C.C.Q.* or the praetorian rule previously derived from Art. 1053 *C.C.L.C* or [for the period following it coming into force] by virtue of Art. 53 *C.P.A.*

[572] We can summarize in the following terms, the essence of this means the exemption according to each clause in question:

> - In the case of Art. 1473 para 1 *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 Art. 53 *C.P.A.*, the manufacturer must prove that the consumer, as a gullible or inexperienced person, knew the danger or was aware of the danger or could have been 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:

> - when the danger was apparent, i.e. visible or easily identifiable by a reasonable person or, as the case may be, by a gullible 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

[569] Antidote 9[Software], Montreal, Druide informatique, "apparent". The Grand Robert de la langue française, supra, note 473, defines the word "apparent" as follows: "Who appears, shows himself clearly to the eyes" or who is "obvious". The Treasury of the French language defines it as follows: "Which appears clearly. 1. Visible, perceptible to the eye or understanding".

DRAFT

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 the case at bar?

ii. Apparent danger

[576] Let us first deal with the argument of apparent danger. The first instance Judgement 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 a by the gullible 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 buyer, a consumer or user or a mass product and is obviously not this type of in-depth examination that define apparent danger, regardless of the liability regime we are referring to.

iii. Real knowledge of the danger by each Class member

[577] Let us also deal with the argument of real knowledge of the dangers or potential harm: the Appellants did not, in fact, prove that the Members of the Blais and Létourneau Classes have 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 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 everyone's knowledge through serious, precise and consistent 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 right to question the estate of Mr. Blais (then deceased), Miss Létourneau herself, as well as 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]

[570] *Imperial Tobacco Canada Ltée v. Létourneau, 2014 QCCA 944.*

DRAFT

[579] The Court decision recalls in fact that:

> [49] The Appellant, as we know, now wishes to summon certain member in addition to respondent Létourneau herself and the successors of respondent Blais (the latter having in fact passed away). As we have seen, the Appellant plans to question them on the following subjects, in particular, in order to establish on the one hand, the absence of a causal link between fault (if any) and damage, and on the other hand, to demonstrate that the situations of each Class member are so different that a 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 a matter for the Appellant to establish the factual basis for the following: the faults of which it is accused have not caused any harm, the Members to the Class contributed to this harm, their conduct constitutes a kind of *novus actus interveniens,* there is no reason to award moral damages, a collective recovery is not a suitable mode of redress here.
>
> […]
>
> [73] It may come as a surprise, of course, that the Judge may prohibit the production or use of the medical records of <u>individuals who he is allowing the Appellant to question</u>. Is that not a contradiction? At first sight, when one considers the reasons for the Judgement under appeal, one might wonder why the Judge authorized, in defence, the interrogation of Members whose personal situation is to particularly significant and whose testimony could have the effect of a drop of water in the ocean. If the Judge had refused such questioning there, of course would be no question of producing the medical records the Appellant wished to obtain. <u>But the fact is he authorized the Appellant to call certain member in support of his defence. We know that the Appellant intends to question them on subjects such as</u> their state of health, their alleged dependence on cigarettes, the reasons for it, <u>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,</u> the presence of carcinogens other than tobacco in their environment, [cross-reference omitted], the moral or other damages they would suffer, etc. At the point where the Appellant is authorised to conduct these interrogations, is access to the medical

> records of these persons not a kind of natural accessory in this type of questioning?
>
> [Emphasis added; cross-reference omitted]

[580] However, in the context of the administration of evidence at trial, the Appellant ITL did not avail himself of this opportunity and did not question Mr. Blais' successors, or Miss Létourneau, or any of the 150 Members that had been chosen for this purpose. The Appellants JTM and RBH also did not conduct any questioning. The file therefor contains no proof of the personal and real 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 Miss Létourneau.[571]

[581] In the case f Mr. Blais, we know he started smoking 1954 at age 10. In 1987, following an episode of heart palpitations, a doctor, although he concluded that "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 don't 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 Miss Létourneau, we know a little more. She began smoking in 1964 at age 19, apparently unaware that smoking was addictive. Around 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 snot 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 for her to stop smoking. Fifteen years later, in 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 Miss Létourneau could not overcome her addiction.[574]

---

571 See also infra, paras.[724] et seq.

572 Motion re-amended for authorization to institute a class action and to be a representative, November 8, 2004, para. 2.9.

573 These facts, mentioned more or less in the same terms by the motion initiating the proceedings, were also alleged by the successive versions of the motions for authorization to institute a class action and supported in this case by affidavits from the interested party.

574 These facts, which are the result of the proceedings, also correspond to the framework adopted by the Court of Québec, Small Claims Division, 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. His action was dismissed: Létourneau v. Imperial Tobacco ltée,[1998] R.J.Q. 1660 (C.Q.), the Judge holding that, on the basis of 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

DRAFT

[583] We have not other information, so it is impossible to rule on Mr. Blais' and Miss Létourneau's actual knowledge of the harmfulness of cigarettes and verify whether this knowledge meets the threshold require dot exonerate the Appellants. And since we know nothing about the other Members of either Class, it is impossible to conclude that there is any real knowledge on their part.

[584] We will assume that there are likely to be Members within these Classes who are well aware of the harm of smoking, at the required level, and who were sufficiently informed so that they could be deemed to have accepted the risk and harm and waive 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-know facts, that is, generally known in a reliable and certain manner. This would be facts that the Class Members could not ignore, unless they failed in their own obligation to inform themselves with notoriety leading to the presumption of knowledge under articles 2846 and 2849 *C.C.Q.*

[586] Therefore, here it is a matter of establishing a fact, the notoriety of danger and 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, which they claimed had been widespread since the late 1950s, as shown by expert evidence that the Appellants claimed the Judge erroneously ruled out. In their 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

---

created by nicotine. The Judge also considers that the plaintiff knew that the cigarette was harmful to her health and that she should have sought information before starting to smoke. This judgment does not have the authority of res judicata and cannot be used as evidence (art. 563 C.C.P. and 985 C.C.P.), but is here to confirm the alleged facts, although without further detail. On the merits, however, the evidence adduced in this appeal is not that of the case at hand, so that most of the Judge's factual findings (particularly those concerning the state of science, in 1964, on nicotine dependence) are of no use.

DRAFT

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".

[Cross-reference 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]

[…]

[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

[575] The last sentence of this paragraph is not without irony in that it refers to a "consensus on medical causation" which would have been 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 for their appeals.

DRAFT

> 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.
>
> [Cross-reference omitted]

[589] The Appellant RBH defers to the other two on this point.[576]

[590] At the appeal hearing, here is how the Appellants formulate 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.

DRAFT

---

576 Appellant's Argument RBH, para. 9.
577 Québec Class Actions Appeal - Outline for Appellants' Oral Argument, p. 10-11.

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.

[Caractères gras dans l'original]

[591] In short, 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 beginning of the 1960s, if not eve in the 1950s.

a. Was the reputation 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 did not demonstrate how this factual determination would be vitiated by a manifest and decisive error. There is obviously no question here of reviewing all the expert evidence on the subject (which evidence is highly contradictory) or repeating the long assessment procedure that the Judge undertook to come to this conclusion, but some elements can be highlighted.

[593] First, it is very surprising to note what the Appellants assert is the notoriety of information, which until 1972, they carefully concealed[578] and of which they later (in 1988) disclosed only in significant 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 disease, it did not reach the threshold required to speak of a level of knowledge likely to exempt Appellants under the extra-contractual 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 must be informed – as has been often repeated – in an accurate, complete and understandable manner, and also be informed about how to protect him or herself from it, especially when the danger is high and the risk significant. Only such information makes it possible to induce knowledge that itself signifies the acceptance of

[578] Except for the surprising and isolated admission of the RBH author company in 1958, which was quickly withdrawn.

DRAFT

the risk and harm, and the pursuant waiver. However, it is primarily the responsibility of the manufacturer to provide this information.

[596] Admittedly, the user has a duty to inform him 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 pro in question, but which cannot require in depth research. Indeed, a person who intends to acquire or use a product, especially a “mass consumption product”, does not have to resorted 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 burden, under any applicable legislation (art. 1053 *C.C.L.C.* or 1473 *C.C.Q.* or 53 *C.P.A.*). In the context of 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 of 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 dangerous product. Between 1972 and 1988 it contains the statement we already mentioned.

[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 will find will not be of a nature to enlighten him or her and certainly not at 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 the user who would be 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 are some warnings against smoking. In the 1950s, cigarette smoking (despite the number of smokers) was not always well regarded, especially for

[579] In 1956, according to a survey by the Canadian Institute of Public Opinion, reported by La Presse, 62% of Canadians smoke and 30% of Canadian women smoke, for an average of 46% (Exhibit 20065.826 - under Exhibit 20065 entitled "Flaherty Documents", p. 134346 (a.c.), p. 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, p. 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 which the Appellants will convey, in one way or another, from the 1960s to the late 1990s

DRAFT

women. It was related to various diseases, it did not seem clean, and it left an odor on curtains and clothing.[581] A person looking for information would no doubt see that, which, in the public arena, is 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 1970s,[582] the Appellants had, for a long time already, undertaken a disinformation campaign in using every means possible on every front as had already been mentioned above, aiming to pull the rug out from under tobacco critics by denying the facts, minimizing them, challenging the science on the subject[583] and presenting the debate on the harmful nature of tobacco as a mater 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, that 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 is concerned about what he or she may read in the 1950s or 1960s, or is curious about the warning appearing on cigarette packages in 1972 and seeks more information, he or she obtained contradictory information, a significant portion of which maintained that cigarette smoking is not harmful or is not as harmful as some would have us believe, information that is superimposed on advertising that is effective at playing the seduction card on many levels. The person may even discover 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 spreads.[585]

---

581 See Exhibit 758-11, Sales Lecture no. 11 - Motivation Research: Cigarettes - Their Role and Function - Oct. 1957, at pp. 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, p. 1)[Emphasis added].

583 They do 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, p. 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, p. 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 would be one of the advantages of this product, as well as its virtues in maintaining a normal weight (pp. 11-12).

585 See, for example, Exhibit 20065.2980 - under Exhibit 20065 entitled "Flaherty Documents", at 134450 (a.c.). This is an article in the family supplement to the Journal de Montréal, dated February 23, 1975,

DRAFT

[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 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 risks of smoking or even the absence of real risks.

[603] The Trial Judgement gives plenty of examples of the Appellants work to undermine information. Among other things paragraphs 245 to 253, 257 and 258 or 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 failure to fulfill the manufacturer's 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 the manufacturer's misleading or deceptive representatives. One cannot blame anyone who has relied on such representatives for not having gotten more information, let alone for not having sought to prove them false or question them.

[605] In this sense, the Appellants' counter discourse is an impediment – or at least, one of the impediments – to the knowledge 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 further actions during this period. Moreover, while they argue that the public cannot fail to have seen or heard what the media of the time were broadcasting about the harmful effects of smoking, there is nor reason to think that they only saw or heard that and

---

with the following title: "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 (for example, by stating that "Cigarettes kill more Québecers than cars", Exhibit 20064.127, October 16, 1977). See also Exhibit 2, p. 2, which supports the proposal of cigarettes as 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 chairs this committee, hence the "Isabelle Committee" to which the trial judgment refers (see paras. 105, 248-250, 456, 460).

[587] See Exhibit 1399.

[588] Exhibit 1399.

[589] See Exhibit 1400, p. 119038-119039.

DRAFT

none of the competing information they were disseminating at the same time. On this point we can only agree with the Judgement of the first instance.

[606] Consequently, to come back to the person who was trying to learn more about cigarettes in 1950s, 1960s or 1970s, he or she would have found limited, 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 have 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. Wouldn't the ignorance of the user (as well as that of the general public) dissipate with the appearance of these warnings? However, earlier 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 who would have felt concerned by those tepid warnings and who wanted to find more information would have discovered the controversial information described above.

[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*: […]
>
> [Cross-reference omitted]

[609] The Judge is correct: these articles published in scientific journals are not accessible to the public and cannot be expected to make the toxic and addictive effects of cigarettes known to the public.

---

590 On the encouragement provided by the federal government in this regard, see in particular the testimony of Denis Choinière, June 11, 2013, pp. 216 and 219.

591 See Exhibit 20005, p. 14.

[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, used above:[592] "what is known in a sure and certain way by a great many people". We can in no way conclude that the dangers and risks of smoking were known, at that time, in a certain and sure manner by a great 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 the anecdotal,[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 snot stand up to analysis.

[612] At best, and this is what ultimately emerges from all the expert reports, while some of the 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 pathology 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

[592] See para.[456], referring to Le Grand Robert de la langue française, supra, note 473.
[593] Like that of the grandfather of the witness Steve George Chapman, who died of lung cancer: for this reason, from an early age, the witness, born in 1964, would have known the links between tobacco and cancer (see supra, note 510). But, of course, for every grandfather who dies 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 famous.

such as lung or throat cancer and emphysema were well known and claim this was known o 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 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 not significant for individuals,[594] but 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.
>
> **HEALTH- RESPIRATORY DISEASES**
>
> **REFERENCES**
>
> [the scientific references contained in notes 1, 2, 3 and 4 of the above text are not reproduced here; bold characters in the original]

[615] This is indeed the public and the public and media attitude of the Appellants and the point of view they will defend from the 1970s, after years of pure and simple denial.

---

[594] See supra, note 554.
[595] Exhibit 846-AUTH, p. 27-28.

DRAFT

However, it is paradoxical, to say the least, to claim on the one end that the ordinary public is well known for a causation that is vigorously denied 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's date of 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": so the reality would be known, while 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 fiscal 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 Descôteaux (ITL employee, who later became ITLs 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.

[621] On that day, it is true that the Surgeon General of the United States had already, for six years (1988), recognized the addictive nature of tobacco, which we will recall, it

---

[596] Let us consult, somewhat at random, Exhibit 758-11, Sales Lecture no. 11 - Motivation Research: Cigarettes - Their Role and Function, supra, note 581, p. 1-3, document dated October 1957.

DRAFT

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)?

The Respondents argue that the actual extent of the risks and dangers of smoking "was unknown to the public throughout the period covered by the actions"[599] (1950-1998) and, indeed, that "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 the addictive effects of smoking were well-known on March 1, 1996.

[624] We must recall that the well-known nature of the knowledge referred to here must be defined according to the threshold of knowledge for the user, which would allow the manufacturer to be exonerated, namely knowledge that is equivalent to acceptance of the risk and harm and waiver of recourse. However, the Judge does not appear to have taken this threshold into account when determining the dates when the knowledge became well-known.

[625] It must be recalled that the reputation referred to here must be defined according to the threshold of knowledge which, for the user, allows the manufacturer to be exempted, namely knowledge such that it is equivalent to acceptance of the risk and damage and waiver of recourse. However, the Judge does not appear to have taken this threshold into account in determining the knowledge dates.

[626] First, let's talk about 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

DRAFT

597 Exhibit 601-1988, pp. 1 et seq.
598 Exhibit 212, p. 1 et seq.
599 Respondents' Argument, para. 254.
600 Respondents' Argument, para. 258.

course, during this 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 of the previous section[601] can be transposed here: until at least 1988, before the *Tobacco Products 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 is 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, deny or the scientific nature of which they call into dispute. 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 informational 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 the 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 their own responsibility to get information, 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 gullible 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 under 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

---

[601] In particular paras.[605] et seq.

[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: Health and Welfare Canada considers that the health danger increases with use - avoid inhaling".

DRAFT

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 regulatory 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 well-known nature 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 gullible 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 gullible 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 from 1994, when the regulatory warnings became more explicit (although still unsatisfactory in many respects), we can, once again, not ignore the counter-discourse maintained by the Appellants, which continued unabated and which, following the Supreme Court Judgement in 1995, was once again associated with misleading advertising strategies, contrary to SS. 219 and 228 *C.P.A.*[604]

[632] We will take 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 item 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]

---

603 See testimony of Denis Choinière, June 11, 2013, p. 219.

604 For example, Exhibit 1215 should be read. This is a note describing the advertising branding that the Appellant RBH is considering for some of her products. See also exhibits 1217-2m and 1218-2m, which concern the branding of certain marks of the Appellant ITL. This is referred to as "lifestyle" advertising, which will be analyzed further in the chapter that these reasons devote to sections 219 and 228 C.P.A.

605 Exhibit 105-1994-PP-2m, Leaflet, vol. 30, n° 5, September / October 1994, article "Clearing the air - Part one: "Who is responsible"", p. 1 and 4, from which the following two sentences can be extracted, 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 "Clearing the air - Part two: "Smoking and Health, The scientific Controversy", pp. 2 and 6; Exhibit 20065.11790 - under Exhibit 20065 entitled "Flaherty Documents", p. 134945 (a.c.), article "Clearing the air - Part five: "Smoking and risk"", p. 7. In 1994, in a brochure

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.

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”.

---

apparently intended for the public, BAT repeated the same discourse on the absence of scientifically established causation (Exhibit 242B-2m; in the same sense, 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, p. 4):

> But I'm not telling you that tobacco is not the cause of diseases, nor am I telling you that tobacco is the cause of diseases. 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: « Y*ou 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, p. 133976 (a.c.)).

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, 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".

DRAFT

> Studies have shown that 99.9% of all 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 gullible and inexperienced person or an ordinary and reasonable person) exposed to this type of argument particularly if he already smokes,[607] can be convinced of it despite being 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. However, the "disinformation" counter-discourse assiduously put forth by the Appellants at the time does not promote realizing these risks which is precisely the objective.

[634] Once again, the issue here is whether the morbid effects of smoking (lung or throat cancer, emphysema) are well known – a high standard – and to determine the date on which the well-known nature 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 the user or future user of any product while they have the obligation to inform themselves does not have the obligation to do extensive research on the subject and even less, the obligation to unravel the contradictory information coming from each side.

[607] About 30% of the Canadian population still smokes 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 2001, Ottawa, Minister of Industry, 2002; Exhibit 40497.64B, Canadian Tobacco Use Monitoring Survey (CTUMS), Ottawa, 2008, p. 202278 (a.c.)).

DRAFT

[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 assumption most favourable to the Appellants) or 1994,[609] or perhaps even in the case of the gullible, 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 is "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. This was not yet known within the meaning of art. 1473 *C.C.Q.* or prior Praetorian law and was not so widespread as to allow us to infer there was general knowledge.

[636] In another line of thinking, 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.

[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 is missing? Because knowing or not knowing, the powerful addictive effect of cigarettes directly affects the user or future user's assessment of their risk. Assuming they know the danger, can we, nevertheless, say that they accept it? Whereas, 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 indicates, smoking in certain public

---

[608] When the first regulatory information appears on cigarette packages.

[609] With the coming into force of regulatory statements that describe in more detail the harmful effects of cigarettes on health.

[610] Unless he is a victim of second-hand smoke, which is not the subject of the actions brought by the Respondents against the Appellants.

[611] *An Act respecting the protection of non-smokers in certain public places, S.Q. 1986, v. 13.*

DRAFT

places.[612] These prohibitions which were not yet very severe,[613] however suggest that if the smoker can 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. Let us here reproduce here for the sake of convenience, Section 3 of this act:[615]

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;	*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;

612 The Non-Smokers' Health Act, S.C. 1988, v. 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 Québec 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, v. 13.*

615 See supra para.[119].

DRAFT

and

(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 smoking "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 3a).

[641] However, even if ignorance of 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 its addictive effect of the actual intensity of that, and consequently the actual risks of those effects. Rather, the harmful effects of smoking are 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 have been retained, also on a voluntary basis).

[642] In short, for all these reasons, the date on which the Judge recognizes that the information concerning pathologies related to smoking is well-known cannot be that of January 1, 1980. As previously indicated in the assumption 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 recognizes the morbidity of cigarettes, or January 1, 1989, the date of its coming into effect and the date of the first regulatory notices, the first regulated warnings. 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-known before the date on which the addictive effect of cigarettes also becomes known, keeping in mind that this knowledge must reach a threshold that allows

[616] *Tobacco Act, S.C. 1997, v. 13.*

DRAFT

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 to the Class Members.

[644] The Appellants argue that, in the best case scenario for the Respondents and class Members, this date must be September 12, 1994, when the reference to addiction first appears on cigarette packages, a reference prescribed by the *Tobacco Products 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. The Judge therefore erred in setting that date at March 1, 1996.

[645] The Judge gives 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

---

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, v. 13.*

619 Paragraphs 129 and 130 of the judgment have already been reproduced in paragraph[143] of these reasons.

DRAFT

> 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.
>
> [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]
>
> [Cross 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, who documents this behaviour at

[620] The Environics hole referred to in para. 132 of the judgment is Exhibit 1337-2m.

[621] The Appellant RBH even seemed to challenge it again in her defence of February 29, 2008 (paras. 57 to 64), arguing that smoking was a habit that can be difficult to break, but that it can still be done with good will. See also the defence filed by the Appellant JTM in the Létourneau case, paras. 282 to 285. See also ITL's defence in the Létourneau case, dated February 29, 2008, 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, appearing before them 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", p. 134870 (a.c.), The Gazette, April 2, 1997). In 1995, RBH continued to defend the view expressed by Prof. Warburton and Prof. Cormier, who

length, knew about and which he should have considered. We understand that he did not do so because he is distinguishing the Appellants' fault in this area from the fault consisting and 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 knowledge could be 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 mandator regulatory warnings). Appellant RBH did so in 1999[624] and Appellant JTM did so in 2004.[625]

---

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, writes as follows:". *Addiction is very much a concern recognizing the situation 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, p. 3). The reports of Prs. Warburton and Cormier are found in Exhibits 430 and 9A respectively.

[623] Document entitled "ITL's Position on Causation Admission" (p. 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 " (p. 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, p. 2).
In October 1999, in a paper for the House of Commons Health Committee (UK), BAT, acknowledges that nicotine "is not a substitute for nicotine. *does have mild pharmacological properties and does play an important role in smoking* » while not preventing anyone from quitting smoking (Exhibit 20230, 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.

[648] The fact that, in these circumstances, the knowledge of this attribute of the cigarette was only truly known in March 1996 doesn't 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 denying it.[626]

[649] For all these reasons, the Court dismissed the Appellant's claim 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 them, as required by the applicable standards, to accept risk and harm (equivalent to a waiver of recourse). Contrary to what the applicants suggest, not only was this a knowledge not known during the 1950s, 1960s, or 1970s, but it is even doubtful that it was known 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, namely March 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 the information was 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.

Even today, however, this recognition is still subject to certain reservations. The idea of addiction is indeed accepted, but in a 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 the 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.
>
> [Caractères gras dans l'original]

[626] See also below, para. [1111].
[627] *Tobacco Act, S.C. 1997, v. 13*.

[651] Consequently, the Appellants 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]

[652] In the case at bar, the Judge shared responsibility 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 committed reckless behaviour leading to the sharing of responsibility by the Judge according to the combined rules under arts. 1477 and 1478 *C.C.Q.* The Judge set this date to take into account the fact that dependence, 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] However, we can wonder whether the Members of the Blais Class, as of the date, which was determined by the trial judgment, had sufficient knowledge of the safety defect so that they could be blamed with a fault (i.e. the “stupid” recklessness of starting or continuing smoking 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 a full acceptance of the risk and waiver of any recourse), or they did not. In the first case, there could be no shared liability, since art. 1473 para. 1 *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 shared, 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 a sharing 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.*?

---

[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. v. Canada (Attorney General),[2003] R.J.Q. 181, the Superior Court had already concluded to this effect (paras. 127, 468-469), a conclusion that the Supreme Court adopted in its subsequent decision (Canada (Attorney General) v. JTI-Macdonald Corp., 2007 SCC 30, paras. 134 in fine).

DRAFT

[655] This is a thorny question, which the Court does not deem useful to answer, since the Respondents did not appeal the shared liability imposed by the Judge.

[656] In summary, with respect to the plea of exemption raised by the Appellants, the Court concludes that:

- the cigarettes' safety defect is not apparent;
- the Appellants have not demonstrated that the Class Members had real knowledge of the morbid and addictive effects of smoking;
- nor did the Appellants establish that these effects were so well-known as to infer that all Members of the Class had enough knowledge to be equivalent to an 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 one hand, it leads to the result that the Judge erroneously achieved by means of 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 an incidental appeal in the case of the Blais Class Members. This also has no effect on the punitive damages awarded by the Judge.

C. Summary

[658] In conclusion and like the Trial Judge, this 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 plea for exoneration under art. 1473 para. 1 *C.C.Q.*, an argument that is recognized by prior law and which has its equivalent in the provisions of 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 fault under causation.

DRAFT

D. Causation

i. General treatment of this issue by 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 Québec legislator has adopted legislation specifically targeting certain remedies related to tobacco products and that 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 Québec civil law, there are several that are both descriptive and normative to address the issue of causation. The main ones, and those on which the doctrine focuses the most attention, are those dealing with equivalence of conditions,[629] adequate causation,[630] immediate causation (or “proximate cause” in English)[631] and reasonable prediction of consequences.[632]

[662] The theory of equivalence of conditions basically consists in “seeking all the facts without 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

---

[629] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,669, p. 713; Frédéric Levesque, Précis de droit québécois des obligations: contrat, responsabilité, exécution et extinction, Cowansville, Yvon Blais, 2014, paras. 464-466, p. 242-243; M. Tancelin, supra, note 382, paras. 787-790, p. 564-565; Centre de recherche en droit privé et comparé du Québec (ed.), Dictionnaire de droit privé et lexiques bilingues: Les obligations, Cowansville, Yvon Blais, 2003, "causalité"; Pierre Deschamps, "Conditions générales de la responsabilité civile du fait personnel", in École du Barreau, Collection de droit 2018-2019, vol. 5 "Responsabilité", Montréal, Yvon Blais, 2018, p. 43.

[630] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,669, p. 713; F. Levesque, supra, note 629, paras. 464-466, pp. 242-243; Patrice Deslauriers, "Injury, Causation, and Means of Exoneration", in Aline Grenon and Louise Bélanger-Hardy (eds.), Elements of Québec Civil Law: A Comparison with the Common Law of Canada (Toronto: Thomson Carswell, 2008), p. 418; Centre de recherche en droit privé et comparé du Québec, "causalité", supra, note 629; P. Deschamps, supra, note 629, p. 43-44.

[631] V. Karim, Les obligations, vol. 1, supra, note 389, para. 2839, p. 1212; J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, paras. 1-669, p. 713; M. Tancelin, supra, note 382, paras. 787-790, pp. 564-565; Centre de recherche en droit privé et comparé du Québec, "causalité", supra, note 629; P. Deschamps, supra, note 629, pp. 42-43.

[632] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,669, p. 713; V. Karim, Les obligations, vol. 1, supra, note 389, para. 2839, p. 1212; P. Deslauriers, supra, note 630, p. 418; P. Deschamps, supra, note 629, p. 44.

[633] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,670, p. 714.

[634] Québec Research Centre for Private and Comparative Law, "Equivalence of Conditions", supra, note 629.

DRAFT

sorted.[635] To establish the cause of harm under this theory is equivalent to identifying all the *sine qua non* conditions for 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 actual event itself or the circumstances that coincided with it.[638] Born "from desire to find a criteria making it possible to discriminate among all the *sine qua non* conditions"[639] of the harm, this theory relies, according to some people, 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 "the event which, by its mere existence, objectively makes it possible for the damage to occur";[641] under the second criterion, it is "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 immediate causation ("proximate cause") "only retains the cause immediately preceding the injury as the real cause of the injury".[643] Having many followers in the area of common law,[644] this theory distinguishes among all the appropriate causes to retain only "the event that occurred last in time and which, by itself, could objectively be sufficient to produce the totality of the damage".[645]

[665] The theory of reasonable predictability of results, on the other hand, "retains a causal relationship between the fault and the injury, when the injury caused was

---

[635] P. Deschamps, supra, note 629 at 43. See also Lara Khoury, Uncertain Causation in Medical Liability, coll. "Minerve", Cowansville, Yvon Blais, 2006, p. 18.

[636] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,670, p. 714; P. Deschamps, supra, note 629, p. 43.

[637] P. Deschamps, supra, note 629 at 43.

[638] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, paras. 1 672, pp. 714-715; F. Levesque, supra, note 629, para. 464, p. 242; Centre de recherche en droit privé et comparé du Québec, "causalité adéquate", supra, note 629; P. Deschamps, supra, note 629, p. 43.

[639] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,672, p. 715.

[640] J.-L. Baudouin, P. Deslauriers et B. Moore, *La responsabilité civile*, vol. 1, *supra*, note 265, paragr. 1-672, p. 715; P. Deschamps, *supra*, note **Error! Bookmark not defined.**, p. 43-44.

[641] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,672, p. 715.

[642] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,672, p. 715. See, for example, M. Tancelin, supra, note 382, para. 789, p. 564; Centre de recherche en droit privé et comparé du Québec, "causalité adéquate", supra, note 629.

[643] Centre de recherche en droit privé et comparé du Québec, "causalité immédiate", supra, note 629. See also M. Tancelin, supra, note 382 at para. 790, p. 565.

[644] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,674, p. 715.

[645] J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,674, p. 715.

DRAFT

normally predictable for the party".[646] Originating in Anglo-American law, this theory allows, in certain circumstances, "to exclude unusual or uncommon damages for those that are of exceptional gravity in relation to the fault".[647]

[666] In general, Québec 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 is most often reflected in the dismissal of theories of equivalence of conditions and immediate causation.[650] The theory of reasonable predictability of consequences is sometimes applied in conjunction with the theory of adequate causation, but adequate causation is more widely used in case law.[651]

[667] In comparison, in the common law provinces, the causation test most frequently used is the "determining factor" (sometimes referred to as "but for" or, in English, the

---

646 J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,675, p. 716.

647 J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,676, p. 717.

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. v. Bell ExpressVu, l.p., 2015 QCCA 422, para. 81; J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, paras. 1-333, p. 374.

649 Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre), 2015 SCC 39, para. 50, citing with approval: J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, para. 1,683, p. 720. See also Roberge v. Bolduc,[1991] 1 S.C.R. 374; Site touristique Chute à l'ours de Normandin inc. v. Nguyen (Succession de), 2015 QCCA 924, para. 57; Fédération des médecins spécialistes du Québec v. Conseil pour la protection des malades, 2014 QCCA 459, para. 139; Wightman v. Widdrington (Estate of), 2013 QCCA 1187, para. 243; Syndicat des cols bleus regroupés de Montréal (CUPE, section locale 301) v. Coll, 2009 QCCA 708, para. 78; Bourque v. Hétu,[1992] R.J.Q. 960 (C.A.); V. Karim, Les obligations, vol. 1, supra, note 389, para. 2849, p. 1215; M. Tancelin, supra, note 382, para. 791, p. 565; Centre de recherche en droit privé et comparé du Québec, "causalité", supra, note 629; A. Nadeau and R. Nadeau, supra, note 223 at para. 652.

650 J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, paras. 1 683, pp. 720-722; F. Levesque, supra, note 629, paras. 464-466, pp. 242-243; M. Tancelin, supra, note 382, para. 794, p. 566; Centre de recherche en droit privé et comparé du Québec, "causalité immédiate", supra, note 629.

651 Laferrière v. Lawson,[1991] 1 S.C.R. 541, p. 602; J.-L. Baudouin, P. Deslauriers and B. Moore, La responsabilité civile, vol. 1, supra, note 265, paras. 1-683, pp. 720-721; F. Levesque, supra, note 629, para. 464, p. 242; M. Tancelin, supra, note 382, para. 791, p. 565; P. Deschamps, supra, note 629, p. 45; L. Khoury, Uncertain Causation, supra, note 635, p. 27; Centre de recherche en droit privé et comparé du Québec, "causalité adéquate", supra, note 629. See, for example, North Atlantic Shrimp Inc. v. Council of the Maliseet First Nation of Viger, 2012 QCCA 7, para. 93, Supreme Court application for leave to appeal dismissed, July 19, 2012, no. 34713; Laval (Ville de) (Service de protection des citoyens, police department and emergency call centre 911) v. Ducharme, 2012 QCCA 2122, paras. 156-157; Provencher v. Lallier, 2006 QCCA 1087, para. 40; Viel v. Entreprises immobilières du terroir Ltée.., [2002] R.R.A. 317 (C.A.), paras. 77-80; Chouinard v. Robbins,[2002] R.J.Q. 60 (C.A.), paras. 33-34; Caneric Properties Inc. v. Allstate compagnie d'assurance,[1995] R.R.A. 296 (C.A.).

"but-for test").[652] This test is an application of the theory of equivalence of conditions.[653] We therefore must ask ourselves whether, but for the fault of the Defendant, would the damage have 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]

> [Translation] […] In general, the "significant contribution" test should be applied in cases that meet two requirements.
>
> First, it must be impossible for the plaintiff to prove by means of the "determining factor" test that the Defendant's negligence caused him harm. This impossibility must be due to factors beyond the plaintiff's control; for example, the limitations of science. Second, it must be clear that the Defendant has breeched the duty of care with respect to the plaintiff, exposing the plaintiff to an unreasonable risk of harm, and that the plaintiff must have suffered the harm in question. In other words, the harm caused to the plaintiff must be capable of being caused by the risk created by the fault of the Defendant. [...]

[669] More recently in *Clements v. Clements*, the Chief Justice revisited the pre-eminence of the "determining factor" as a test of causation- the nine Judges of the Court were unanimous on this point- while making the following clarifications:[657]

---

652 See for example Ediger v. Johnston, 2013 SCC 18, para. 28; Clements v. Clements, 2012 SCC 32, para. 8 and 13; Fullowka v. Pinkerton's of Canada Ltd., 2010 SCC 5; Resurfice Corp. v. Hanke, 2007 SCC 7, para. 21-22; Blackwater v. Plint, 2005 SCC 58, para. 78; Athey v. Leonati, [1996] 3 R.C.S. 458; Snell v. Farrell, [1990] 2 R.C.S. 311; Horsley v. MacLaren, [1972] R.C.S. 441; Philip H. Osborne, The Law of Torts, 5th ed., Coll. "Essentials of Canadian Law," Toronto, Irwin Law, 2015, p. 54; Lara Khoury, "The Canadian, English and Australian Judge in the Face of Causal Uncertainty in Medical Liability", (2014) 59: 4 McGill R. 989, p. 994 and 1002; Erik S. Knutsen, "Coping with Complex Causation Information in Personal Injury Cases", (2013) 41 Advoc. Q. 149; David Cheifetz, "The Snell Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Shark", (2005) 30: 1 Advoc. Q. 1; Louise Bélanger-Hardy, "Les délits", in Aline Grenon and Louise Bélanger-Hardy (eds.), Elements of Québec Civil Law: A Comparison with the Common Law of Canada, Toronto, Thomson Carswell, 2008, p. 396.

653 Lara Khoury, Uncertain Causation in Medical Liability, coll. "Minerve", Cowansville, Yvon Blais, 2006, p. 18 [Uncertain Causation].

654 *Ediger v. Johnston, 2013 SCC 18, para. 28; Clements v. Clements, 2012 SCC 32, para. 8; Blackwater v. Plint, 2005 SCC 58, para. 78; P. H. Osborne, supra, note 652, p. 54.*

655 In this sense, the criterion of the determining factor 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 and 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, para. 24 and 25.*

DRAFT

> [Translation] [43] It's important to reaffirm that the traditional test of the determinant factor continues to apply in ordinary cases involving several agents or perpetrators. As I explained earlier the issue is whether to determine whether the plaintiff established that the negligence of one or more of the Defendants constituted a necessary cause of the injury. The respective degrees of fault of the Defendants are taken into account in calculations made of the various legislative provisions on contributory negligence. On the other hand, the test of appreciable contribution to risk applies in cases where it is impossible to prove causation under the determinative factor test with respect to any of the various Defendants- all of whom have otherwise been negligent in a manner that may actually have caused the plaintiffs injury- because each one can "point fingers" at the others and thus prevent a link of causation from being established on a balance of probabilities.
>
> [44] This does not mean that new situations will not raise new questions. For example, I postponed to another occasion the consideration of the situation that may arise when many plaintiffs bring an action for damages for exposure to toxic agents and where, although statistically demonstrated that the Defendant's actions have caused harm to certain Members of the Class, it is also impossible to determine who these Members are.

[670] These nuances are important because as discussed below the British Columbia Legislative Assembly passed legislation in July 2000 entitled *The Tobacco Damages and Health Care Costs Recovery Act,*[658] which inspired the Québec Legislator in 2009. However, the repeated use of in this law of wording such as "*causes, directly or indirectly*" and "*causes or contributes to*" – wording which recalls the terminology used for the test for the appreciable contribution to risk – seems to indicate a desire to incorporate a more flexible test for causation than the determining factor test.

[671] To this we must add several important clarifications taken from the act that the Québec Legislator adopted like that of several other provinces, to regulate certain legal proceedings related to tobacco products. Before proceeding with this analysis, we should recall the conclusion that the Court came to above in paragraph [404] et seq.: when a manufacturers liability is engaged under articles 1468 et 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 and nevertheless for the sake of being complete the question of conduct causation will also be addressed in the following analysis because it has been argued persistently on both sides without the parties questioning the specific scope of articles 1468 et 1469 *C.C.Q.*

---

657 *Clements v. Clements*, 2012 CSC 32, paragr. 43 et 44.

658 *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, v. 30.

DRAFT

ii. Effect of the tobacco-related Damages Health Care Cost Recovery Act

[672] The *T.R.D.A.* came into effect on June 19, 2009. It is well known to be modeled on British Columbia's *Tobacco Damages and Health Care Costs Recovery Act*. Both laws have been the subject of a constitutional challenge in the Courts. In both cases, the validity of the law 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 Québec Court of Appeal with respect to the *T.R.D.A.* (*Imperial Tobacco Canada Ltd v. Québec (Attorney General)*)[660].

[673] In the case at bar, ruling on the applicability and scope of the *T.R.D.A.*, the Trial Judge found that the law applied to the actions before him and that by virtue of section 15, the law allowed the respondent to provide epidemiological or statistical evidence of (individual) medical causation and (individual) conduct causation.

a. Apparent scope of *T.R.D.A.*

[674] Like the law on which it is based, *T.R.D.A.* enacted a number of rules that derogate from common law and 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.* is part of a particular context, which is the context of civil law in Québec. It is not identical to the *Tobacco Damages and Health Care Costs Recovery Act*, as the Québec Legislature has included a few additional important details. The *T.R.D.A.* must be interpreted accordingly.

[675] To fully understand the contribution of the *T.R.D.A.* to this litigation it must be read carefully. The provisions cited below are the most immediately relevant and (indiscernible) to identify what appears to be the intentional scope of this legislation.

[676] Starting with the first section, the legislature announced his intentions. The law deals with health and smoking. We see that the legislator establishes this specific rule facilitate the government's recovery through the Courts of the cost of health care resulting from a fault by tobacco manufacturers. i.e.: a breach of one of their obligations. But that it also wishes to see "some of these rules" applied in actions for damages related to tobacco that are brought by others than the government.

CHAPITRE I OBJETS ET DÉFINITIONS	**CHAPTER I** PURPOSE AND DEFINITIONS
1. La présente loi vise à établir des	**1.** The purpose of this Act is to

[659] *British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49*.

[660] *Imperial Tobacco Canada Ltd v. Québec (Attorney General),* 2015 QCCA 1554, application for leave to appeal to the Supreme Court dismissed, May 5, 2016, no. 36741.

> 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.
>
> 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.
>
> 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.
>
> 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

[677] The foregoing serves as a sort of forward to some specific rules on the meaning and scope of which cannot be misunderstood. The legislator uses double references within the same law for the purposes of the ongoing appeals, the starting point for analysis is article 25.

> **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.
>
> Ces règles s'appliquent, de même, à toute action collective pour le recouvrement de dommages-intérêts en réparation d'un tel préjudice.
>
> **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.
>
> Those rules also apply to any class action based on the recovery of damages for the injury.
>
> [Soulignements ajoutés]

DRAFT

[678] There can be no doubt that both class actions decided by the Trial Judge are, within the meaning of this article, “class action[s] for 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 article 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 includes articles 22, 23 and 24 *T.R.D.A.*

[679] The first reference is found in article 25. Article 24, included in §3 described above, makes a second reference. It specifies the following:

> **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.

> **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.
>
> [Soulignements ajoutés]

[680] We must therefore deduce from the following that the effect of the double reference is as follows: article 25 refers to article 24, which itself refers to article 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 – provided under the relevant part of article 15? Here is what it says:

> **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

> **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.

DRAFT

> études pertinentes, y compris les renseignements obtenus par un échantillonnage.

[682] Article 25 is explicit and provides that the double reference referred to above must apply ''with the necessary adaptations''. What are these adaptations?

[683] With the necessary adaptations, Section15 necessarily means that in actions such as those for 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 solely on the basis of statistical information or information from epidemiological studies, sociological studies or any other relevant studies including information derived from a sampling.

[684] The specific wording of this article 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 irrelevant this same proof can also be established ''on the sole basis'' of any other information (this is the meaning of the word) ''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 II *British Columbia* v. *Imperial Tobacco Canada Ltd.*[661] Such differences have their significance.[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 takes the trouble to edit the following provision further on.

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	**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.

[661] *British Columbia v. Imperial Tobacco Canada Ltd.,* 2005 SCC 49.

[662] Another comparable law, the *Act respecting the recovery of the amount of damages and the cost of health care attributable to tobacco*, O. 2009, v. 13, is also devoid of the words "on the sole basis of". This is what makes Khoury say that "Québec legislation goes much further" than that of other provinces (Lara Khoury, "Compromises and free transpositions in legislation allowing the recovery of the cost of health care from the province". tobacco industry, (2013) 43 RDUS 1, page 16).

pour le recouvrement de dommages-intérêts en réparation de préjudices liés au tabac.

[686] By this it points out that once the adjustments made by the *T.R.D.A.* have been received, common law, including, through case law sedimentation, remains the reference in a class action for damages. This obviously does not exclude the possibility that common law may evolve in accordance with this act and that evidence of this same kind may be admitted in a class action.[663]

b. Appellants' Critique of Section 15 *T.R.D.A.*

[687] The Appellants all argued that the Respondents had not discharged 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.* would inexorably lead to conclusion that the Respondents, in several respects, failed to discharge their burden of proof. By its nature the evidence that they offered would be powerless in law to establish either medical causation or conduct causation for the Members of the Blais and Letourneau Classes. To support these claims RBH relies primarily on paragraphs 16(2) and 17(2) *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. 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.	**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.
En outre, nul ne peut, dans une telle action, être contraint:	Moreover, no one may be compelled in such an action

[663] See *Clements v. Clements*, 2012 CSC 32, paragr. 44.

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 prodigués;

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. 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.

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.

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

(1) to answer questions on the health of, or the health care provided to, particular health care recipients; or

(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.

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.

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.

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

DRAFT

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 renseignements identifiant ou permettant d'identifier ces bénéficiaires en aient été extraits ou masqués au préalable.

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 blanked out.

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° 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° 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° 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.

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

(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;

(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

(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.

17. Si le gouvernement satisfait aux

17. If the Government establishes

DRAFT

exigences de preuve prévues à l'article 16, le tribunal présume:

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;

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. 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.

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° la quantité de produits du tabac appartenant à la catégorie visée par l'action fabriqués par le

the elements of proof required under section 16, the court presumes

(1) that the persons who were exposed to the type of tobacco product manufactured by the defendant would not have been exposed had the 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.

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.

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

(1) the quantity of tobacco products of the type involved in the action that were

DRAFT

défendeur qui ont été vendus au Québec entre la date de son premier manquement et la date de l'action ;

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

2° la quantité totale de produits du tabac appartenant à la catégorie 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.

(2) the total quantity of tobacco products of the type involved in 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.

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.

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.

[689] RBH, we should repeat, bases its reasoning first on subsections 16(2) and 17(2) T.R.D.A. It is clear, according to RBH, for a Defendant's liability to be engaged in a class action, the government must, under section 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

DRAFT

be sued to provide evidence under section 16(2), i.e. proof of general medical causation and nothing else.

[690] Continuing on that path, RBH then argues that, if the government relieves itself of the burden imposed on it by section 16(2), then article 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) demands government proof. 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 paragraph 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] It is important first to understand the effect of ss. 13 and 14 *T.R.D.A.* These two sections, as the following seven, make up § 2 ("*Special provisions for an action brought on a collective basis*") of the section other exercise of the government's right to recovery. They a re used to define what constitutes and what ay constitute "collective action" by the government to recover healthcare costs as defined in section 10.

[695] Section 13 states a general principle and shows in its first paragraph what is excluded from the judicial debate in the course of a class action: it cannot be an issue of 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

[664] RBH Argument Plan, para. 119.

DRAFT

therefore irrelevant. What matters, is a set or class of beneficiaries, 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 the 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 to receive "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 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 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, behavioral to other characteristic specific to a particular beneficiary, could be evidence in defence when the government is exercising the right of recover. 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 article 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 bring 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 section 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 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. The action "taken on a collective basis" by the government must proceed to a Judgement on the merits, regardless of what may be revealed by one or more pieces of evidence relating to a particular 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 the 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 the reading of section 19 that again, as in section 17(2), the act is expressed in terms of aggregates of persons ("persons", "a number of persons" or "a number of those persons").

[703] As recently pointed out by Justice Bich on behalf of a unanimous panel of Five Court Justices, legislative debates can provide useful clues as to the scope of a piece of legislation. Here is what she wrote:[666]

---

[665] RBH Argument Plan, para. 119.
[666] *Air Canada v. Québec (Attorney General)*, 2015 QCCA 1789.

> [Translation] [166] We know that parliamentary debates are an interpretative tool whose use requires some caution, given its nature. We also know that the use of such a tool is not always decisive and cannot contradict and unambiguous text. Nevertheless, the tool has since earned its stripes in case law and the Supreme Court itself reiterated this point recently in *Mouvement laïque québécois v. Saguenay (Ville)*, where it reiterated that such debates (as well as other elements), when they are ambiguous, are part of the indications that allow us to establish the legislator's objective, and therefore his intention.
>
> [Cross-reference omitted]

[704] In this case, S.19 *T.R.D.A.* was the subject of some specific and 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 S.19, the then Minister of Health and Social Services, Yves Bolduc, first mentioned a minor amendment, made at the request of the Barreau du Québec, that does not affect the issue discussed here. He then describes the purpose sought by the presumptions in S.17. The Minister was accompanied by Me 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 S.19, as far as what is relevant here, included the following discussion:[667]

> [Translation] **Mr. Bolduc:** Thank you, Mr. Chair. In S.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, S.19: "The court may reduce the amount of the healthcare costs for which a Defendant is liable or adjust among the Defendants their share of responsibility for the healthcare 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."
>
> Comments. This article properly recognizes the right of any Defendant in a collective action to obtain a reduction in the amount of healthcare costs to which he or she would be held if he or she were able to rebut any of the presumptions of causation provided for in S.17.

---

[667] National Assembly, Standing Committee on Social Affairs, *Journal des débats*, 39th Lég., 1st sess., Vol. 41, No. 37, June 15, 2009, p.

DRAFT

> The section also gives the Court the power to adjust, in this case, the other Defendants' share of liability, if any, relative to the cost of healthcare for which they were liable.
>
> **Chair (Mr. Kelley):** So, first, on the amendment, our usual question of failures. Are there any comments? No. Then, the amendment is passed.
>
> We will now open the floor to a more general discussion on S.19, as amended. The Honourable member for Hochelaga-Maisonneuve.
>
> **Ms. Poirier:** If I understand correctly, if it is proven that one of the Defendants has a lesser involvement, the amount of costs could be reduced. Is that correct?
>
> **Chair (Mr. Kelley)**: Mr. Charbonneau.
>
> **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 Québec 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 S.17 are *juris tantum* presumptions. The use of the word "presumes" at S.17 and the word "deemed" at S.21 shows that the legislator had in mind the distinction drawn by Art 2847 *C.C.Q*. On the other hand, with respect to rules applicable in actions taken on a collective basis by the government, the effect of SS. 13 and 14 is to considerably limit the type of evidence admissible to trigger the application of S.19. The above commentary from the *Journal des débats* provides two illustrations of evidence administered in defence that could have this effect. Medical evidence or conduct evidence on the individual scale cannot be relevant to this debate, and the statistical sampling contemplated under S.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 S.17 *T.R.D.A.* as simple presumptions, but for the rest, their claims described above in paragraphs [687] to [692] are unfounded. The Trial Judge could take into account the methods of proof listed in S.15 *T.R.D.A.* to determine, on the one hand, the alleged causation between the Appellant's 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.

DRAFT

[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, S.15 of that 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 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 was acting not to facilitate proof of a fact that was public knowledge or even given knowledge about the harmful effects of smoking on health, but rather with the explicit aim of facilitating, as he himself said, "proof of causation between alleged facts".

iii. Challenge related to the first instance

[710] The notion of causation was at the forefront of the Blais and Létourneau cases. It is appropriate to identify what seems relevant how the notion is relevant here before situating it in the specific context in which the parties addressed it.

[711] Fundamentally, if there is causation between the false alleged against the Appellants and they harm inflicted on the Members of the Blais and Létourneau Classes it can have both a medical and conduct aspect at the same time. Beyond this first distinction a medical causation can be analysed from four main angles which are clearly

[668] *Canada (Attorney General) v.* JTI-Macdonald Corp., 2007 SCC 30, para. 9. Already in 1995, in RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 R.C.S. 199, in a litigation respecting the constitutionality of the Tobacco Products Control Act, SC 1988, v. 20, La Forest J. observed: "The Appellants are large corporations that sell a product that earns them a profit and is, on overwhelming evidence, dangerous. It is true that this remark appears in dissenting reasons, shared by Justices L'Heureux-Dubé, Gonthier and Cory, as to the validity of the law under section 1 of the *Canadian Charter.*

discernable in the appeal cases. In Blais, there is first a general medical causation-the fact that tobacco products manufactured by the Appellants are allegedly toxic and would constitute a major cause of certain serious diseases 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 the basis of overwhelming evidence, the person smoking of 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, the 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 each member of the Létourneau Class dependence on tobacco is attribute 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 would have any impact on smoking by 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 that were taken when they started to 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 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 would therefore would have caused or contributed to cause the lung cancer of Representative Blais (para. 21). Direct inhalation of tobacco smoke, combined with phenomenon of addiction would 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 would confirm the existence of this causation. (para. 73 et 74). The same would apply to 85 % of the case of emphysema in Canada (para. 76), and therefore, for the Members of the Class (para. 77). The Respondents then list with lengthy excerpts from what they anticipate will be their evidence the

[669] For example, during the pleadings in the Court of Appeal, the hypothesis of the active smoker who would have been a pulmonologist or oncologist practicing in the 1960s.

alleged faults of the Appellants and the impact of those faults on the Members of the Class. The Appellants allegedly knew about causation between various types of cancer and cigarette smoking for many years. (para. 97-104), but they 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), but they deliberately abstained from disclosing this fact systematically trivialized the risks associated with smoking (para. 124-131) and adopting a counter-discourse to encourage smoking, especially among young people. And for cigarettes misleadingly described as 'light' "or mild" (para. 132-162). Many of these allegations are reflected in the Létourneau case's motion to institute proceedings. The Blais case follows with a number of allegations relating to the assessment of punitive damages and "compensatory non-pecuniary" damages (para. 163-169), which as discussed below, will be 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 to say in substance that causation is inseparable from a case by case examination of the situation of each member of the Class both in the Blais case and the Létourneau case. It is pointless to go back over each aspect of the related challenge here because the trail of bread crumbs always remains the same. This can be illustrated by some excerpts of their arguments. Thus, in its amended defence of November 17, 2008 in the Blais case, the appellant JTM immediately showed its colors by stating that[670]

> […] in 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. His conclusion on this issue, the same appellant affirmed the following in his defence.

> 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?

[670] JTM's amended Defense, 17 November 2008, para. 2c).

(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;

(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? Didhe or she follow thatadvice?

DRAFT

[716] In its defence, 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 para. 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 a response on October 23, 2009: "The appellant is ignoring les allegations [sic] mentioned in paragraph 98 of the defence which do not concern it [sic]".[672]

[718] These and other 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. An aspect of the conduct of the proceedings at first instance

[719] The motions in the proceedings in the Blais et Létourneau cases both dates are dated September 30, 2005. There's a significant overlap in the allegations they contain, particularly with respect to causation.

[720] On March 28, 2014, just a little over eight months before the end of the trial, the Respondents filed an amended motion to institute proceedings in the Blais case which reiterated all the allegations made on September 30, 2005, but which made two significant changes to the lawsuit: (i) it replaced the description of the Class in

---

[671] RBH Defense, 29 February 2008, para. 36.

[672] Respondent Létourneau's response to RBH's defense, 23 October 2009, para. 59.

DRAFT

accordance with terms of an interlocutory judgment dated July 3, 2013[673] and (ii) in the wake of that amendments, as well as in light of expert evidence given by the Respondents at trial, it substantially revised the calculation of damages claimed from the Appellants.

[721] Following that, in the joint "notes and authorities" for both cases, that were committed 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 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.

---

[673] *Québec Council on Tobacco and Health v. JTI-MacDonald Corp. (Létourneau v. JTI-MacDonald Corp.),* 2013 QCCS 4904.

[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 preponderant evidence of causation at the level of each member of the two Classes, or could we be satisfied with evidence (also preponderant, that must go without saying) that would allow us to extrapolate the impact that cigarettes and the alleged faults against the Appellants had on their Members to all or part of each Class?

[724] This question was first addressed in an interlocutory judgment dated September 13, 2013[674], 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 *subpœnas 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 surfaces because, as the Trial Judge points 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 decision rendered

---

[674] *Québec Council on Tobacco and Health v. JTI-Macdonald Corp.,* 2013 QCCS 4863.

[675] *Imperial Tobacco Canada Ltd v. Létourneau*, 2014 QCCA 944.

[676] *Québec Council on Tobacco and Health v. JTI-MacDonald Corp.,* 2011 QCCS 4090. Previously, in 2008, the Appellants had asked permission to interview 100 Members of the Létourneau Group and 50 Members of the Groupe Blais beforehand, and had attempted to obtain their medical records. they were refused in both cases: Québec Council on Tobacco and Health v. JTI-MacDonald Corp. (Létourneau v. JTI-MacDonald Corp.), 2009 QCCS 830, motion for leave to appeal dismissed, April 27, 2009, 2009 QCCA 796.

October 2, 2012,[677] Justice Wagner, then of the Court of Appeal, wrote this with the agreement of his colleagues Pelletier and Hilton:

> [Translation] [51] I am of the opinion that the Judges reasoning in dealing with access to the medical record, like the order to submit to a medical examination, is in accordance with the state of the law and I do not see how obtaining the medical records, or the order to submit to a medical examination, could allow for a relevant debate on common questions that are above the individual personality of Members. In all respects, this is a management decision and, in the absence of an error of law or a manifest and decisive error of fact that could jeopardize the right to a full and complete defense, the Court should not intervene.

[725] By its application, which only concerned the medical records of the two representatives, the Appellant ITL was seeking a decision in principle.

[726] In the matter of the question on appeal, the Court concluded that it was necessary to declare "that the disputed *subpœnas* were valid with respect to the Respondent Létourneau personally and the successor or successors of the Respondent Blais".[678] Access was therefore given to their medical records. The unanimous decisions, dated May 13, 2014, were written by Justice Bich.

[727] It is appropriate to reproduce here large excerpts from these reasons to provide context to the issue:

> [Translation] [17] Since the year 2009, at least, both at the pretrial and trial stages, the Appellant repeatedly requested in various ways permission to interview 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 defense (in particular with respect to causation between fault and harm); and argues that even if it could be held liable in any way, this evidence is necessary to demonstrate the inappropriateness of the collective recovery requested by the Respondents. In essence, the Appellant argued that this evidence would enable it to establish, for example, that 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 were so disparate that collective recovery could not be considered (even though it's only a matter of awarding moral damages).
>
> [18] With regard to questioning the Members, we understand from the Judgement under appeal that the Appellant was finally granted permission to have some of the person's registered in both actions heard. However, with respect to the medical records of these individuals, permission was consistently denied, including by our Court, in 2012.

---

677 *Imperial Tobacco Canada Ltd. v. Létourneau*, 2012 QCCA 2013.
678 *Imperial Tobacco Canada Ltd. v. Létourneau,* 2014 QCCA 944, para. 5.

[…]

[30] Indeed, relevance is one of the concepts whose application may well vary during a proceeding and even during the trial: what does not seem relevant one day may, sometimes later, given the conduct of the evidence, become relevant, and vice-versa. A Judge who allows an objection to the evidence can later realize that such evidence on the contrary was necessary, or is necessary, or useful, to solve the issues in dispute and therefore has the power to rescind his previous determinations or change his or her mind in the future.[679] This is supported by *Allali v. 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 *find the non-recevoir*. The circumstance of the case, however, do not lend themselves to such a qualification (nor did they lend themselves to it in the case decided by our 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 default of the defendant companies. The question asks, therefore, 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 on 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 civil liability actions where class action is only the procedural vehicle, the Trial Judge, if he or she were to answer any of the questions defined by the authorization judgment in the affirmative (thus finding a fault), must also answer the questions as to whether this fault caused the harm alleged by the Respondents and the existence of which must also be established.

---

[679] See Léo Ducharme, *Précis de la preuve*, 6th ed. Montreal, Wilson & Lafleur ltée, 2005, para. 1472, p. 601.

[680] *Allali v. Lapierre*, 2007 QCCA 904.

[728] Then, after citing *Bou Malhab v. Diffusion Métromédia CMR inc.* [681] and various sources of doctrine, Justice Bich added:

> [41] It follows from all this that the burden of the Respondents 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 view of deciding on the 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 at each stage revealed concerning the issues in dispute, including causation. Justice Bich went on to say:

> [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 sufficient (i.e., preponderant) 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 said Act), while sufficiently establishing the conditions for a collective recovery order (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 question. 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 experts' 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 by challenging it with not only expert statistical and epidemiological evidence with respect to the harm and to the cause, 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

[681] *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 CSC 9.

inappropriateness of an order for collective recovery because of the disparity in causes and damages, if any.

[53] In accordance with our 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 free to decide on their strategies and means of proof. The appellant, however, has the same freedom to refute the Respondents' evidence and exercise their 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 the 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 questioned in this way (it is understandable that Mr. Blais himself will not be questioned, given his death), including questions on their respective medical records, nor did he oppose their production. Ms. Létourneau's lawyer was less assertive. In any event, it should be noted that the appellant already has Mr. Blais' and Ms. Létourneau's medical records in their possession, that they already questioned them on this matter (at the preliminary stage), and that they even obtained a second opinion in Mr. Blais' 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).

[60] What about the Members (other than the representatives) whom the appellant wants to question (as the Trial Judge allowed), and whose medical records the appellant would also like to obtain?

DRAFT

> [61] It goes without saying that one cannot consider obtaining testimony from all the Members, or even a major part of the Members, which, in any event, would not be practically feasible, without infringing the legislative intent underlying a class action, and distorting the class action. That being said, we know that it is not uncommon, precisely because we want to support the evidence one way or another, that some Members of the Class would 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 Trial Judge's ruling 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, this decision was the subject to some subsequent actions.

[731] There was discussion on that decision. To clarify it, we will reproduce here an extract of the oral arguments of November 24, 2016 in the Court of Appeal, when the question of what impact this decision had on the proceeding in Superior Court arose. Me Johnston and Me Lespérance, counsel for the Respondents, replied as follows:[682]

> Me 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 Judgement that has been quoted extensively by our colleagues, a Judgement 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, "But are you going to ask the Members to come in?" The answer was yes, and they never called anyone.
> >
> > We prepared... how many?
>
> Me ANDRÉ LESPÉRANCE:
>
> > A hundred and fifty (150).
>
> Me BRUCE JOHNSTON:
>
> > A hundred and fifty (150) people to be questioned at trial, and they didn't call one of them. If you want to talk about a strategic decision, this is one.

[682] Stenographic notes of 24 November 2016 (SténoFac), p. 179-182.

DRAFT

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…

[…]

Me ANDRÉ LESPÉRANCE:

They chose the Members.

Me BRUCE JOHNSTON:

They chose them, yes. But we prepared them.

[…]

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?

Me BRUCE JOHNSTON:

Yes, yes.

THE COURT (YVES-MARIE MORISSETTE):

Following the Court of Appeal Judgement?

Me BRUCE JOHNSTON:

Yes, that's right.

THE COURT (YVES-MARIE MORISSETTE):

Did you read it carefully?

DRAFT

Me 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, so 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 23 May 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]

Me SUZANNE CÔTÉ:

> 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.

[683] Representations of Me Côté, May 23, 2014, pp. 43-44.

DRAFT

[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 to be 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 don't 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 interrogation, 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' grievances 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 is the one who 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 affirmed 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:

> 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 total, in the Appellants' briefs, there are fifty-six claims relating to the complete absence of proof ("no evidence"), which varies 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 recent Supreme Court of Canada decision in *Benhaim v. St-Germain*[684] recalls certain constants in 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 proscribed than on a question of law. Justice Wagner, author of the Supreme Court's majority reasons in *Benhaim v. St-Germain*, observes 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 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] In particular, the last four sentences of this passage will have been noted.

[741] Very tangible institutional constraints justify this division of roles between trial and appellate courts. As this was a medical liability case, Justice Wagner wrote that

---

[684] *Benhaim v. St-Germain,* 2016 SCC 48.
[685] The citation refers to *St-Jean v. Mercier,* 2002 SCC 15.

DRAFT

Benhaim v. St-Germain involved a large quantity of complex evidence. All the more so with a case such as that involving the present appeals: their complexity overshadows, and by far, that of most if not all medical liability cases. The *Benhaim v. St-Germain* trial lasted six days. In comparison, the trial in the ongoing 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] (so 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 has ample opportunity to question witnesses, obtain oral or written explanations and clarifications from them, give 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 – the present 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 it is in the nature of things that 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 are from Justice Brown, who writes:

> [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 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

686 Exhibit 987, for example, decimated 50 times, occupies more than 12,000 pages divided into 28 volumes of appendices.
687 *Nelson (City) v. Mowatt*, 2017 CSC 8.

DRAFT

> 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 enough 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. In *Benhaim v. St-Germain*, this warning is repeated twice by Justice Wagner:[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.

[745] In Québec law, article 2804 *C.C.Q.*sets out the meaning of the preponderance of evidence by stating that "Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof".

---

[688] *Benhaim v. St‑Germain*, 2016 CSC 48. Voir également *Harper v. Canada (Procureur général)*, 2004 CSC 33, paragr. 78.

DRAFT

[746] This idea of precedence is generally foreign to the judgments 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 "preponderant" evidence in the legal sense of the term, 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 the present 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 dependence from which each member of the Blais or Létourneau Class allegedly suffer. However, the Judge is not a medical researcher. He must now rule on what "renders the existence of a fact more probable than its non-existence" (art. 2804 *C.C.Q.*.), based on the evidence before him 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 writes 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

---

[689] In 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, p. 58)

[690] Ian Binnie, "Science in the Courtroom: The Mouse that Roared", (2007) *U.N.B.L.J.* 307, p. 312.

[691] *Benhaim v. St‑Germain*, 2016 CSC 48. . The book cited is that of Pre Khouri (L. Khoury, Uncertain Causation, supra, note 635).

> defendants 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. <u>Evidence of Causation and Its Assessment by the Judge</u>

[751] At trial, the dispute was heard taking into account the distinction between medical causation and conduct causation. The 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 dependence 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? Conductal 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 devotes chapter VI of his reasons to causation, which is considered under all these aspects.

a. Medical causation

[752] The Trial Judge discusses 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 is of particular interest to him. He formulates it under subtitle C: "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. Following in the footsteps of this question the one concerning the Létourneau case then arises, 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

[753] Could the Judge conclude that smoking is the cause of the diseases in question?

[754] It should be noted first of all 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 Argument Plan filed by the appellant JTM in Superior Court. It should be mentioned here because it clearly highlights the claim argued before the Trial Judge and 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.
>
> [Original emphasis]

[755] Many excerpts from the briefs and argument plans 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:
>
> > [In French:] L'épidémiologie est une branche de la médecine publique qui étudie la fréquence et la répartition des maladies dans le temps et l'espace chez une

---

[692] JTM's argumentation plan, para. 2536. Obviously, it should read "us" instead of "U.S." in the last line of the quotation.

[693] RBH's argument, para. 97. The quotation in the quotation is from Spieser v. Canada, 2012 QCCS 2801, para. 469.

DRAFT

> population humaine, ainsi que le rôle des facteurs qui déterminent cette fréquence et cette répartition.
>
> [Original emphasis; cross-reference omitted]

[756] Based primarily on the testimony of two of the experts cited in the application, Drs. Desjardins[694] and Guertin[695], the Judge referred to very general epidemiological statistics. Dr. Desjardins says that smoking causes 85% to 90% of lung cancers. He adds that smoking, according to the American Cancer Society, causes between 93% and 97% of deaths from this cancer in men over 50 years of age and between 86% and 94% of these deaths in women Dr. Guertin states 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 are 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 write:"[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 leads 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

---

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 ".

696 Dr. Guertin explains 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, p. 2.

697 *Québec Council on Tobacco and Health v. JTI-MacDonald Corp. 2013 QCCS 4904, 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 undertaken, para. 676. Perhaps there is a certain exaggeration ("religiously") in this sentence, but its meaning is clear.

700 Dr. Siemiatycki has 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 Québec population. In his recalculations, Dr. Siemiatycki used

table requested by the Judge during the deliberation 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 is the smoking dose 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 packets-yearly, the dose that reaches this level of RR (the "critical smoking dose") is about four pack years. Using data from various sources, including the Québec Cancer Registry compiled by the Ministère de la Santé et des Services sociaux, he then estimated the number of people affected by the diseases in Québec, 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*":[702]

> 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

data from a study of the Montreal population: testimony of Dr. Jack Siemiatycki, February 18, 2013, pp. 99-102. The results of his recalculations were introduced into evidence with Exhibit 1426.6.

[701] See exhibit 1426.7.

[702] Testimony of Dr. Jack Siemiatycki, February 20, 2013, pp. 13-15.

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.[703] 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 forward by the Appellants, Mr. Marais,[704] PhD in mathematics/statistics, le Dr. Mundt,[705] epidemiologist, and Mr. Price,[706] PhD in mathematics/statistics, criticized Dr. Siemiatycki's report from many angles. The Judge discusses this in paragraphs 719 to 767 of his reasons. In paragraphs 745 to 748, he explains 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 the Marais and Mundt experts, 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 Québec. 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 incorporates in his analysis a piece of data from Dr. Mundt's testimony, for whom the relative risk of developing lung cancer only becomes really significant between 10 and 15 pack years.[707] 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.

---

703 *R. v. J.-L.J.*, 2000 CSC 51, paragr. 25.

704 Recognized by the Supreme 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* ».

705 Recognized by the Supreme Court « *as an expert in epidemiology, epidemiological methods and principles, cancer epidemiology, etiology and environmental and lifestyle risk factors and disease causation in populations* ».

706 Recognized by the Supreme 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 to draw causal inference"*.

707 It is also interesting to note that, in his report, Mr. Marais (JTM) writes that, assuming that Dr. Siemiatycki's method is valid, the "smoking dose" at which the relative risk would hypothetically reach 2.0 would be 11 package-years: Exhibit 40549, p. 71, paragraphs 57 and 73, paragraphs 63-64.

DRAFT

[763] This major change to the Class description for the Blais Class significantly affects 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 Québec 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 smoking dose 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 his meaning in these terms:[708]

> [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 average metric, an average measure for a heterogeneous group. This is calculated from all the individual Members of the group, a single average, assigning that average back to each individual member of the group and labelling that an individual assessment. But there's nothing individual about it.

[766] And he goes on to give as an example a measure of the average size of individuals in a given population:[709]

> 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 will be further elaborated later in his testimony with figures from Statistics Canada on the average size of Canadians.

[768] In the case at bar, however, the evidence requested was more than sufficient to consider the meta-analyses conducted by Dr. Siemiatycki to be conclusive. In addition to the fact that he claims to have solid experience in analyses of this type, which is noted by the Judge in paragraph 701 of his reasons, this expert considers that in this case the heterogeneity factor has no consequences for the purposes of his study. He

---

708 Testimony of Laurentius Marais, March 10, 2014, p. 72.
709 Testimony of Laurentius Marais, March 10, 2014, p. 73.

accepts almost all the theoretical proposals presented to him in cross-examination, but also states the following:[710]

> 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 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 […]".[711]

---

[710] Testimony of Dr. Jack Siemiatycki, March 19, 2013, p. 96-97

[711] Testimony of Dr. Jack Siemiatycki, March 19, 2013, p. 70.

DRAFT

[770] It is clear that he knows what such distortions consist of. Elsewhere in cross-examination, he expresses himself in a way that shows that he understands very well what he is being accused of but that in his eyes this accusation is a misrepresentation:[712]

> 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 notes in paragraphs 762 et seq. of his reasons, the record 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.[713] 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[714] (in cross-examination, Dr. Barsky (JTM) acknowledged in particular that asbestos exposure is responsible for about 2% of lung cancers).[715] 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

---

712 Testimony of Dr. Jack Siemiatycki, February 20, 2013, p. 196.

713 See in particular Lung Cancer (Exhibit 1382, p. 58; Exhibit 1428, p. 504 et seq.; Exhibit 1709, p. 42 et seq.); Throat Cancer (Exhibit 1387, p. 24); Emphysema / COPD (Exhibit 1382, p. 14).

714 Exhibit 40504.21, pp. 216 et seq.; Exhibit 40549.1, p. 34S.

715 Testimony of Dr. Sanford H. Barsky, February 18, 2014, p. 23 et seq.

elevated compared with never-smokers".[716] In the same vein, the Surgeon General acknowledges 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".[717] This observation applies to smokers of both sexes and to all histological types of lung cancer.[718] In sum, still according to the Surgeon General:[719]

> 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.[720]

[773] Exhibit 40549.1 also shows that there is no significant gender difference in the "susceptibility" of developing develop 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 associations".[721]

[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

---

716 Exhibit 40549.1, p. 35S and 41S-43S.
717 Exhibit 601-2004, p. 43.
718 Exhibit 601-2004, p. 49.
719 Exhibit 601-2004, p. 49.
720 Testimony of Dr. Jack Siemiatycki, February 19, 2013, pp. 23-24.
721 Exhibit 40549.1, p. 37S.

DRAFT

indicates that there is no risk-free level of exposure to tobacco smoke." So, let's quote him again, in his 2004 report:[722]

> 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*".[723] 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*".[724] This statement is based on his knowledge of "*hundreds and perhaps thousands of publications*".[725] The evidence provided by Drs. Desjardins and Siemiatycki revealed that cigarette consumption is a major confounding factor in epidemiological studies to determine the association between other risk factors and lung cancer.[726]

[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 writes on this subject:[727]

> [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].[728] It acts as a contributing factor in nearly three-quarters of UAT SCCs. As reported in the study by Day et al. the

---

[722] Exhibit 601-2004, p. 43.
[723] Testimony of Dr. Jack Siemiatycki, March 19, 2013, p. 171.
[724] Exhibit 1426.1, p. 23.
[725] Exhibit 1426.1, p. 23.
[726] See in particular Exhibit 1382, pp. 59-60; Exhibit 1426.1, pp. 22-23.
[727] Exhibit 1387, p. 21 and 24.
[728] Cancers of the upper aerodigestive tract correspond to cancers of the larynx, pharynx[oropharynx and hypopharynx] and oral cavity. In common parlance, these types of cancers are sometimes referred to as "throat cancers". However, it is important to remember that in this case, the notion of "throat cancers" refers only to squamous cell carcinomas of the larynx, oropharynx and hypopharynx (see supra, note 151).

> 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. […]
>
> [Renvois omis]

[777] As for emphysema and COPD,[729] Dr. Desjardins mentions that doctors hold smoking responsible for 85% of COPD cases.[730] 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).[731] In fact, in Dr. Siemiatycki's words, the evidence shows that "[n]o other factor approaches smoking in terms of the strength of association"[732] with respect to emphysema and COPD.

[778] What conclusions could the Judge draw from these expert reports?

[779] The experts who testified on the medical and epidemiological aspects of the case for the plaintiffs were all highly qualified and all 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 emerging from the evidence provided by them is that it was directed at the methodology

729 See the definition of COPD, supra, note 43.
730 Exhibit 1382, p. 14.
731 Exhibit 1382, p. 14.
732 Exhibit 1426.1, p. 26.

of the epidemiological work 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] 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. To be valid as evidence, they should be at a level of granularity such that any imaginable causal factor (congenital, environmental, behavioural, etc.) should be 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 mentioned at the very end of his testimony,[733] could perhaps be obtained by conducting a survey from a representative sample of Blais Class Members on the thirteen topics previously mentioned in paragraph [715]. However, Mr. Marais acknowledged 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 states as much in paragraph 740 of his reasons.

[782] Finally, and in any event, the safest 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,[734] called by JTM, stressed in particular the crucial role of a pathologist in diagnosing a cancer patient:[735]

> 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

---

[733] 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, pp. 323-325).

[734] Recognized by the Superior Court as an expert in pathology and cancer research.

[735] Testimony of Dr. Sanford H. Barsky, February 17, 2014, p. 107-108.

> 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 largely from genre confusion. Indeed, the purpose of the class action is not to attempt to restore the health of each member of this 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 is therefore right when he writes about the expert reports 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 to be under-inclusive. Let's take the Blais Class. This 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 cannot qualify to be Members of the Class because the definition of the critical smoking dose excludes them[736] if they smoked less than 12 pack years[737] during 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's call them subset B) may have the same diseases and qualify to be 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.

---

[736] Similar reasoning is possible for other elements that fall within the definition of groups or subgroups 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 subgroup from 46,172 to 23,086 Members, to reflect the high error interval in the statistics compiled by Dr. Siemiatycki. The first group was probably over-inclusive. There is every reason to believe that, reduced to 23,086 Members, the revised group is sub-inclusive.

[737] That is to say 87,600 cigarettes.

[787] However, 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 must 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 does, the Judge ensures 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] However, if, on the basis of preponderant epidemiological evidence, the difficulty created by the unknown can be overcome, 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 finds that the Respondents provided preponderant evidence 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".[738] 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, specific and consistent presumptions that was not countered with convincing evidence to the contrary, the Judge was justified in finding, as he did, medical causation in the case of the Blais Class.

a.2. Létourneau

[738] *Snell v. Farrell*, [1990] 2 R.C.S. 311, p. 330.

DRAFT

[792] Could the Judge find that smoking is the likely cause of tobacco dependence for Members of the Létourneau Class?

[793] With regard to this aspect of the medical causation between smoking and tobacco dependence, the Judge is 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,[739] which the Judge preferred to those of expert witnesses Davies[740] and Bourget[741] for the reasons 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 conclude that a person with the characteristics listed by the Judge in paragraph 788 of his reasons will have developed, in the clinical sense of the term, a tobacco addiction. As in the case of the Blais Class, and again according to the explanations already given above starting at paragraph [785], the Judge defines the Class in a way that, in light of this evidence, will necessarily make 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.*.), the Respondents, in accordance with article 15, were allowed 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

---

[739] Recognized by the Supreme court « *as an expert psychiatrist with a specialization in addiction* ».

[740] Recognized by the Supreme court « *as an expert in applied psychology, psychometrics, drug abuse and addiction* ».

[741] Recognized by the Supreme court « *as an expert in the diagnosis and treatment of mental disorders, including tobacco use disorder, as well as in the evaluation of mental* ».

from a sampling". And that is indeed what they did, by means of presumptive evidence that the Appellants were powerless to refute. The reasoning that was followed here is similar to the one 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 a long period of time to recognize the toxic nature of cigarettes, known to the Appellants, and the failure for a long period of time to recognize the addictive nature, known to the Appellants, of nicotine, omissions otherwise reinforced by advertising, sponsorship and conduct likely to encourage smoking, were together the likely causes of the smoking among these Members.

[798] The Trial Judge considers these assumptions in paragraphs 791 to 817 of his reasons. He concludes 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 addictive nature. As one of the Respondents' lawyers argued at the November 24, 2016 hearing, "... when we talk about conduct causation, the most rational and probable explanation for smoking is addiction".[742] The inference of behavioural 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 dependence, which is acquired relatively quickly.

[800] However, according to the evidence, 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 a few representative pieces of information from this evidence give 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,[743] 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*,

---

742 Stenographic notes of 24 November 2016 (Sténofac), p. 66.

743 They cover a very long period, from 1964 to 2014, the first research having been launched by the Surgeon General in 1959.

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 give a concise and reliable idea of the context that the Judge was to consider:[744]

> 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:
>
> • Cigarettes and other forms of tobacco are addicting.
>
> • 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 becomes a known fact for a vast

[744] Exhibit 601-1988, p. i.

DRAFT

majority of people. It can be said that, in doing so, he is 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 mentioned (see paragraph [130]), he wrote:[745]

> 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 have already been the subject of research on the possible physiological causes of addiction, he goes on to say:[746]

> [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 executive, Michel Descôteaux, wrote a memo to Anthony Kalhok, then Vice President Marketing of the company. Both testified at the trial. The document in question was prepared for a meeting in the United Kingdom organised by British American Tobacco and attended by executives of companies controlled by the latter. Marked confidential, the document attempts to take stock of what the company's public relations strategy should be, understood in a very broad sense. It contains the following passage:[747]

---

[745] Exhibit 1379, p. 2.
[746] Exhibit 1379, p. 2.
[747] Exhibit 11, p. 4. This passage has already been reproduced supra, para.[129]; see also supra, para.[619].

> 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 the bar on conduct causation, the Respondents cited, in particular, Dr. Juan Negrete,[748] a psychiatrist. In 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 then objected to the filing of this article on the ground that it had been sent to them by e-mail shortly before Dr. Negrete's interrogation. 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 interests of 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 in 1971, 1971 and 1974 respectively in medical and scientific journals, the 2007 study states the following:[749]

> 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 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."

[748] Recognized by the Superior Court as an *"expert psychiatrist with a specialization in addiction"*.

[749] Exhibit 1471, p. 704.

> This classic description of the natural history of nicotine dependence was only rarely challenged through the end of the 20th century.
>
> [Referrals 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 operative part of his judgment, that a person 1) who started smoking before September 30, 1994;[750] 2) who smoked on average at least 15 cigarettes[751] 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[752] per day would be tobacco dependent. On this point, the Judge states 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 whether a person is addicted to tobacco. But this does not resolve the issue of the right to compensatory damages for 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", notes the Judge.

[812] This statement can be accepted without hesitation. On the other hand, it will have been understood that, in terms of dependence and conduct causation, people who, for example, started smoking before January 1, 1976, who smoked twelve packs-years and who developed one of the diseases in question 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 has its source in the 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 would explain the consumption habits of smokers during the relevant period. In structuring his reasoning, the Judge took into account the

---

[750] And who, since that date, have been smoking mainly cigarettes manufactured by the plaintiffs.
[751] Manufactured by the plaintiffs.
[752] Manufactured by the plaintiffs.

DRAFT

date on which the risk of developing any of the 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 they had persisted in their smoking habits even though, on the one hand, this risk, in his opinion, was now known,[753] but on the other hand, they had not yet crossed the threshold for tobacco dependence established by the Judge. However, the addiction factor was not known, and this factor alone significantly increases the risk to health. It is in this context that evidence of conduct causation must be assessed, while knowing that 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 and alleged fault and injury, the question of causation can be resolved without difficulty on the basis of the statistics presented in evidence by the Appellants and 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).[754] 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%.[755] It is certain that various factors combined to cause this clear downward trend in smoking. However, in view of these figures, 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 social acceptability of tobacco use continues to decline. The latter two factors are

[753] Describing the nature of the respective faults of the Members who started smoking after January 1, 1976 and the Appellants, he wrote 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.* »

[754] Exhibit 40495.33, p. 14.

[755] Exhibit 40495.33, p. 17.

the very ones that sponsorship and advertising, including lifestyle advertising,[756] are intended to combat, as well as 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 from the evidence before him the conclusions he made in paragraphs 803 to 817 of his reasons.

[817] To contradict the hypothesis of behavioural causation attributable to the alleged faults against them, the Appellants cited various experts who, for example, responded to Dr. Negrete's expertise, 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 them.

[818] It should be recalled, however, that in 1994, in *RJR – Macdonald Inc. v. Canada (Attorney General),* ITL and JTM acknowledged that warnings alert and raise public awareness of the risks associated with smoking and help reduce smoking:[757]

> [Translation] What has been cited clearly indicates that the government adopted the regulation in question with the intention of protecting public health and thus promoting the public good. In addition, both parties acknowledged that past studies have shown that warnings on tobacco product packaging produce results in increasing public awareness of the dangers of tobacco use and in reducing general tobacco use in our society. However, the applicants have argued strongly that the Government has not established and cannot establish that the specific requirements imposed by the contested regulation are of benefit to the public. In our view, this argument does not assist the Applicants at this interlocutory stage.
>
> [Emphasis added]

[819] Chief Justice McLachlin, expressing the opinion of a unanimous court, reiterated this conclusion in 2007 in Canada (Attorney General) v. JTI-Macdonald Corp. Moreover, in that case, the Chief Justice expressly acknowledged that, since the 1994 litigation, a "mass of evidence in the intervening years supports this conclusion"[758] that warnings produce results and contribute to reducing the incidence and prevalence of tobacco use.

[820] In the case at bar, the Judge was sceptical of the expertise of the witnesses called by the Appellants and clearly explained why. The case of experts Davies and

[756] This concept is defined in the *Tobacco Act*, SC 1997, v. 13, art. 22 (4): "Advertising that associates a product with a lifestyle, such as prestige, hobbies, enthusiasm, vitality, risk or daring or evoking an emotion or image, positive or negative, about such a way of life. (lifestyle advertising) ".

[757] *RJR - Macdonald Inc. v. Canada (Attorney General),* [1994] 1 R.C.S. 311, p. 353.

[758] *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 CSC 30, paragr. 135.

DRAFT

Bourget has already been mentioned. With respect to Professor Viscusi,[759] an economist by training, and Mr. Young,[760] 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.

[821] As for the expert report of Professor Soberman,[761] 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 with no doubt that the Judge appreciated this testimony at its true value. In the final analysis, moreover, he drew no inference, positive or negative, from this expertise towards 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 mentioned in his reasons the testimony of James J. Heckman,[762] an expert called by ITL and whose name appears only in the list of expert witnesses attached to the judgment.[763] Professor of Economics at the University of Chicago and winner of the Nobel Prize in Economics[764] in 2000, Mr. Heckman was called upon to respond to expert testimony by Professor Pollay.[765] The Respondents had cited the latter, a marketing professor at the University of British

---

[759] Recognized by the Supreme 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* ».

[760] Recognized by the Supreme Court « *as an expert in the theory, design and implementation of consumer product warnings and safety communications* ».

[761] Recognized by the Supreme Court « *as an expert in marketing, marketing theory and marketing execution* ».

[762] Recognized by the Superior Court "*as an expert economist, expert econometrician and an expert in the determination of causation*".

[763] 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, para. 348 [emphasis in original]) Paragraph 77 of RBH's argument and note 359 of JTM's argument echo this criticism.

[764] Thus is nicknamed the prize of the Bank of Sweden in economics in memory of Alfred Nobel that awards the Royal Academy of sciences of Sweden.

[765] Recognized by the Superior Court « *as an expert on marketing, the marketing of cigarettes and the history of marketing* ».

DRAFT

Columbia, to testify as to what the Appellants' tobacco product advertising and marketing practices revealed about their intentions. The Judge faithfully summarizes 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 considers this expertise to be largely well founded, he considers 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 this report, which ITL described as "dispositively demonstrated".

[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. However, he had to admit on cross-examination 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*[767] (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, following the adoption of the first version of the *Tobacco Act*,[768] had increased the number of advertisements in the form of sponsorships.

[826] On this subject, he testified as follows:[769]

> Q. […] In nineteen ninety-eight (1998), just assume that the Government

---

766 Exhibit 21320.1, p. 3-4.
767 *Tobacco Act, SC 1997, v. 13.*
768 *Tobacco Act, SC 1997, v. 13.*
769 Testimony of Professor Heckman, April 15, 2014, p. 98-99.

DRAFT

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.

R. It might, it might be important, yes, that’s to be determined with the data; it might be.

[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 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 expertise produced by the plaintiffs (in particular because it does not exclude confounding factors). However, his own testimony certainly does not constitute counter-proof demonstrating the absence of a causal link between advertising, marketing, warnings and smoking prevalence.

DRAFT

[828] In short, in addition to the fact that the Judge was not required to mention Professor Heckman's testimony, his failure to do so was due to the flaws that seriously eroded the probative value of this expertise.

c. Dependence and definition of the Létourneau Class

[829] There remains one last aspect of things that needs to be addressed.

[830] The Judge specifically addresses 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 cited by him in his report, the Judge concludes that a person who usually smokes 15 cigarettes a day is addicted to tobacco. Then, at paragraph 788, he turns to the definition of the Létourneau Class, which he reformulates in the terms already mentioned above, specifying that Membership of the Class presupposes that each member, on February 21, 2005 or until his death if it occurred before that date, was still smoking an average daily dose of 15 cigarettes manufactured by the Appellants and that he 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 tobacco dependence must be considered proven.

[831] The Appellants approached this definition of tobacco dependence from various angles. In summary, their claims consist of this. 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 and Statistical Manual of Mental Disorders - V* (or "DSM - V").[770] When the Judge notes in paragraph 784 of his reasons that 95% of daily smokers are addicted to nicotine, this conclusion would not be supported in the evidence, even though the DSM - V sets the incidence of addiction at 50% of current daily smokers. In the final analysis, the Judge would have 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 a reason already cited, the Judge did not award compensatory damages to the Members of the Létourneau Class,[771] even though 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

---

770 This is a standard reference work published by the American Psychiatric Association. The fifth edition was published in 2013.

771 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 group would be "impracticable or too onerous" within the meaning of section 1034 a.C.p.c.

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". However, there is no incidental appeal in the Létourneau case, which makes the Appellants' appeals on the definition of dependency largely theoretical. 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 period of "gestation" for the 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 of addiction discussed in this article was based on an article written by an eminent scientist, Dr. Russell. In addition, at the trial, Dr. Negrete explained that "meeting the clinical criteria for addiction] takes longer than starting to experience the symptoms that form part of the addiction syndrome much sooner".[772] 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, which 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.[773] In fact, according to the evidence that the Judge considered preponderant, tobacco dependence would occur four years after the beginning of cigarette consumption.

[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, the claims they make on this point are directed at the Judge’s assessment of the evidence, but they do not demonstrate how he committed a palpable and overriding error in his assessment of that evidence.

[836] First, the Judge was 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

[772] Testimony of Dr. Negrete, March 20, 2013, p. 130.
[773] Recall that the Court fixes this date on 1 March 1996, see in particular supra, para. [642], [648] and [656].

Judge very explicitly stated the reasons why he retained the first testimony and dismissed the other two. With regard to the latter, the Judge wrote in particular: "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 adds: "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". We are here at the epicentre of the power of free assessment of the evidence vested in the Judge presiding at trial.

[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,[774] 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.[775] In a complementary expert report, Dr. Negrete provides additional details on the incidence of tobacco dependence among young people:[776]

> 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 secondary school), 38.2% of children who smoked already met the criteria for clinical diagnosis of nicotine dependence (ICD-10).
>
> […]
>
> A similar study, conducted among Secondary 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.

[838] These observations coincide with several other pieces of evidence on file that show that the vast majority of smokers start smoking during adolescence.[777] The 2012 U. S. Surgeon General Report thus reveals that "among adults who become daily smokers, nearly all first use of cigarettes occurs by 18 years of age (88%)

[774] See, for example, Exhibit 601-2012.
[775] See references cited in 601-1988.
[776] Exhibit 1470.2, p. 3
[777] See, for example, Exhibit 30025.1, p. 268.

[...]".[778]Similarly, it appears that for most smokers, the transition from occasional to daily cigarette consumption occurs during this period.[779]

[839] Given this evidence - of which only a very selective overview is provided here – and which undeniably constitutes sociological, epidemiological or "other" studies covered under 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' failure, is acquired four years after the onset of smoking (with an average consumption of at least 15 cigarettes per day). The Appellants do not demonstrate how this conclusion would be vitiated by a palpable and overriding error that would justify the Court's intervention. In fact, as already mentioned, this conclusion of the Judge appears rather conservative in the light of the above-mentioned evidence, much of which suggests that tobacco dependence is likely to develop in a period of under 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 Québec courts have opted for the theory of adequate causation: is damage the logical, direct and immediate consequence of fault? The *T.R.D.A.*, a law 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 offered at trial. However, substantial evidence, mainly in the form of medical (including epidemiological) expertise, provided a sufficient basis for finding 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 conductual 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* (S. 219, 228 and 272 *C.P.A.*)

[841] The Appellants argue that the Justice erred at various stages of the analysis of their liability pursuant to the *C.P.A.* We recall that the Justice ordered the Appellants to pay compensatory damages based on three areas of liability (general law of negligence,

---

778 Exhibit 601-2012, p. 165.
779 See, for example, Exhibit 601-2012, p. 134; 40499, p. 573; 30025.1, p. 268.

the *Charter* and the *C.P.A.*) schemes which overlap in several aspects and therefore with respect to the principle of the full remedy for the prejudice incurred.

2.1. Context

[842] The Trial Justice found the Appellants liable pursuant to section 272 *C.P.A.* both for moral damages caused to members of the Blais group and punitive damages, the payment of which was ordered in favour of both groups. In order to reach that conclusion, he initially 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.*), applying the four criteria of absolute (*juris de jure*) presumption of prejudice set forth by the Supreme Court of Canada in *Richard v. Time Inc.*[780].

[843] The Appellants challenged these conclusions on various fronts that we will regroup under four principal themes.

[844] Firstly, 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 practises of the Appellants took place prior to the adoption of the relevant provisions in 1980. Certain members thus allegedly do not have the legal standing required pursuant to the *C.P.A.*, in particular those who stopped smoking prior to 1980.

[845] Thus, along similar lines, the Appellants argue that the public awareness of the toxic nature of tobacco as of January 1, 1980 renders any prohibitive practice irrelevant. JTM adds that the ban against advertising in 1989 is tantamount to the cessation of any prohibitive practice and ITL is of the view that the prohibitive practises can *a fortiori* solely be examined 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] Secondly, the Appellants take issue with the qualification of prohibited practises by the Trial Justice. JTM is of the view that the Justice erred by concluding that its advertising constituted false or misleading representations as contemplated by section 219 *C.P.A.*, insisting on the contradiction between this finding and other findings of the judgment under appeal to the effect that the Appellants had not disclosed information which can properly be deemed as 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.

[780] *Richard v. Time Inc.*, 2012 SCC 8.

DRAFT

[847] On the issue of the existence of the failures to disclose an important fact (s. 228 *C.P.A.*), ITL criticizes the Justice 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".

[848] Finally, the Judge provided no explanation on the notion of important fact. Thirdly, the Judge allegedly erred by applying the third and fourth criteria of the presumption of prejudice set forth in *Richard v. Time Inc.* In the case of the third criterion, JTM and ITL argue that the Judge erred by concluding that all the members were aware of their representations since there exists no evidence of circulation of their advertising materials. Furthermore, JTM calls into question the analysis of the criterion of sufficient nexus estimating that no evidence allows for the conclusion that it had been satisfied. ITL adds that the Judge improperly applied the rule of causation 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] Fourthly, and finally, according to ITL, section 272 should not apply within the framework of an extra contractual (tort) claim on the basis of the principles set forth in *Richard v. Time Inc.*, both with respect to compensatory and punitive damages.

[850] Faced with these arguments, we propose to analyse the impact of the *C.P.A.* on collective actions based on the following aspects: (A) its adoption and scope, (B) the conditions of the implementation of the claims provided for at section 272 *C.P.A.*, (C) the impact of the presumption of prejudice and (D) the availability of penalties imposed pursuant to 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 and effect on April 30, 1980[781]. The Appellants insist on the fact that the *C.P.A.* therefore cannot apply to a significant part of the relevant period, i.e. from 1950 up until April 30, 1980.

[852] However, the Justice was not unaware of this reality as demonstrated in the excerpt of the Judgment where he specifies that the order for punitive damages can solely be based on infringements of the *C.P.A.* as of April 30, 1980:

---

[781] *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.

DRAFT

> [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 does not reiterate this mention in the analysis of moral damages, it is clear that the order arising out of the facts and events which triggered liability occurred during the period from 1950 to April 30, 1980 are based on the general principles of civil liability. Furthermore, the Justice 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 up until service of the claim in November 1998.

[854] The Appellants accurately point out that their actions prior to April 30, 1980 cannot be considered under the angle of the *C.P.A.* Excluding a reference to advertising which appeared in 1979[782] and another that appeared apparently in January 1980[783], the analysis of the Trial Justice focused on later advertising although it frequently falls within a temporal continuum of events and failure to act. With respect to the reference to the advertisements of 1979 and 1980, this error is without consequence since the Justice also referred to other advertising later than April 30, 1980[784]. We note that he could just as easily have cited a myriad of other examples[785].

[855] Furthermore, the Appellants argue that since the *C.P.A.* entered into force and effect after the date of public knowledge established as being January 1, 1980 for the Blais group, the Justice erred by concluding there had been a commission of prohibited practises, 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[786].

---

782 Judgment under appeal, para. 535, referring to Exhibit 152.
783 Judgment under appeal, para. 535, referring to Exhibit 40436.
784 Judgment under appeal, 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).
785 There are multiple examples among the hundreds of samples of advertising material filed with the Court record: exhibits 1381.1-1381.107, 1500.1, 1500.2 et 1501.1-1534.11.
786 The Court notes, furthermore, that the date of public knowledge for the two groups could not have been set prior to March 1, 1996. See *supra*, paragr. [650] *et seq.*

B. Conditions of implementation of the remedy set forth at section 272 C.P.A.

[856] The orders handed down against the Appellants for the period subsequent to April 30,1980 rely upon section 272 *C.P.A.*, in addition to the *Charter* and the *C.c.Q.* This provision provides:

> **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;
> 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.

> **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;
> (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.

DRAFT

[857] In *Richard v. Time Inc.*[787], Justices LeBel and Cromwell proceeded with a review of conditions giving rise to the remedies set forth at section 272 *C.P.A.* They initially analyzed the standing required to exercise these remedies. The consumer who is victim of a violation of an obligation imposed by the *C.P.A.* upon a merchant must have contracted in order to procure a good or a service related to the failure to meet the duty (s. 2 *C.P.A.*). Without a contract there is no remedy pursuant to section 272 *C.P.A.* to solely claim punitive damages.

[787] *Richard v. Time Inc.*, 2012 SCC 8, paragr. 104.

[858] There are four criteria set forth by the Supreme Court in *Richard v. Time Inc.* in order to give rise to the presumption of prejudice and the award of remedies provided for at 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 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.[788].

[859] It is appropriate to underline that the expression "absolute presumption of prejudice", generally used to qualify the impact of these criteria but also the mechanism of application of the section 272 remedy does not refer to prejudice in the usual connotation of the word in civil liability matters, but to the fraudulent impact on the consumer triggered by the failure of the merchant to meet its obligations. We shall return to this point

[860] In the following, each of the criteria shall be analyzed in order to examine the proper scope for appeals and for each of them to dispose of the arguments of the Appellants with respect to the evidence admitted by the Trial Justice.

i. Violation of an obligation imposed by Title II of the *C.P.A.*

[861] The *C.P.A.* does not rely upon the notion of fault, but rather that of non-compliance with rules governing making of contracts or formal requirements under the Act (s. 271 *C.P.A.*) or the failure of the merchant to fulfil its obligations (s. 272 *C.P.A.*)[789]. In the latter case, these failures may fall under two categories, either the failure to meet contractual obligations (Title I) or the failures that fall within prohibited commercial practises (Title II) and thus most frequently during the precontractual phase. It is clear that the existence of this latter category is not subject *per se* to the existence of a contract (s. 217 *C.P.A.*).

[862] The failure of a merchant to meet 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 allows the consumer the possibility of relying upon the remedy set forth at section 272 *C.P.A.*

[863] Title II sets forth a series of prohibited commercial practises. It is established that the notion of general impression set forth at section 218 *C.P.A.* is the criterion that is used in the qualification of a representation as a prohibited commercial practice. This provision states as follows:

---

788 *Richard v. Time Inc.*, 2012 SCC 8, paragr. 124.

789 *Vidéotron v. Girard*, 2018 QCCA 767, paragr. 50, application for leave to appeal to the Supreme Court of Canada dismissed, February 21, 2019, no. 38225.

DRAFT

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.	**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.

[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""[790]. The general impression triggered by a representation is neither the "rushed or partial reading" nor the "the minute dissection of the text" of an ad, but particularly and especially a "reading over the entire text"[791]. As underlined by the Supreme Court of Canada in *Richard v. Time Inc.*, this is a high standard for the merchant, but it remains nevertheless that 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."[792]. 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 upon a credulous and inexperienced consumer. Where the general impression is not true to reality, this amounts to a prohibited practice[793].

[865] How do these principles apply to the present matter?

[866] Following his review of the evidence, the Justice came to the conclusion that the Appellants engaged in two types of prohibited commercial practises, 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 challenged these findings, it is appropriate to examine them individually. However, as the Judge ruled that the Appellants did not in their representations falsely attribute any special advantage to cigarettes and that their conduct did not violate subparagraph 220(a) *C.P.A.*, it is not necessary to address this aspect.

a. Failing to mention an important fact (s. 228 *C.P.A.*)

[867] The Quebec legislation in the field of consumer rights sets forth a prohibition that denies the merchant the right to fail to mention a fact which is important. Section 228 states as follows:

---

[790] *Richard v. Time Inc.*, 2012 CSC 8, paragr. 49.
[791] *Richard v. Time Inc.*, 2012 CSC 8, paragr. 56.
[792] *Richard v. Time Inc.*, 2012 CSC 8, paragr. 60.
[793] *Richard v. Time Inc.*, 2012 CSC 8, paragr. 78.

> **228.** Aucun commerçant, fabricant ou publicitaire ne peut, dans une représentation qu'il fait à un consommateur, passer sous silence un fait important.

> **228.** No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

[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 waves or the print press. Section 216 *C.P.A.* lists in a non-exhaustive manner both communicational acts and conduct or omissions:

> **216.** Aux fins du présent titre, une représentation comprend une affirmation, un comportement ou une omission.

> **216.** For the purposes of this title, representation includes an affirmation, a behaviour or an omission.

[869] The notion of representation thus embraces any and all forms of communication engaged in by a merchant, manufacturer or public relationist that are likely to reach consumers and it is necessary to vest the notion of representation with a broad interpretation[794]. The notion is furthermore not limited to precontractual representation[795].

[870] The Appellants submit that the interpretation of section 228 *C.P.A.* adopted by the Justice gives rise to an absurd result insofar as it is tantamount to saying that there was an "omission in the omission". In other words, since as of 1989 (date of entry 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 which in appearance is incoherent if it is 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 the omission or complete absence of explicit representation within the public sphere. However, the analysis proves necessarily different where it is a question of a hazardous product such as in the present matter. In fact, some might argue that it is impossible that the Appellants had failed to mention important facts during the period of prohibition against advertising because they were shackled and prevented from engaging in any form of advertising by law. This assertion, however, does not take into

---

794 *Richard v. Time Inc.*, 2012 CSC 8, paragr. 44; Luc Thibaudeau, *Guide pratique de la société de consommation*, Cowansville, Yvon Blais, 2013, nº 47.6.

795 *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCSC 333, paragr. 48.

account the fact that the idea of “representation” is truly a broad notion which comprises the marketing of cigarette packages even during the period of prohibition against advertising.

[872] Furthermore, where a good or service is subject to 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 omissions be linked with a precise affirmation or line of conduct. The manufacturer must actively alert the public where it acquires significant 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 forth at article 1473 (2) *C.c.Q.*). This obligation can be fully justified with respect to the informational disequilibrium that underlies certain obligations of the manufacturer, who is better informed than the consumer on the properties of goods and services that it is offering to the public. This duty is all the more justified within 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[796], demands such an approach.

[873] The argument further to which an omission can solely exist in the presence of a statement by the merchant is unfounded within the context of the present matter where we find over the years numerous public affirmations by the Appellants, not to mention their advertising of tobacco products. It is clear that the Appellants have not merely forgotten to disclose an important fact: The Justice concluded that they knowingly failed to disclose important facts in their advertising and by their policy of silence[797]. The Appellants have not demonstrated how these conclusions of the Trial Justice are tainted by any palpable and overriding errors.

[874] The notion of important fact set forth at section 228 *C.P.A.* has a very broad scope which governs the decisive elements in forming the consent by the consumer. It covers the safety of a good and its quality as underlined by the Court of Appeal in *Fortin v. Mazda Canada inc.*, a matter where the locking system of a vehicle sold to consumers as defective[798] :

> [139] With all due respect for the Justice, I am of the view that the “important fact” referred to at section 228 *C.P.A.* does not solely aim to protect the physical safety of the consumer. It also encompasses all the fundamental elements of the contract likely to interfere with an informed choice. […]

---

796 *Richard v. Time Inc.*, 2012 SCC 8, paragr. 119.
797 Judgment under appeal, para. 269, 271, 337, 523, 574 and 631.
798 *Fortin v. Mazda Canada inc.*, 2016 QCSC 31. On the issue of a fundamental impact of an important fact on consent, see also *Amar v. Société des loteries du Québec*, 2015 QCSC 889, paragr. 49. See also *Vidéotron v. Union des consommateurs*, 2017 QCSC 738, paragr. 97. This is furthermore the preferred approach supported by Prof Masse (C. Masse, *C.P.A. : analyse et commentaires*, *supra*, note 445, p. 862).

DRAFT

> [140] The "important fact" refer to by section 228 *C.P.A.* therefore deals with the decisive element in the agreement of sale, such as price, warranty, payment terms, quality of the good, nature of the transaction and <u>any other decisive consideration with respect to which the consumer has agreed to contract with the merchant</u>.
>
> [Underlining added; references omitted]

[875] This excerpt demonstrates that the quality of the good and the considerations related to risk for the consumer triggered by the normal use of the good may enter into account.

[876] The Justice having 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 persists as of April 30, 1980 under the governance of the *C.P.A.*

[877] The evidence retained by the Judge, notably in the analysis of common questions[799], 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 in his analysis of liability pursuant to 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 wherein these representations, including omissions as contemplated by section 216 *C.P.A.*, amounted to a failure to disclose important facts following the entry into force and effect of the *C.P.A.* By doing so they acted in a manner to comfort the impression that the knowledge of risk was still at a stage of uncertainty. Worse, they provided misleading information whereas the 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 any intervention on appeal.

[878] The Appellants submit that the Judge erred by imposing the duty to disclose a fact which 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. In the Appellants' submission, a fact cannot be qualified 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 accidental inflammability 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.

---

[799] Judgment under appeal, para. 37-642

DRAFT

[879] Even supposing that the Appellants are not wrong on this point, the failure to mention the addictive nature of tobacco in advertising of the Appellants or in their sponsorship, in conjunction with the policy of silence[800], negates this argument[801]. The ordinary consumer, whether a smoker or not, has to be warned that the product that 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 appear on the cigarette packages up until 1994, the Appellants failed to disclose an important fact. The fact that the warnings became gradually 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 criticism of the Appellants according to which the Justice failed to specify what they had to disclose is also without foundation. It is clear, upon an overall reading of the decision, that the Justice was of the view that the Appellants could have for several years publicly recognised the important risks for health presented by consumption of cigarettes. This furthermore 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.
>
> [Underlining added, reference omitted]

[881] It is worth mentioning again that the Appellants had to denounce not only the risks of developing the diseases at issue, but 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 our Court – is an important fact that they should have disclosed well prior to the imposition of warnings concerning addiction as of 1994[802]. Certainly, the grounds of the Judge were succinct in this regard, but the Appellants have demonstrated no reviewable error on the existence of the failure to mention an important fact.

[882] There remains the question raised by the Appellants of determining whether the Justice erred by not clearly specifying whether the prohibited practises continued after 1998, i.e. after prohibition of the advertising, where applicable, and whether they

800 Judgment under appeal, para. 56, 271, 337, 523, 574 and 631.
801 See *supra*, paragr. [636] *et seq.*
802 Judgment under appeal, para. 110; the Justice refers to Exhibit 40003E-1994, i.e. the *Règlement sur les produits du tabac – Modification*, DORS/93-389, règlement pris en vertu de la *Loi réglementant les produits du tabac*, L.C. 1988 ch. 20.

continued during the remainder of the relevant period. This will be dealt with at paragraphs [893] *et seq.* hereunder.

b. False or misleading representation (s. 219 *C.P.A.*)

[883] The second type of prohibited practice alleged against the Appellants is that they have made false or misleading representations by displaying in their advertisements upbeat scenarios which gave the impression that cigarettes are not dangerous.

[884] False or misleading representations are prohibited by section 219 *C.P.A.* :

219. Aucun commerçant, fabricant ou publicitaire ne peut, par quelque moyen que ce soit, faire une représentation fausse ou trompeuse à un consommateur.	**219.** No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

[885] The body of Quebec law contains several occurrences of the tandem “false or misleading”. Amongst the laws[803] and regulations[804] which make use thereof, we note that it is often a question of creating penalties that prohibit “false or misleading statements” or the fact of providing a “false or misleading statement”.

[886] In the *C.P.A.*, the legislator was careful to distinguish between false representations and misleading representations, whereas the false representation 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 “misleading” is not defined in the *C.P.A.*, we have to refer to its ordinary meaning. *Le Grand Robert de la langue française* defines in reference to the verb “mislead”, the primary meaning of which is “to induce error with respect to facts or intentions by using lies, dissimulation and cunning” (translation)”[805]. The French Academy in the 8th edition of its dictionary – the 9th not having yet arrived at the entry “misleading” indicates that to mislead means[806] :

803 See for example *Tobacco Control Act*, RLRQ c. L-6.2, s. 54; *Act to Promote Access to Justice through the Establishment of the Service Administratif de Rajustement des Pensions Alimentaires pour Enfants*, RLRQ, c. A-2.02, s. 24(1°-2°); *Act respecting transparency measures in the mining, oil and gas industries*, RLRQ, c. M-11.5, s. 41(2°); *Act respecting immigration to Québec*, RLRQ, c. I-0.2, s. 3.2.1.

804 *Code de déontologie des avocats*, RLRQ, c. B-1, r. 3.1, art. 122; *Règlement sur les lieux d’élimination de neige*, RLRQ, c. Q-2, r. 31, art. 4.

805 *Le Grand Robert de la langue française*, *supra*, note 473, “trompeur” and “tromper”.

806 Académie française, *Dictionnaire de l’Académie française*, 8e éd., Tome second, Paris, Librairie Hachette, 1932-1935, “tromper”.

DRAFT

> To induce into error by artifice. *Mislead the purchaser on the quality of merchandise, mislead with agility, grossly mislead brutally with effrontery. 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 being "[*t*]*hat leads someone astray, that causes error; imprecise, confusing, deceptive.*"[807]

[889] Whereas mislead means to induce into error it is obvious that the implementation of representations where an information or an image dissimulates a fact, reports a factitious reality or yet again glosses over certain facts, may constitute, depending upon 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 claim of the Appellants according to which the public knowledge of the hazards of tobacco neutralises the prohibited practises should be set aside. It adds to the law a ground of defence that the law does not recognize. The aim of protecting the public from legislation calls for a generous interpretation of the scope of prohibited practises. The prohibition is not a variable geometry based on the ability of the merchant to demonstrate the knowledge of the consumer of a danger of any sort and thereby releasing it from its obligations to refrain from engaging in unlawful commercial practises. Furthermore, 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 innumerable advertisements of the Appellants filed as evidence led the Justice to conclude that an important part of them, of the "*lifestyle*" variety, associates tobacco products with social or sporting activities which highlight young people apparently brimming with health. He esteemed that in this sense the advertising was misleading as it concealed the harmful and toxic effects of the product on the health of consumers and rather presented smoking in a positive light[808].

[892] This is a conclusion which in the absence of a palpable and overriding error is sheltered from the intervention of the Court of Appeal. The Appellants have 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 which is received, as contemplated by section 218 *C.P.A.* By distinguishing between advertisements that qualify as neutral, the misleading

---

807 *Shorter Oxford English Dictionary*, 6e éd., vol. 1, Oxford, Oxford University Press, 2007, "misleading".
808 Judgment under appeal, para. 535.

DRAFT

advertisements at 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 prohibited practises

[893] The Appellants allege that the prohibited practises did not persist until the end of the relevant period and that the Justice was ill-founded in so finding. The findings of the Justice in this regard deserve some particulars. He did in fact implicitly conclude there was an existence of prohibited practises during the period from entry into force and effect of the 1980 *C.P.A.* up until service of the Autumn 1998 claims. An overall reading of his grounds allow for this conclusion[809]. Nor did the Justice ignore the cessation of advertising between 1989 and 1995[810]. His finding that there was prescription of the claims for punitive damages incurred up until 1995[811] also allows for the belief that in his view the prohibited practises lasted from 1995 until Autumn 1998.

[894] In order to properly frame this issue, it is necessary to recall the chronology of events and the legislation over the two final decades of the 20th century and then to analyze the advertising practises from 1998 to 1998.

[895] The initial warnings on cigarette packages appeared as of 1972 and are the result of Voluntary Codes agreed upon between the members of the Canadian tobacco industry which include the Appellants under their corporate form of that time. The Voluntary Codes were implemented as a reaction to a growing expectation of controls of the industry by the legislator. The 1972 warnings specify without elaborating throughout “danger […] increases with use”. Then in 1975, it contained a recommendation to avoid inhaling smoke[812]. The subsequent codes maintain these warnings while modifying their size on occasion and at other times prescribing the recommended content of cigarettes in tar and nicotine[813].

[896] As we have already seen in 1988 the *Tobacco Products Control Act*[814] was adopted, including section 9 that provided for certain labelling rules including the addition of messages in relation to health. Paragraph 11(1)(a) of its application regulation requires cigarette manufacturers to print new warnings on cigarette packages as of October 31, 1989[815] :

---

809 Judgment under appeal, para. 541 and 1024.
810 Judgment under appeal, para. 420.
811 Judgment under appeal, para. 900.
812 Judgment under appeal, para. 110.
813 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 *supra*, paragr. [504] *et seq.*
814 *Tobacco Products Control Act*, S.C. 1988, ch. 20, s. 9(1)(a).
815 *Tobacco Products Regulation*, DORS/89-21, art. 11(1)(a). See also *supra*, paragr. [530].

(i) "L'usage du tabac réduit l'espérance de vie. Smoking reduces life expectancy."

(ii) "L'usage du tabac est la principale cause du cancer du poumon. Smoking is the major cause of lung cancer."

(iii) "L'usage du tabac est une cause importante de la cardiopathie. Smoking is a major cause of heart's disease."

(iv) "L'usage du tabac durant la grossesse peut être dommageable pour le bébé. Smoking during pregnancy can harm the baby."

[897] Several requirements ensure visibility of these warnings, notably with respect to their size and contrasting colour[816]. We note here that these mentions 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, solely lung cancer is referred to.

[898] As mentioned above[817], the implementing regulation[818] of the *Tobacco Products Control Act*[819] was amended in 1993 in order to modify the content of the warnings that had to become more severe. Thus, as of September 12, 1994, eight warnings appeared, including "Fumer peut vous tuer / *Smoking can kill you*" and "La cigarette crée une dépendance / *Cigarettes are addictive*". Each of the warnings had to appear on 3% of the packs of each of the brands produced during a year, thereby plausibly ensuring a rotation of messages and a broadcast deemed to be adequate.

[899] On September 21, 1995, the Supreme Court of Canada invalidated the *Tobacco Products Control Act* in part[820]. The new *Tobacco Act*[821] in 1997 and its implementing regulation would only enter into force towards the end and after the termination of the relevant period[822]. During the interim, thus, the Voluntary Codes from 1995 and 1996[823] ensured the presence of warnings on packs. These warnings in particular dealt with addiction, lung diseases, cancer and mortality[824].

---

816 *Tobacco Products Regulation*, DORS/89-21, art. 4, 15(a) et 15(d).
817 See *supra*, paragr. [540].
818 *Tobacco Products Regulation – Amendment, DORS/93-389, s. 4(1).*
819 *Tobacco Act*, S.C. 1997, ch. 13.
820 I.e sections 4 (advertising), 8 (brands) and 9 (non-attributed messages related to health) and sections 5 and 6, that are inseparable. See *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1995] 3 S.C.R. 199.
821 *Tobacco Act*, S.C. 1997, ch. 13.
822 *Tobacco Act*, S.C. 1997, ch. 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, ch. 38, including several provisions that entered into force and effect after the end of the relevant period.
823 See exhibits 40005O-1995, 40005P-1995 and 40005S-1996.
824 See a sample advertisement at Exhibit 40005Q-1995 ; see *supra*, paragr. [548].

DRAFT

[900] In short, the warnings on 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 up until the end of the relevant period.

[901] It is thus possible that the prohibited practice consisted in failing to mention an important fact – in the present matter, the risk of addiction – had ceased when the warnings on addition appeared on September 12, 1994. However, it is not necessary that we rule on this aspect since, as we are going to see, the misrepresentations resumed with the invalidation of the *Tobacco Products Control Act*[825] 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 the type of prohibited practice, the sole question that remains is to determine whether the Appellants continued to engage in prohibited practises between September 12, 1994 up until service of the claims in 1998. Based on the findings of the Court with respect to civil liability of the Appellants pursuant to the general law of civil liability, the question is solely relevant for the imposition of punitive damages in the two matters.

[903] As the Justice concluded, the advertising practises of the Appellants amounted to false or misleading representations[826]. As he also concluded, the advertising campaigns ceased as of 1989 at the time of the entry into force and effect of the *Tobacco Products Control Act*[827] and its implementing regulation and were resumed at the time of partial invalidation of this statute[828]. Ads thus remained between 1980 and 1988 and from 1995 to 1998.

[904] The Justice did not err by finding an existence of prohibited practises up until the end of the relevant period. Certainly, the frequency of the prohibited practises and their scope are 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 find 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 Justice had not erred.

[905] The Appellants have failed to demonstrate an error allegedly committed by the Justice in concluding that there existed prohibited practises during the period from 1995 to 1998. Thus, even presuming that the prohibited practises ceased on September 12, 1994 due to the addition of warnings on addiction – which is not demonstrated and that we will address in further detail at the time of assessment of the quantum of punitive

[825] *Tobacco Act*, S.C. 1997, ch. 13.
[826] Judgment under appeal, para. 536.
[827] *Tobacco Act*, S.C. 1997, ch. 13.
[828] Judgment under appeal, para. 523.

DRAFT

damages – they were resumed in 1995. In fact, the Appellants have not called into question the factual finding of the Judge pursuant to which they adopted a policy of silence when, conjugated with their advertising campaigns and sponsors[829], was tantamount to the commission of two types of prohibited practises that are imputed to them. In accordance with section 218 *C.P.A.*, the general impression left with an inexperienced consumer by this conjunction of omissions and communicational acts, failure to inform and sustained advertising campaigns is characterised by an attitude of *laisser-aller* and the presentation of the cigarette which is upbeat, whereas a more alarmist tone would have been clearly more appropriate in the mid-1990s. This general impression is not true to reality.

d. Summary

[906] The Justice thus correctly decided that the Appellants engaged in prohibited practises as contemplated by the *C.P.A.* commencing on April 30, 1980. The Appellants failed to demonstrate on appeal that the prohibited practises irrevocably ceased in 1989 or in 1994. More significantly, the prohibitive practises did not cease during the three years preceding the filing of the collective actions.

ii. Knowledge of prohibited practises

[907] The Appellants argued that the Justice erred in concluding that the evidence demonstrated that the members of the groups Blais and Létourneau had personal knowledge of the prohibited practises to a certain degree if in fact the Court concluded that these practises did in fact exist.

[908] According to the Justice, the consumers were aware of misleading practises arising out of advertisements of the "lifestyle" type. He asserted that according to the experts Lacoursière and Flaherty, the members came across articles denouncing the risks associated with tobacco[830] 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 failures to disclose important facts as contemplated by section 228 *C.P.A.*, the Justice ruled that one cannot by definition have knowledge of something that does not exist. Thus, the second criterion will be proved for the two types of practice of prohibited business.

[910] The arguments of the Appellants concerning the "omission in the omission" having been set aside, one is left with the conclusion that the reasoning of the Judge with respect to the learning about omissions of the Appellants is exempt of any

---

829 Judgment under appeal, para. 535. The Justice listed certain examples of ads and sponsors without distinction (see exhibits 1240B and 1240C, that the Justice erroneously designates as being exhibits 1040B and 1040C).

830 Judgment under appeal, para. 513 et 537.

DRAFT

reviewable errors since they are inseparable from the representations made to the members and which contain insufficient information concerning the product.

[911] Furthermore, the Appellants criticize the Justice for having set aside experts' reports, Lacoursière and Flaherty in defence, but using certain aspects for the benefit of the plaintiffs and estimates that the evidence does not allow this because the experts did not offer opinions on the visibility of advertisements in media that they examined. They concluded by insisting on the fact that no member came to testify concerning his or her knowledge of advertisements and still less about the impact of them on his choice as whether or not to smoke.

[912] The Justice could, in his analysis of the overall evidence, retain in whole or in part the opinions of experts that were adduced into evidence[831]. The exercise of this power of weighing the evidence by the Justice does not disclose an error that calls for the intervention of this Court.

iii. Contracts subsequent to the prohibited practises

[913] Both the trial Judgment[832] and the Appellants analyzed the third criterion set forth in *Richard v. Time Inc.* for the purposes of application of the remedy set forth art article 272 *C.P.A.* by examining whether the conclusion of the contract *results* from the prohibited practice. However, this prism of analysis should be set aside because it does not correspond to that retained by the Supreme Court of Canada in *Richard v. Time Inc.* and, were it to be retained, it would neutralise 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[833]. In fact, at paragraph 124 of this leading case, the Supreme Court of Canada formulated a third criterion of the analysis by requiring in French that the "*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*"[834]. It is appropriate to cite paragraph 124 of this case in its entirety :

[124] L'application de la présomption absolue de préjudice	[124] This absolute presumption of prejudice presupposes a rational

[831] *Lévesque v. Hudon*, 2013 QCSC 920, paragr. 69 et 75.
[832] Judgment under appeal, para. 515 et 538.
[833] 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 "The Judgment of the Court was rendered by Justices LeBel et Cromwell" (*Richard v. Time Inc.*, 2012 SCC 8).
[834] *Richard v. Time Inc.*, 2012 CSC 8, paragr. 124.

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 <u>subséquente</u> 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

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 <u>resulted</u> 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.*

DRAFT

> contractuelles prévues à l'art. 272 *C.P.A.*
>
> [Emphasis added]

[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 to attribute to the third criterion a temporal dimension as implied in the French version rather than causal, in other words, to require that the formation of the contract be subsequent to rather than resulting from knowledge of the prohibited practice.

[917] Firstly, 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. This complies with the meaning of the word "subsequent" used at paragraph 124 of the Judgment. One can in fact read at paragraph 141 :

> [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 […].

> [141] […] He then had to prove that he had seen the representation constituting a prohibited practice before the contract was formed, amended or performed […].
>
> [Emphasis added]

[918] Furthermore, whereas it is necessary to attribute a causal importance to the disclosure of the formation or modification of the contract, it is not solely the fourth criterion of the test that would be impaired, but the entire presumption itself. In fact, the fourth criterion requires a rational link between the practice and the object of the contract. To demand this link here by hypothesis, and a vague causation between the practice and the contract itself would render the fourth criterion vague and superficial. Furthermore, to require that this link at this stage would deny any effect 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 targets a chronological sequence of the prohibited practice and the conclusion of the contract rather than the causal effect of the prohibitive practice[835].

---

[835] *Vidéotron v. Girard*, 2018 QCCA 767, paragr. 69 and 76, application for leave to appeal to the Supreme Court of Canada dismissed, February 21, 2019, no. 38225. See also Pierre-Claude Lafond, *Droit de la protection du consommateur : Théorie et pratique*, Montréal, Thomson Reuters, 2015, paragr. 735; Luc Thibaudeau, "Going Back in Time", (2018) 441 *Colloque national sur l'action*

[920] The contracts were entered into between each smoker who purchased a cigarette 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 to us to be evident, although it is not all the members of the group who can affirm it but solely those who smoked after April 30, 1980. Since the prohibited practises of the Appellants continued as of April 30, 1980 up until 1998, we can conclude that the great majority of contracts are subsequent to the prohibited practises which allows for the affirmation that the third criterion set forth in *Richard v. Time Inc.* has been satisfied.

[921] We should add that the members who no longer smoked as of April 30, 1980 and prior to the end of the prohibited practises did not furthermore have the legal standing required to exercise the claim under 272 *C.P.A.* because they could not claim to have acquired property related to the prohibited practises of the Appellants. In the same manner, the members who did not smoke 12 pack-years after the commission of the prohibited practises or who, *a fortiori*, did not become dependent after 1980, cannot claim a medical causation and therefore seek damages for their injury.

[922] This has no impact on the admissibility of their application pursuant to the general law governing civil liability. That could nevertheless have justified a restricted definition of the Blais group had the Court of Appeal set aside the responsibility of the Appellants under the law of general civil liability for members who did not have the required standing pursuant to *C.P.A.* Such however was not the case.

iv. <u>Sufficient nexus</u>

[923] Finally, the consumer who sought one of the remedial measures provided for at section 272 *C.P.A.* has to demonstrate the existence of a "a sufficient nexus […] between the <u>content of the representation</u> and the <u>goods</u> or services covered by the contract"[836] The notion of sufficient nexus does not appear in the *C.P.A.* In *Richard v. Time Inc.*, Justices LeBel and Cromwell explain that this sufficient nexus has to exist firstly between the content of the representation and on the other hand the good that is the object of the contract. it is appropriate to point out that the Justices then paraphrased this criterion by explaining that the "the prohibited practice must be one that was <u>capable</u> of influencing a consumer's behaviour with respect to the formation, amendment or performance of the contract.."[837]

[924] It is important to specify that the grounds of the case *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 continuity which is at issue is focused on the link between the representation and the good. This representation must be

---

collective : Développements récents au Québec, au Canada et aux États-Unis 51, p. 58 et 64 [*Développements récents*].

[836] *Richard v. Time Inc.*, 2012 SCC 8, paragr. 124 [emphasis added].

[837] *Richard v. Time Inc.*, 2012 SCC 8, paragr. 124 [emphasis added].

"capable" of influencing the consumer – it is not necessary in all cases that it *had* actually in fact influenced the consumer. The word "capable" as employed by the Supreme Court of Canada means in fact one thing that it *can do* and not that it *had done* any action or *had had* any impact[838]. It undoubtedly concerns a notion which is within the immediate proximity of the capability and not of the actual influence and not the realisation of this influence.

[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 of a fraudulent impact of the prohibited practice on the decision to conclude a contract or the non-availability of the defence of absence of prejudice. To require the consumer at the fourth step to prove that the representation actually had the effect that he or she is alleging would be equivalent to requiring that he or she prove the fraudulent impact of the practice in order to be able to benefit from the presumption. That would amount then consequently to demanding that the consumer adduce evidence of the *impact* of the presumption that he or she desires to implement thereby, reducing the exercise of *Richard v. Time Inc.* to a vicious circle.

[926] Recently, the Court underlined in *Vidéotron v. Girard*[839] that it is the sufficient nexus between the good and the prohibited practises that has to be considered. The hypothetical conduct of the consumer is not relevant in this analysis. Solely the sufficient possibility that the representation influences in the abstract the conduct of the consumer.

[927] ITL refers to the judgment of our Court in *Dion v. Compagnie de services de financement automobile Primus Canada*[840] in support of its argument to the effect that the criterion of sufficient nexus has not been fulfilled. In this manner, merchants were criticized for having invoiced the fees for mortgage registrations without having explained all the components, thus constituting a practice prohibited by section 227.1 *C.P.A.* The Trial Justice concluded that the sufficient nexus was demonstrated. The Court of Appeal did not consider that there was an error and dismissed the appeals. The current appeals may be distinguished from this matter[841].

[928] No reason justifies departure from the clear and succinct explanation of the fourth criterion made by the Supreme Court of Canada in *Richard v. Time Inc.*, which

DRAFT

[838] According to *Le Grand Robert de la langue française*, *supra*, note 473, likely means "that has the capacity, a latent capacity, a possibility of occasional use (for things) whereas *capable* implies a permanent and acknowledged capacity (translation)."

[839] *Vidéotron v. Girard*, 2018 QCCA 767, paragr. 70-73, application for leave to appeal to the Supreme Court of Canada dismissed, February 2019, no. 38225.

[840] *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCSC 333.

[841] In fact, in *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCSC 333, an admission of the absence of sufficient nexus had been made; this decision within this context does not call into question the case *Richard v. Time Inc.*

require clearly that the analysis of the fourth criterion should not be carried out according to the characteristics of the individual but well and solely by interest in the rational link between the good sold and the representation[842].

[929] In the present matter, the Judge could conclude that the illegal representations of the Appellants seen by the consumers were capable of influencing their decision to acquire the product since the content of these representations were inextricably related to the product sold.

[930] The Justice concluded that the majority of advertisements made by the Appellants since 1980 for the products aim to present their cigarettes under a favourable light[843]. He also concluded that the advertisements delivered an upbeat 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 Justice after this excerpt from the Judgment all display a positive image unrelated to cigarettes (surfing, transporting of wood, cycling etc.) upon which is superimposed the image of a pack of cigarettes, partially opened with several cigarettes sticking out and ready to be smoked. If one considers both the false or misleading representations as 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 committed no error by finding the existence of this sufficient nexus.

[932] Furthermore, certain statistics adduced into evidence[844] demonstrate that tobacco use decreases to the same degree that awareness of risks of the product increase. This proof is in no way necessary to conclude that the ultimate criterion of the approach preferred by the Supreme Court of Canada is fulfilled since the sufficient nexus must be analyzed on the objective basis of the *likelihood* – i.e. the possibility of an influence of the representation of the consumer – and not its *realization* – i.e., the fact that the representation in fact did have an impact on the consumer. It nevertheless remains that it confirms that the representations are likely to impact the conduct of consumers and reinforces the finding of the Justice.

[933] Finally, we should emphasize that the expertise of Dr Soberman, further 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 Justice in these terms:

---

842 See for example Luc Thibaudeau, *Développements récents*, *supra*, note 835, p. 58.
843 Judgment under appeal, para. 533.
844 See exhibits 987.1, p. 2 et 40495.33, p. 14.

> [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.

[934] The Appellants did not demonstrate how this conclusion contains a reviewable error.

[935] In summary, the Appellants demonstrated in no way where the Justice erred in finding that the conditions of establishing the claim pursuant to section 272 *C.P.A.* were fulfilled. On the contrary, he adopted a conception of the third criterion that benefited them. It follows that the *juris de jure* presumption of prejudice or fraudulent impact of the prohibited practises applies in the present matter. We shall now study the consequences of this irrebuttable presumption.

C. Scope of the irrebuttable presumption of prejudice

[936] Coming to the finding that the presumption of prejudice applied, the Justice concluded that the remedies under section 272 *C.P.A.* were available[845]. In a section distinct from the Judgment, he also concluded there was an existence of a causation link between the civil wrongs of the Appellants and the cigarette smoking of the members[846]. It is appropriate to note once again that the Court set aside the idea that the Respondents had the burden of demonstrating the existence of “behavioural causation” pursuant to the general laws of civil liability. It is thus appropriate to discuss under the angle of the *C.P.A.* the exact conduct of the presumption of prejudice and its consequences on the question of causation.

[937] A review of the older case law of our Court discloses the genesis of the absolute presumption of prejudice. It should be noted that the Court wrote already in 1995 in *Nichols v. Toyota Drummondville (1982) inc.*, that “contrary to what was possible in the event that a claim was based on section 271, the merchant sued under section 272

---

[845] Judgment under appeal, para. 517 et 541.
[846] Judgment under appeal, para. 809 et 817.

cannot offer the defence of absence of injury incurred by the consumer in order to seek dismissal of the claim"[847]. Several years later, in *Turgeon v. Germain Pelletier Ltée*[848], the Court qualified the presumption set forth at section 253 *C.P.A.* as a "presumption of fraud" underlining furthermore that in the facts of this case the prohibited practises "*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 practises and fraud on the one hand and the immediate parallels traced by the Court between fraud and language used in section 253. This conceptual proximity is far from being foreign to the presumption of prejudice contained at section 272 *L.p.c.*

[938] How should we understand the presumption of *prejudice*?

[939] We recall that the word prejudice is not meant here as a constitutive component of the elements of civil liability. It is meant in the sense that the proof of the four criteria cannot be deemed proof of a prejudice which can be compensated by the award of damages.

[940] It is rather 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 desire to align this presumption with classical civil law concepts, we could identify its field of action as being within 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 (s. 1401 *C.c.Q.*). In extra-contractual (tort) matters the presumption of prejudice rather allows for the proof of the civil fault. These conceptual approximations, although of assistance in explaining, bring very little to the analysis.

[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 fulfilled, a merchant cannot simply argue that the prohibited practice that it has committed has not had any impact on the conclusion of the contract. It is thus in summary an irrebuttable presumption of the prohibited practice that had fraudulently incited the consumer to conclude or amend a contract.

[942] The general notion of causation in the law of negligence cannot either be directly transposed into the framework of a claim pursuant to section 272. The legislator decided to alleviate the burden of proof upon 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 forth in *Richard v. Time Inc.* replaces the evidence of what has been qualified in the present matter as "behavioural causation" and allows the consumer to obtain remedial measures. Stated otherwise, where it is demonstrated that the consumer is aware of the prohibitive practice and that the

[847] *Nichols v. Toyota Drummondville (1982) inc.*, [1995] R.J.Q. 746, p. 749.
[848] *Turgeon v. Germain Pelletier Ltée*, 2001 R.J.Q. 291, paragr. 47-48.

DRAFT

consumer contract is subsequent and that there exists a sufficient nexus between the representation and the purchased good, the remedy becomes possible, obviously subject to proving quantum where it is a case of a claim in 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[849] :

> [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.
>
> [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.
>
> [Emphasis added]

[944] The merchant thus cannot argue that his omission under the *C.P.A.* was without impact on the decision of the consumer to contract and still less to require of the consumer that he or she bring proof of such an impact.

[945] In the present matter, without regard to the classification and the terminology under the general law governing civil liability, the scheme of section 272 *C.P.A.* has the

[849] *Richard v. Time Inc.*, 2012 CSC 8.

effect of providing irrebuttable evidence that the practises of the Appellants, including their silence, caused the purchase of the cigarettes by the consumers. This is tantamount in these collective actions to what has been identified as behavioural causation. Within the context of the *C.P.A.* the Respondents are entitled to plead that there do not exist two types of causation. With regards to the *C.P.A.*, behavioural causation is nothing other than the fraudulent impact of the prohibited practises of the Appellants. Now since this fraudulent impact is presumed, the argument of the Appellants dealing on the behavioural causation is inadmissible from the angle of the *C.P.A.*[850].

[946] The Justice's conclusion appears to support at least in part this interpretation of the presumption, in particular where he writes:

> [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 impact of the presumption but it is not its sole impact. It is sufficient for purposes of this matter to state that the Justice has not erred in concluding that it has given rise to the penalties provided under section 272. For the remainder, his omission to give full effect to the presumption of prejudice has no impact since he furthermore concluded pursuant to the law of general civil liability that the faults committed by the Appellants had caused the tobacco use of the members. There is thus no reason to intervene on this aspect.

D. Penalties imposed upon 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 Justice could award the moral damages pursuant to the *C.P.A.* to compensate the prejudice incurred by the members of the Blais group pursuant to prohibited practises of the Appellants.

[949] Contrary to what is argued by ITL, section 272 *C.P.A.* applies both in contractual and extra-contractual matters[851].

[850] The Court has already concluded that the responsibility of the manufacturer under the general law of negligence does not impose on the Respondents any demonstration of "behavioural causation".

[851] *Richard v. Time Inc.*, 2012 SCC 8, paragr. 127-128.

DRAFT

[950] That being the case, an obstacle which appears without consequence should be raised here.

[951] As we have concluded, the general law of civil liability allows for full compensation of the prejudice established by the Trial Justice. Pursuant to the principle of full compensation, the *C.P.A.* has nothing to add to the scope of this liability, but is superimposed thereupon without covering its totality.

[952] Had the Court dismissed the basis for liability under the general civil law and the *Charter,* solely the prohibited practises 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 of the members who had smoked the critical tobacco dose of 12 pack-years after April 30, 1980 since the fraudulent impact of the prohibited practises could not be presumed prior to the entry into force and effect of the *C.P.A.* In other words, it would have been necessary for each of the members to bring proof of consumption of 12 pack-years throughout the period of commission of the prohibited practises; a member who smoked six pack-years prior to 1980 and six pack-years after 1980 could no longer lay claim to the medical causation and thus to the liability of the Appellants. *A fortiori*, it would have been necessary to prove that a member had become dependent – thus that he or she had smoked during four years according to the terms established by the Justice – following the prohibited practises, thus between April 30, 1980 and the end of the prohibited practises in 1998.

[953] However, based on the conclusions of the law of general civil liability, it is sufficient here to note that the Appellants are liable for the moral damages caused to certain members of the Blais group pursuant to the *C.P.A.* Due to the principle of full remedial compensation in law for liability this conclusion has no impact, neither upwards nor 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 Justice did not err in this regard. The arguments of the Appellants that call into question the suitability of ordering payment and assessment of their quantum are dealt with at section IV.5 of this Judgment.

2.3. Summary

[955] The Justice committed no reviewable error in finding liability of the Appellants pursuant to the *C.P.A.* The *C.P.A.* scheme, which is distinct from the law of general civil liability, nevertheless overlaps it without however covering the claims in their entirety of members of the Blais group, given that the prohibitive practises were solely committed as of the entry into force and effect of the *C.P.A.* This obstacle, with respect to which

DRAFT

the Justice was furthermore aware, has no impact on the current appeal since the principle of full restitution requires compensation of neither more nor less than the prejudice of the members and the law of civil liability is sufficient in this regard. In this sense, the Judgment is not vitiated by any palpable and overriding error nor furthermore, by any error in law.

[956] The Justice was correct in concluding that the criteria of the irrebuttable presumption of a prejudice were fulfilled. The existence of prohibited practises to which the consumers were exposed and that precede the conclusion of consumer contracts are sufficient in the presence of a rational link between the practises and the cigarettes to conclude the existence of a violation of the *C.P.A.* and a fraudulent impact on the consent of the consumers. Since the liability of the Appellants has been retained pursuant to the law of general civil liability, the presumption has no impact in the present matter except that of rendering possible a claim in punitive damages in favour of the members of the two collective actions.

3. *CHARTER OF HUMAN RIGHTS AND FREEDOMS*

3.1. Context

[957] The Justice concluded that the Appellants were also liable to pay moral damages caused to members of the Blais group pursuant to the *Charter* and punitive damages in both cases[852]. He concluded that the faults of the Appellants constituted unlawful violations to the right to life, personal security and integrity of the members, justifying the award of compensatory damages. Relying on the case *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*[853], the Justice was of the view that the Appellants, without wishing to cause diseases to their clients, acted in full knowledge of the immediate and natural or extremely probable consequences of their acts, justifying therefore the award of punitive damages.

[958] While the Justice found the existence of unlawful violations of rights to life, personal security and integrity[854], he also referred in a separate section of the Judgment under appeal to violation of the rights to freedom, dignity and inviolability[855]. The reasons of the Justice are succinct on the question of these latter violations; therefore, we shall restrict ourselves to analyzing the alleged violations of rights to life, security and integrity.

[959] Beyond the arguments that overlap those that the Appellants have already advanced based on the general law of civil liability – the absence of fault and

[852] Judgment under appeal, para. 476-488.
[853] *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 11.
[854] Judgment under appeal, para. 484.
[855] Judgment under appeal, para. 183.

DRAFT

causation – and that we have already disposed of, the Appellants are challenging the findings of the Judge from four vantage points.

[960] First of all, ITL challenges the question of the entry into force and effect of the *Charter*. In its view, the Justice erred by not taking into account the entry into force of this law and its impact on liability. Furthermore, because the *Charter* entered into force and effect during the relevant period, the constitutive components of civil liability of the Appellants were allegedly not proved for all of the members. JTM advances a similar argument, further to which the members who commenced smoking prior to the entry into force and effect of the *Charter* were not victims of unlawful violations as contemplated by section 49 of the *Charter,* since it was their decision to commence smoking that was the cause of the prejudice.

[961] Secondly, ITL is of the view that the Justice erred by qualifying its actions as unlawful violations. It submits that it had not considered the impact of the conduct of ITL upon the members, but solely its conduct which constitutes an error. It furthermore argues that the knowledge of risks by the members as of January 1, 1980 defeats the argument of unlawful violation. JTM adds to this latter argument that no member of the Blais group was a victim of any violation since the *Charter* solely entered into force and effect after the date of commencement of cigarette smoking (January 1, 1976). In the Létourneau file, the group was substantially reduced since solely the members who commenced smoking between June 28, 1976 and the date of commencement of cigarette smoking (March 12, 1992) were deemed to be victims of a violation.

[962] Thirdly, ITL takes issue with the intentional nature of the violations.

[963] Fourthly, JTM argues that punitive damages are not autonomous and that the Justice thus erred by ordering their payment in the Létourneau file.

[964] We shall analyze the arguments while focusing on (A) the field of application of the *Charter* and its entry into force and effect, prior to analyzing the question of (B) unlawful violations and (C) their intentional nature.

3.2. Analysis

A. Field of application and entry into force and effect of the Charter

[965] Sections 1 and 49 of the *Charter* that are front and centre of these appeals do not modify the principles of the general law of civil liability and it is now established that the claim 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.* and now governed

by Article 1457 *C.c.Q.*[856]. Sections 1 and 49 secure nevertheless the importance of the rights set forth therein due to the *Charter*[857].

[966] The provisions of the *Charter* at issue entered into force and effect on June 28, 1976[858]. ITL argues that the Judge erred by ignoring this reality and applying the *Charter* to each relevant period.

[967] This is incorrect.

[968] It is clear upon a reading of the following excerpts of the Judgment that the Justice was fully aware that the *Charter* does not apply throughout the relevant period:

> [488] We look in detail at the criteria for assessing punitive damages in Chapter IX of the present judgment. At that time <u>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.</u>
>
> [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. <u>We recognize that neither one was in force during the entire Class Period, the Quebec Charter having been enacted on June 28, 1976</u> 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.
>
> [Emphasis added]

[969] The Appellants, as was the situation which prevailed for the *C.P.A.*, are entitled to affirm that their acts or omissions preceding June 28, 1976 cannot be deemed to constitute unlawful violations as contemplated under the *Charter* and that the pack-years smoked prior to such date cannot consequently be included in the calculation of the critical tobacco dose of a member as defined in the Judgment under appeal.

[970] However, due to the findings on the issue of civil liability, the entry into force and effect of the *Charter* has no impact on the legal standing of the members or on the liability of Appellants with respect to them or the assessment of compensatory damages, since the general rules of civil liability applicable throughout the relevant period are sufficient to justify the compensation awarded by the Justice.

---

856 *Béliveau St-Jacques v. Fédération des employées et employés*, [1996] 2 S.C.R.. 345, paragr. 118-124; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, paragr. 23.

857 *Québec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC 3, paragr. 32.

858 *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.

[971] Given that the Justice has not committed a reviewable error in this regard, the Court does not have to rule on the existence of fundamental rights prior to the entry into force and effect of the *Charter,* which is far from being excluded[859].

[972] Obviously, a different conclusion with respect to civil liability based on the standards of the general law in conjunction with liability retained pursuant to the *Charter* would have required perhaps a redefinition of the Blais group, but this is not the case.

[973] This response to the arguments of the Appellants on the application of the *Charter* and the full repair of the prejudice by the general law of civil liability estops the argument of JTM further to which members who started smoking prior to the entry into force and effect of the *Charter* had not been victims of unlawful violations.

[974] In summary, the Judge correctly took into account the entry into force and effect of the *Charter* in 1976.

B. Unlawful violations of the right to life, personal security and inviolability

[975] The first paragraph of section 1 of the *Charter* protects rights which are at issue within the framework of the two appeals, i.e. the rights to life, personal security and integrity:

> **1.** Tout être humain a droit à la vie, ainsi qu'à la sûreté, à l'intégrité et à la liberté de sa personne.

> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.

[976] It is now widely accepted that the confirmation of an unlawful violation of a right or freedom protected by the *Charter* allows, subject to proof of causation and prejudice, to reach a finding of civil liability of a Defendant. In principle, that means that the grounds of defence recognized in civil liability are open to the Defendant, in particular, the acceptance of known risks by the victim. This argument was dealt with in the section of this case which deals with fault.

i. <u>The rights to life, personal security and integrity</u>

[977] The right to life guaranteed by section 1 of the *Charter* and also protected by Article 3 *C.c.Q.*, crystallizes most frequently at the time when its object – the very life of the person protected – ends. Thus, the fact of removing life is clearly a violation of this

[859] *Béliveau St-Jacques v. Fédération des employées et employés*, [1996] 2 S.C.R.. 345, paragr. 118. See also Louis LeBel, "La protection des droits fondamentaux et la responsabilité civile", (2004) 49 *R. de D. McGill* 231, p. 235-240; Albert Mayrand, *L'inviolabilité de la personne humaine*, Montréal, Wilson & Lafleur, 1975, paragr. 2.

DRAFT

right[860], subject to the consequences of the loss of legal personality on the compensation of the prejudice. A violation of the right to life may also consist in conduct that increases the risk of dying, for example the danger for life associated with an unreasonable and unjustified waiting time caused by a dysfunctional aspect of the health system[861] or yet again, under certain circumstances, a prohibition of the medically assisted right to die[862].

[978] The right to personal security of the person is also provided by section 1 of the *Charter*. Under Quebec law one can align the rights to life and integrity 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 a violation of his personal security. Our Court has already, for example authorized the anonymous designation of a party who had been subject to serious threats in order to protect his right to personal security[863]. It also upheld a decision where the aggressive intervention of a tactical squad constituted a violation of rights to life, personal security and integrity of persons killed or wounded.[864]. The case law in relation to section 7 of the *Canadian Charter* also assists defining the scope of this right. For example, the Supreme Court of Canada decided that the act of indirectly prohibiting the hiring of security guards by a prohibition against living off the avails of prostitution[865] or yet again the imposition of procedures that are unnecessarily complex preliminary to a therapeutic abortion constituted violations of personal security as contemplated by section 7[866]. In the same manner, a violation of personal security may result from circumstances that incite a person to reasonably fear for his life or that threatens his or her right not to be subject to violence, injuries or danger.

[979] Finally, the fundamental right to personal integrity guaranteed by section 1 of the *Charter*, is also a right of personality expressly recognized since January 1, 1994 by Articles 3 and 10 *C.c.Q.* Inviolability was first formally recognized in the civil law in 1971 by the enactment of Article 19 *C.c.L.C.*[867]. The doctrine recognizes that integrity and

---

860 *Augustus v. Gosset*, [1996] 3 S.C.R.. 268, paragr. 62; *de Montigny v. Brossard (Succession)*, 2010 SCC 51, paragr. 59.

861 *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35, paragr. 28 and 40, where the Court wrote *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.”

862 *Carter v. Canada (Attorney General)*, 2015 SCC 5, paragr. 62-63. It should be mentioned that this appeal was decided pursuant to the *Canadian Charter*.

863 *Association pour l’accès à l’avortement, Re,* J.E. 2002-928, 2002 CanLII 63780.

864 *Roy c. Patenaude*, [1994] R.J.Q. 2503.

865 *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

866 *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (in particular the reasons of Beetz J).

867 L’article 19 *C.c.L.C.* (S.Q. 1971, c. 84, art. 2) states :

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.	**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.

DRAFT

inviolability are within this context neighbouring concepts, occasionally difficult to separate, as the first protects the right to remain whole and constitutes this "ultimate link that unifies the person with his or her body"[868]; the second prohibits interference by third parties with the person and "appearing as a method to safeguard his dignity""[869]. 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[870]. In order for a court to find there is a violation to the right to integrity, it is necessary that this violation leave some residual after-effects[871].

[980] As underlined previously, it is not necessary to rule on the existence of these fundamental rights prior to the enactment of the *Charter*, an existence that is not excluded. It is sufficient to solely reiterate that the right to inviolability was recognised formally as of 1971 at the time of the adoption of article 19 *C.c.L.C.*[872].

[981] Keeping in mind the meaning to assign to rights guaranteed at section 1 of the *Charter*, one inescapably comes to the conclusion that the findings of the Justice set forth at 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 wrote:

> [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 here made the demonstration of any palpable and overriding error. In fact, one cannot isolate this excerpt without first considering the remainder of the judgment under appeal. With respect to the Blais group it is sufficient in order to reach this conclusion to read the numerous paragraphs of the Judgment which list the consequences of the diseases at issue upon the members, their life, their health and their welfare[873]. For example, by dealing with the impact of cancers of the larynx and pharynx, the Justice wrote:

---

868 Édith Deleury and Dominique Goubau, *Le droit des personnes physiques*, 5e éd., Montréal, Yvon Blais, 2014, paragr. 100.
869 É. Deleury et D. Goubau, *supra*, note 868.
870 See for example *Cinar Corporation v. Robinson*, 2013 SCC 73, paragr. 115.
871 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, paragr. 96-97; *Godin v. City of Montreal*, 2017 QCSC 1180, paragr. 31.
872 Art. 19 *C.c.L.C.* (L.Q. 1971, c. 84, art. 2). See also the cited references, *supra*, note 859.
873 Judgment under appeal, para. 979-984, 989-991 and 999-1001.

DRAFT

> [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, 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:
>
> […]
>
> - 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 group, the Justice also analyzed the impact of addiction on its members[874]. He wrote:

> [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);
>
> […]

[985] The Appellants have not succeeded in demonstrating that the findings of the Judge of violations to rights to life, integrity and personal security are erroneous. In fact,

---

[874] Judgment under appeal, para. 944-945.

DRAFT

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 violated their integrity by causing lengthy and painful physical and psychological înjury. This argument is thus destined to fail. The Justice properly considered the impact on the members of the conduct of the Appellants and there has been no demonstration of any error in law or a palpable and overriding factual error which would justify the intervention of the Court in this regard.

[986] The finding further to which the Appellants infringed the right to life, personal security and integrity of the members of the two groups is beyond reproach.

ii. Unlawfulness of the violation

[987] Section 49 furthermore requires that a violation of rights and freedoms protected by the *Charter* has to be unlawful in order to give rise to compensation for the prejudice:

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.	**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.
En cas d'atteinte illicite et intentionnelle, le tribunal peut en outre condamner son auteur à des dommages-intérêts punitifs.	In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

[988] The notion of unlawfulness of the violation has been interpreted as meaning that the violation at issue must be wrongful as contemplated by the general law of civil liability. In *Béliveau St-Jacques v. Fédération des employées et employés*, Justice Gonthier wrote[875] :

> 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

[875] *Béliveau St-Jacques v. Fédération des employées et employés*, [1996] 2 S.C.R. 345, paragr. 120. Voir aussi *Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R., paragr. 116.

DRAFT

> 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 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. We furthermore specify that the *C.c.Q.* imposes upon any person the duty to comply with "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 / *the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another*" (art. 1457 *C.c.Q.*)[876].

[990] Thus, in order to determine whether a conduct is wrongful as understood in the civil law, the standards laid down by the *Charter* are relevant. As indicated by Justice Dalphond in *Genex Communications inc. v. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*: "a violation of standards of conduct prescribed by the *Charter* constitutes a civil fault as contemplated by 1457 *C.c.Q.*"[877].

[991] In summary, the requirement of an unlawful violation set forth at subparagraph 1 of section 49 requires firstly the finding of an unjustified violation of the right protected by the *Charter*. Furthermore, the unlawful violation requires a demonstration that the violation results from wrongful conduct.

[992] The Court dismisses the argument to the effect that the Justice had committed a reviewable error by ruling that the conduct of the Appellants constituted an unlawful violation as contemplated under section 49 of the *Charter*.

[993] In the present matter, the finding of the Justice[878] further to which the unlawful violations were committed by each of the Appellants has not been shaken by the

---

[876] We should also recall the preliminary recitals of the *C.c.Q.* :

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.	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.

[877] *Genex Communications inc. v. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCSC 2201, paragr. 129.

[878] Judgment under appeal, para. 484.

arguments advanced on appeal. The wrongful nature of the violation is based on the failure of the Appellants in their duty to inform[879], up until the dates of public knowledge in each matter. These determinations are sufficient to conclude that the Appellants have committed unlawful violations during the period from the enactment of the *Charter* up until the end of the relevant period.

[994] As for the unlawfulness of the violations seen from the angle of the threshold tests included within the *Charter* itself, it emerges that the standard of conduct which arises out of section 1 of the *Charter* requires that any person who does not conduct him or herself so as to offer to the public a product likely to cause death (right to life) that substantially increases the risk of mortality (the right to personal security) 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 out of the *Charter* certainly require the Appellants to refrain from engaging in advertising that represents the cigarettes in a positive manner, sponsors sporting or artistic activities or yet again acts in a manner that sows confusion in the mind of the public.

[995] The factual determinations of the Trial Justice allowed him therefore to conclude that the violations committed by the Appellants were unlawful as contemplated by section 49 (1) of the *Charter* commencing on the date of its entry into force and effect.

[996] Furthermore, the Court is of the view that the knowledge of the dangers of tobacco by members is not disculpatory in the determination of unlawfulness of the violation. This is a civil law defence which we have already discussed. The knowledge of the dangerousness of tobacco has thus the same consequence it has in civil law, i.e. based on the case the exoneration or the sharing of liability.

[997] Furthermore, on this same topic, one can certainly raise the issue of the concurrent application of the *Charter* and the *C.P.A.*, an issue which was not addressed by the Justice. In fact, the merchant who violates its obligations towards the consumer, and by doing so violates a right guaranteed under the *Charter* commits a violation to a right that one could qualify as unlawful because the violation arises out of conduct which does not comply with the rules of conduct that are incumbent upon him, in this case pursuant to the *C.P.A.* In this context, presuming that the merchant was not eligible to rely upon the knowledge of the consumer pursuant to the *C.P.A.*, the same merchant is no more eligible to do so for the same unlawful violation pursuant to section 49 of the *Charter*[880].

[879] Under the double aspect of the failure to inform and active disinformation.

[880] We emphasize that the Respondents did not raise the argument pursuant to which it would not be appropriate to apportion liability pursuant to the *C.P.A.* of the *Charter* for the periods following their respective entries into force and effect.

DRAFT

[998] It should be recognised that the fundamental rights and freedoms guaranteed in the *Charter* have a paramount value in the Quebec judicial order; that the *C.c.Q.* governs the relations between persons in harmony with this *Charter* and that the *C.P.A.* falls within the public order of protection of the citizenry. It follows that the harmonious interaction of all these rules does not exclude that standards of public order prescribed by the *C.P.A.* can constitute relevant rules of conduct in consideration of article 1457 *C.c.Q.* for the guarantee and the implementation of rights promulgated and protected by the *Charter.*

C. Intentional violation

[999] The extraordinary nature of punitive damages under Quebec civil law requires that their award result from an express provision of the law, as provided by article 1621 *C.c.Q.* The second paragraph of section 49 of the *Charter* authorizes the award of punitive damages where the unlawful violation of rights or freedoms protected by the *Charter* is furthermore intentional.

[1000] It was settled during the hearing that the analysis of intent should deal with the consequences of the injurious misconduct and not on the conduct itself[881]. The case law requires proof (i) that the author of the violation wished to cause the consequences of the wrongful violation or (ii) that he was aware of the immediate and natural or extremely probable consequences of his misconduct[882].

[1001] Although the autonomous nature of punitive damages historically was a somewhat controversial subject matter, it is now well established, contrary to the arguments of JTM, that punitive damages may be awarded without the necessity of a principal claim in compensatory damages being successful. In *de Montigny v. Brossard (Succession)*, the Supreme Court of Canada ruled that except where dealing with a public indemnification scheme “there is no reason not to recognize the autonomous nature of exemplary damages” and particularly that “If 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.”[883], which is not compliant with the principle of priority of the *Charter* in the Quebec legislative pyramid. It is beyond doubt that punitive damages are available in the present matter even in the case of the Létourneau case.

---

881 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, paragr. 121.

882 See for example *Hinse v. Canada (Attorney General)*, 2015 SCC 35, paragr. 164; *Cinar Corporation v. Robinson*, 2013 CSC 73, paragr. 118; *de Montigny v. Brossard (Succession)*, 2010 CSC 51, paragr. 68; *Ville de Québec v. Association des pompiers professionnels de Québec inc.*, 2017 QCSC 839, paragr. 105; *Agence du revenu du Québec v. Groupe Enico inc.*, 2016 QCSC 76, paragr. 166-167.

883 *de Montigny v. Brossard (Succession)*, 2010 SCC 51, paragr. 45.

[1002] Furthermore, given the autonomy of the claim in punitive damages, one can question the nature of the burden of proof required since it is not necessary to demonstrate that material or moral damages result from the unlawful and intentional violation. In a context such as the Létourneau matter, where solely punitive damages are awarded, is it necessary to establish the existence of causation as is the case in matters where compensatory damages are awarded?

[1003] At first glance, the requirement of an unlawful violation 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* with respect to the violation committed even where such violation is neither quantified or quantifiable. In fact, the notion of unlawful violation refers, as we have just mentioned, to the violation of a right that results from a conduct infringing a standard of conduct[884].

[1004] To qualify the nexus between fault and violation of a right as grounded in causation gives rise to confusion. In *Montréal (Ville) v. Lonardi*[885], under the pen of Justice Gascon, the Supreme Court of Canada has recently mentioned that the causation link is not necessary *per se* in the case of awarding punitive damages: “On 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. […]”

[1005] Notwithstanding the autonomy of punitive damages, it remains just as necessary to establish a link which is not a link of causation between the conduct of the defendants and the violation of the right or freedom of the victim. Once the proof of this link has been established, it solely remains to determine the wilful nature of the unlawful violation notwithstanding the fact that the consequences suffered by the victim of the violation cannot be quantified or are not quantifiable.

[1006] None of the arguments raised on appeal convinces us that the Justice committed a reviewable error in his assessment of the wilful nature of the unlawful violations to the rights of members of the two groups.

[1007] The Appellant ITL cites this excerpt of the reasons of the Trial Justice in support of his claim that the Justice improperly applied the criterion set forth in the *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. <u>That unacceptable behaviour does not necessarily mean that they malevolently desired that their customers fall victim to</u>

---

[884] *Québec (Curateur public) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, paragr. 116.

[885] *Montréal (City) v. Lonardi*, 2018 SCC 29, paragr. 80.

> 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 Justice's reasons which literally refers to the remarks of Justice L'Heureux-Dubé 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.
>
> [Reference omitted]

[1009] One can deduce from this excerpt of the reasons that according to the Trial Justice 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 act. Furthermore, whether one or the other, a global reading of the reasons of the Justice on the actions of the Appellants after June 28, 1976 certainly supports his conclusion that each of the Appellants was fully aware at least as of the entry into force and effect of the *Charter* of the immediate and natural consequences, or yet again the extremely probable consequences of its acts and omissions. There is no error to flag here.

[1010] In fact, this matter appears to us even more patently clear than several school cases including *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*[886]. It is sufficient for the present appeals to reiterate certain findings of fact of the Justice. The Appellants have known since the 1950s of the dangers inherent in cigarettes[887], but they nevertheless have continued to represent cigarettes positively in their advertising campaigns subsequent to the entry into force and effect of the *Charter* on June 28, 1976 up until the end of the relevant period with the exception of certain short periods[888]. They failed to disclose the danger of contracting the diseases at issue on their cigarette packages up until October 31, 1989 and of becoming addicted to tobacco up until September 12, 1994[889]. The maintained what the Justice properly

---

886 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211.
887 Judgment under appeal, para. 70, 72, 138, 566, 567, 612 et 622.
888 Judgment under appeal, para. 420 et 535.
889 Judgment under appeal, para. 110.

qualified as a policy of silence and conspired within the CTMC to delay raising awareness of the public[890]. These findings are examples of factual conclusions of the Trial Justice.

[1011] Several elements of evidence in the Court records demonstrate both the knowledge of the Appellants that their conservative efforts to inhibit consumer awareness of the dangers. It is thus sufficient to recall the reaction of the CTMC, where the Appellants are members, to the publication of a key report on addiction by the Surgeon General of the United States in 1988. The Justice wrote:

> [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".
> >
> > 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

[890] Judgment under appeal, para. 523.

DRAFT

> faced by our society, but more importantly, the term 'addiction' lacks precise medical or scientific meaning".
>
> [Emphasis added; references omitted]

[1012] By thus jointly opposing scientific evidence advanced by a public authority and comparing the report of the Surgeon General's attempt to make smoking socially unacceptable "*by warming up some old chesnuts*" [sic], the Appellants have certainly demonstrated the specific intent and the state of mind corresponding to that in the *St-Ferdinand* case. In fact, according to a factual conclusion which has not been successfully challenged, the Appellants were aware at this time for nearly forty years of the addictive properties of tobacco. This concerted decision of CTMC is solely 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 marks rather that the Appellants acted "in full knowledge of the […] at least extremely probable consequences" of the acts. In fact, the Appellants probably feigned being unaware 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 group as defined and on smokers who would develop one of the diseases at issue. They understood that this marketing strategy consequently threw individuals into the path of addiction, causing mortal illness or yet again exposing them to high risks of developing such diseases. By doing so they certainly violated in an unlawful and an intentional manner the rights to life, the personal security and integrity of the members of the two groups. All of the evidence retained by the Trial Justice, including his finding on the policy of silence sufficiently warrants this conclusion.

[1014] The Justice therefore has committed no error justifying the intervention of the Court by qualifying these violations as intentional.

3.3. Summary

[1015] In the absence of a reviewable error in the Judgment under appeal, the order to pay compensatory damages to members of the Blais group pursuant to the *Charter* does not give rise to any intervention on appeal. The rights to life, personal security and integrity of the members of the two groups have been infringed by the Appellants in a wrongful and unlawful manner since the standards of conduct established by the civil law have been violated. As the Justice had indicated, the violations have continued from the entry into force and effect of the *Charter* up until the end of the relevant period governed by the claims. We recall that this finding is in no way necessary in order to warrant full compensation of the prejudice in view of the finding of the Justice on the basis of the principles of civil liability.

DRAFT

[1016] Nor has the Judge committed any reviewable error by finding that the violations were intentional and he could as a result order the payment of punitive damages in the two matters. The assessment of quantum remains to be dealt with 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 which have to be analyzed in order to establish their quantum.

4. PRESCRIPTION

4.1. Prescription of compensatory damages

A. Context

[1017] It must 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, Appellants JTM and ITL[891] 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[892].

[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 therefore held that the persons thus added to the class benefited from the suspension of prescription provided for in article 2908 C.C.Q.[893]. Relying primarily on the reasons of Gascon, J., a then Superior Court judge, in *Marcotte v. Fédération des caisses Desjardins du Québec*[894], He was of the view that when the judge

[891] RBH relied on the arguments of ITL and JTM.
[892] *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2013 QCCS 4904.
[893] Impugned judgment, paras 857-858.
[894] *Marcotte v. Fédération des caisses Desjardins du Québec*, 2009 QCCS 2743, main appeal allowed and cross appeal dismissed in *Fédération des caisses Desjardins du Québec v. Marcotte*, 2012 QCCA 1395, appeal to the Supreme Court allowed in part in *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57.

DRAFT

authorizing the action considers it advisable not to stipulate a cut-off date in the description of the class, the suspension of prescription provided for 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 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 fC.C.P., an argument rejected by the trial judge on the grounds that, on the contrary, article 1022 fC.C.P. allows the court to amend the class at any time.

[1024] Lastly, 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 that the Respondents establish that it was impossible for them to act pursuant to article 2904 C.C.Q. with respect to the claims related to a safety-defect and the failure to inform.

B. Analysis

[1025] The following articles of the *C.C.Q.* set forth the prescription mechanisms specific to class actions by providing for interruption of prescription following institution of the authorized action (art. 2897) and suspension of prescription as of the authorization proceedings (art. 2908):

> **2897.** L’interruption qui résulte de l’exercice d’une action collective profite à <u>tous les membres du groupe</u> qui n’ont pas demandé à en être exclus.
>
> **2897.** An interruption which results from the bringing of a class action benefits <u>all the members of the group</u> who have not requested their exclusion from the group.
>
> **2908**. La demande pour obtenir l’autorisation d’exercer une action collective suspend la prescription en faveur de <u>tous les membres du groupe</u> auquel elle profite ou, le cas échéant, en faveur <u>du groupe que décrit le jugement</u> qui fait droit à la demande.
>
> **2908.** An application for leave to bring a class action suspends prescription in favour of <u>all the members of the group</u> for whose benefit it is made or, as the case may be, in favour <u>of the group described in the judgment</u> granting the application.

DRAFT

> 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.
>
> 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.

> 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 suspension of prescription.
>
> In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.
>
> [Emphasis added]

[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 shall, as of that judgment, cease to benefit from the suspension of prescription.

[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 to describe a broader class than the one defined in the conclusions of the application for authorization[895].

[1028] It could be argued in this case that the suspension of prescription extends to "new" members only as of the authorization judgment. They may not argue that they refrained from bringing an individual action because they believed they benefited from the class action being authorized.

---

[895] *Société des loteries du Québec (Loto-Québec) c. Brochu*, 2007 QCCA 1392, para 6.

DRAFT

[1029] In any event, the wording of article 2908 C.C.Q. indicates, at least impliedly, that the suspension continues until the judgment ruling on the class action, also providing 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] Lastly, section 27 T.R.D.A. establishes an onerous rule of common law concerning prescription in the context of a class action seeking damages as compensation for a tobacco-related injury:

> **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.
>
> 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.

> **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.
>
> Actions dismissed on that ground before 19 June 2009 may be revived within three years following that date.

[1031] This provision, held to be constitutionally valid[896], indicates the legislator's clear intention to 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 later, 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 both from the rules of section 27 T.R.D.A. and from 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:

---

896 *Imperial Tobacco Canada Ltd. v. Québec (Attorney General)*, 2015 QCCA 1554, application for leave to appeal to the Supreme Court dismissed, May 5, 2016, No. 36741.

DRAFT

> [Translation]
>
> All persons who are or have been victims of cancer of the lungs, larynx or throat or who suffer from emphysema after inhaling cigarette smoke over a prolonged period, as well as the assigns and/or heirs of deceased persons who otherwise would have been part of the class.

[1033] It should be noted that the use of the term "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[897], handed down Feberuary 21, 2005 by Jasmin, J. notes that the proposed description is [translation:] “much too vague”, which compromises 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 at the time 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 fifteen cigarettes per period of twenty-four (24) hours over a prolonged and uninterrupted period of at least five (5) years, as well as the assigns 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 of the required level of smoking, the new description does 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 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 closed on the application. In addition to the critical smoking dose, which the Respondents wish to specify, the motion alleges the need to limit the eligibility period for the Blais class by specifying a cut-off date.

---

[897] *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, J.E. 2005-589, 2005 CanLII 4070 (C.S.).

[1037] On July 3, 2013, the trial judge amended the description of the Blais Class[898]. He established the "critical dose" of smoking as 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 adding to the class 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[899] to read as follows:

> 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 group also includes the heirs of the persons deceased after November 20, 1998 who satisfied the criteria mentioned herein.

[1040] In the impugned judgment, the description of the class remains the same (with a few linguistic nuances), the only difference being that the smoking dose is increased to 12 pack/years.

[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

---

898 *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2013 QCCS 4904.
899 *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2013 QCCS 4904, para 83.

belonged to the Blais Class, and did not have to institute an individual action to avoid losing his 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 (art. 2908 and 2897 C.C.Q.) and for 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 pursue the Appellants individually. On the contrary, as soon as the disease was diagnosed, he could legitimately consider himself part of the class.

[1044] The judge was correct in applying the principle stated by Gascon, J. in *Marcotte v. Fédération des caisses Desjardins du Québec*[900]. Gascon, J. specifically explained that absent a cut-off date in the initial description of the class, there was no basis for holding that the action could be prescribed:

> [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 group 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, under the terms of 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 class members who have not asked to be excluded from the action.

---

[900] *Marcotte v. 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 CSC 57. In our view, the principle stated by Gascon, J. in the Superior Court reflects the state of the law.

DRAFT

> [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* v. *Brochu*, it is true that the need to include a cut-off date in the description of a group 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 only occurred in March 2008, after Mr. Marcotte's amendment application.
>
> [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 cut-off date whatsoever.
>
> [432] According to the Court, any doubt in this regard must operate in favour the Class members. This is particularly necessary regarding the content of the notice to members, approved by the authorization judgment, which is intended as the method of communication chosen to inform members.
>
> [433] In matters of the prescription and extinction of a right, the party invoking it, 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 group does not allow for the conclusion that there is preponderant evidence supporting Desjardins' position.
>
> [434] There is no reason to conclude that the rights of action in this case respecting a "presumed" July 5, 2004 cut-off date are prescribed for the description of the class, whereas neither the authorization judgment nor the notices to members specify it.

[1045] The above comments are transposable to this case. The ambiguity resulting from the absence of a cut-off date in the description of the Blais Class does not allow for the conclusion that the claims of persons diagnosed with a specified disease since service of the application for authorization are prescribed. As of February 21, 2005.

[1046] Furthermore, as this Court noted in Société des loteries du Québec (Loto-Québec) v. 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[901]:

> [Translation]

---

[901] *Société des loteries du Québec (Loto-Québec) v. Brochu*, 2007 QCCA 1392.

DRAFT

> [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 can get to the essential phase of inquiry and hearing on the merits. The trial judge specially assigned for this purpose is best placed to decide questions concerning the action 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 a significant measure of discretion.
>
> […]
>
> 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; Reference 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 judgement 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. points 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 were diagnosed with one of the specified diseases, without any temporal restriction. As

Gascon, J. noted, any doubt in that regard must operate in favour of the members of the class.

[1050] JTM's argument based on article 1013 f.C.p.c., can be rejected summarily. The trial judge rightly held that article 1022 f.C.p.c. allows the court to amend the class at any time, even on its own initiative. This conclusion is in keeping with the principles derived from *Société des loteries du Québec (Loto-Québec) v. Brochu*[902], in which the Court proposes a broad interpretation of the third paragraph of article 1022 fC.C.P. and advocates a flexible approach to amending the description of a class. Such an approach, which is transposable 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[903].

4.2. Prescription of punitive damages

A. Context

[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.)[904]. In the Blais action, he held that claims that occurred before November 20, 1995, three years before service, are prescribed[905]. 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[906].

[1053] The Appellants frame the argument in appeal primarily by challenging the accuracy of the addiction knowledge date, arguing that prescription has accrued with respect to almost the entire amount of punitive damages in both actions.

[1054] In the Blais action, JTM asserts that all causes of action are prescribed. As regards 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

---

902 *Société des loteries du Québec (Loto-Québec) v. Brochu*, 2007 QCCA 1392.
903 See *supra*, para [1031].
904 Impugned judgment, para 897.
905 Impugned judgment, para 900.
906 Impugned judgment, paras 887-890. Nevertheless, the judge mentions the Respondents' admission to the effect that the claims for punitive damages that arose before September 30, 1995 are prescribed. However, strictly speaking this is of no consequence because the trial judge held that all the causes of action arose after September 30, 1995.

DRAFT

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) he became addicted to it before 1980 and (3) he 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 of the writ (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. The trial judge erred in extending knowledge by 18 months so that the warnings would ensure maximum wareness of the addiction. The prescription starting point would therefore be September 12, 1994 – the date of mandatory publication of warnings on cigarette packages that cigarettes are addictive. The class members were deemed to be aware of the product's safety defect described in the warnings as of that date.

[1056] 40] 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 contravention 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. Therefore, it would 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 a 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, this is dealt with deal in this Court's evaluation 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"[907]. 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. 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.	**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.

[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, which began to run as of the formation of the contract in question.

[1061] Extinctive prescription of a right of action runs as of the day that right of action arose (art. 2880 par. 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 right of action[908]. 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 stipulates 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[909]. In this sense, section 273 prescribed the same approach as common law prescription.

[1062] The difficulty of these appeals lies rather in the duality of the legislative provisions which justify an 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.

DRAFT

[907] S. 27 *T.R.D.A.* [emphasis added]. The idea of reparation, explicit in the French text, is implicit in the English text.

[908] *ICQ Algérie v. Duquette*, 2018 QCCA 160, paragr. 7; *Rosenberg v. Canada (Procureur général)*, 2014 QCCA 2041, paragr. 8; *Dufour v. Havrankova*, 2013 QCCA 486, paragr. 3; Céline Gervais, *La prescription*, Cowansville, Yvon Blais, 2009, p. 106-107.

[909] *Service aux marchands détaillants ltée (Household Finance) v. Option Consommateurs*, 2006 QCCA 1319, paragr. 13-16 and 21.

i. Blais file

[1063] In the Blais file, the judge held that the claims for punitive damages which arose as of November 20, 1995, namely three years before service[910], were not prescribed. This conclusion will be analyzed based on the *Charter,* then 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"[911]. 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 give 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.

[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[912] are not broken

---

910 Impugned judgment, paragr. 900-901.
911 *Gouin Huot v. Équipements de ferme Jamesway inc.*, 2018 QCCA 449, paragr. 6.
912 See Exhibit 1426.7, tables D1.2 and D3.1, p. 2-5.

DRAFT

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, we 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) he became addicted before 1980 and (3) he 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 article 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. The arising of a member's right of action assumes that he 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 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 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.

[1075] Prescription is a defence[913] 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[914], it would be in order 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

913 *Montréal (Service de police de la Ville de) (SPVM)*, 2016 QCCA 430, paragr. 44.
914 Recall that the Court rules that the date the judge should have identified is that of March 1, 1996.

DRAFT

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 in the quantification of the punitive damages, it is not established that knowledge of the danger is the only element which marks the arising of the cause of action. 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, we reiterate 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 is not proposing a different analysis for the prescription of punitive damages based on elements generating 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 since all the causes of action arose on March 1, 1996, when it became known that smoking was addictive[915].

[1079] We have 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 notes, the evidence[916] indicates that the

---

[915] Impugned judgment, paragr. 888.

[916] 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 only refer to certain exhibits which are representative of the file. In doing so, the judge referred to several exhibits concomitant or subsequent to September 30, 1995. See the impugned judgment, paragr. 265 (infrap. note 149, Exhibit 20063.10, p. 154), paragr. 535 (Exhibits 1240B and 1240C, identified by error as Exhibits 1040B and 1040C) and paragr. 1078 (infrap. note 476; Exhibit 20063.10, p. 154).

DRAFT

Appellants did not completely cease their 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 which 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 we must defer to it. Accordingly, the judge's conclusion that the Létourneau action is not prescribed is unassailable.

[1081] We will however note the following. Both the Appellants and the respondents argued that knowledge of addiction constitutes the starting point for the prescription of punitive damages in the Létourneau file. However, in doing so the parties seem to forget 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 to be granted punitive damages in the Létourneau file arises every time the criteria of *Richard v. Time Inc.*[917] 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 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 estoppel, an argument the judge dismissed, but a clear

---

He could also have referred to other exhibits which support the hypothesis of the continuation of the campaign of disinformation, and its relative success, after September 12, 1994. We note Exhibits 61 (p. 3), 401 (p. 3), 569, 569A, 569B, 1230-2m, 1337-2m and 21316.184. As described in the judgement authorizing the action (*Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, J.E. 2005-589, 2005 CanLII 4070, paragr. 58 (S.C.)), 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. We note 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.

[917] *Richard v. Time Inc.*, 2012 SCC 8.

DRAFT

case of the Appellants not proving 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 have therefore smoked daily during the four years preceding the action. As a corollary, it is admitted that the conditions of *Richard v. Time Inc.*[918] 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, unprescribed cause of action.

b. Charter

[1085] The prescription for punitive damages granted 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 devastating.

[1086] The judge certainly is not proposing a differentiated analysis of prescription depending on whether the *C.P.A.*, the *Charter* or both apply. His conclusion that no claim by members of the Létourneau class is prescribed is however 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 since they benefited from the combination of the suspension and interruption of prescription prescribed 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 could bring an action against the Appellants for punitive damages under the *Charter*.

[918] *Richard v. Time Inc.*, 2012 SCC 8.

DRAFT

[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 judgement in first instance. But even assuming the judge is 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 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 DAMAGE

4.4. Main Appeal

A. Background

[1091] Considering that punitive damages are indicated under both the *Charter* and the *C.P.A.,* the Judge evaluated their quantum.[919] 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 case, 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 case, in the absence of an order for compensatory damages, the Judge maintained the amount of punitive damages he established. It highlights 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 points out that the

[919] Judgment, paras. 1017-1112.

company artificially reduced its profits through a corporate reorganization, which was an attempt to avoid its obligations. He therefore sets her putative annual income at $103,000,000, imposes punitive damages equivalent to approximately 125% of this income ($125,000,000) and also orders 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 quantum assessment.

[1095] As part of 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, no order for punitive damages would be possible. For its part, JTM argues that its conduct does not justify an award of punitive damages because it does not meet the analytical criteria set out in *Richard v. Time Inc.,*[920] which the Judge had also neglected to perform and which the Court should perform *de novo.*

[1096] As for the 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.[921]

[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 *Charter,* s. 49(2).

---

[920] *Richard v. Time* Inc. 2012 CSC 8.

[921] *Richard v. Time Inc.* 2012 CSC 8, paragr. 150 ; de Montigny v. Brossard (Succession), 2010 CSC 51, paragr. 48.

DRAFT

[1099] Since the *C.P.A.* is silent on the criteria to be considered, "the determination of the criteria for awarding punitive damages must take into account the general objectives of punitive damages and those of the law in question".[922] 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.
>
> 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. [923]

[1101] For a court to sentence a merchant to pay punitive damages, it must be established that the obligations imposed by the *C.P.A.* were not fulfilled.[924] 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".[925] Although evidence of antisocial behaviour is relevant, it is not strictly necessary.[926]

[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,[927] meaning that it is essential to avoid awarding an amount exceeds what is necessary to ensure the preventive function of punitive damages. Among the criteria set out in paragraph 2, which is not exhaustive, we must consider i) the seriousness of the fault, by far the most important aspect, which is analysed according to the wrongful conduct and the impact of that conduct on the

[922] *Richard v. Time Inc.* 2012 CSC 8, paragr. 154.
[923] *Richard v. Time Inc.*, 2012 CSC 8, paragr. 160-161.
[924] *Richard v. Time Inc., 2012 SCC 8, para. 158.*
[925] *Richard v. Time Inc.* 2012 SCC 8, para. 180. See also *Vidéotron v. Girard,* 2018 QCCA 767, paras. 106-107, application for leave to appeal to the Supreme Court dismissed, 21 February 2019, no. 38225.
[926] *Bank of Montreal v. Marcotte,* 2014 SCC 55, paras. 91, 100, 101, 108 and 109.
[927] J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, vol. 1, supra, note 265, para. 1,394, p. 444.

DRAFT

victim[928], ii) the payer's financial situation and iii) the compensation he 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,[929] 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".[930] A court may also take account of any sanctions already imposed by other authorities, including criminal or administrative penalties.[931]

[1104] An appellate court may not intervene without discretion highly delicate exercise. [932] The Court may interfere with 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 purposes for the punitive damages, namely prevention, deterrence (specific and general) and denunciation.[933]

[1105] We must now consider how these principles were applied in this case by the Judge.

i. Blais

[1106] Although the Appellants do not concede the amount of $90,000 awarded as punitive damages in the Blais case, they do not make any specific argument against this conclusion, relying rather, in essence, on the arguments put forward in the Létourneau case 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 case that would justify an intervention on this point.

---

928 See, for example, *Richard v. Time* Inc., 2012 SCC 8, para. 200; *Vidéotron v. Girard*, 2018 QCCA 767, para. 106, application for leave to appeal to the Supreme Court dismissed, 21 February 2019, no. 38225.

929 *Richard v. Time Inc.*, 2012 CSC 8, *para*. 205.

930 *Richard v. Time Inc.*, 2012 CSC 8, *para*. 206.

931 *Richard v. Time Inc.*, 2012 CSC 8, *para*. 207-208.

932 *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand,[1996]* 3 S.C.R. 211, para. 122; *Vidéotron v. Girard,* 2018 QCCA 767, para. 90, application for leave to appeal to the Supreme Court dismissed, 21 February 2019, no. 38225.

933 *Cinar Corporation v. Robinson*, 2013 SCC 73, para. 134.

DRAFT

ii. Létourneau

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 not 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".[934] Thus, 28 years after the knowledge date chosen by the Judge in the Blais case, 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 case, it is nevertheless relevant in establishing the quantum in the Létourneau case. 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 Québec had or had learned of it by March 1, 1996. His first public use of the word "cause" in relation to tobacco and health would have occurred in 2000,[935] i.e. twenty years after the knowledge date chosen by the Judge in the Blais case. These examples show that specific deterrence is still relevant.

[1111] In this regard, despite the 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. [936] And despite this long interlude, the Appellants were 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 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 case, not without having pointed out, via a detour through the *Diagnostic*

---

[934] Exhibit 1721-080626, Examination on discovery of Michel Poirier, June 26, 2018, p. 233 [emphasis added]

[935] See document entitled *ITL's Position on Causation Admission,* p. 206417 (a.c.).

[936] Judgment, para. 151.

DRAFT

and Statistical Manual of Mental Disorders,[937] the lack of relevance of the concept of addiction according to him. Therefore, 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 fail 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 points out, face a moral dilemma of the same nature. The Judge ordered the payment of punitive damages on the basis of all these objectives[938] 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.[939] His decision is incontestable.

[1113] ITL then claims that the Judge used the indirect route of punitive damages to compensate for the lack of compensatory damages in the Létourneau case. 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 case.[940] In fact, he concludes 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.
>
> [Emphasis added]

[1115] It should be added that it is 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, but rather that the criteria specific to the attributive provision for this type of damages must be met. The Supreme Court recalled 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

937 See also *supra*, note 175.
938 Judgment, paragr. 1038.
939 Judgment, paragr. 1037.
940 See Judgment, paras. 788 and 944.

DRAFT

an obligation to make reparation for the injury, it can nonetheless form the basis for an award of punitive damages".[941] 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 this excerpt,[942] the Supreme Court was only seeking 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 opening criteria for the award of punitive damages set out in *Richard v. Time Inc.*[943] and that the Judge failed to make an appropriate analysis. They ask us to perform the analysis that the Judge should have made.

[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:
>
> > [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.
>
> [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, before the Court of Appeal, to allege that the Judge did not carry out an analysis that he should have carried out, which in fact, albeit succinctly, he

---

941 *Montreal (City) v. Lonardi,* 2018 SCC 29, para. 80.
942 *Montigny v. Brossard (Succession)*, 2010 CSC 51, para. 40.
943 *Richard v. Time Inc.*, 2012 CSC 8.

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, depending on 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 related to determining the quantum

[1120] ITL claims that the amount to which it is sentenced 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 deference that guides sentencing for punitive damages.

[1121] It is true that the total amount of the three Appellants' convictions ($131,000,000) far exceeds the amounts generally awarded by the courts for punitive damages. For example, we have *Cinar*[944] ($500,000), *Enico*[945] ($1,000,000), *Markarian*[946] ($1,500,000), *Pearl*[947] ($1,856,250) and even *Biondi*[948] ($2,000,000) to be convinced of this. However, in this case, the seriousness and impact of the infringing conduct and prohibited practices are not commensurate with the cases generally studied by the courts and are in a completely different register.

[1122] The notion of a rational connection between the amount of the conviction and the objectives of punitive damages was explained in *Whiten v. Pilot Insurance Co.*,[949] 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 behaviours in the future, the advisability of depriving a legal person of profits acquired while flouting

944 *Cinar Corporation v. Robinson*, 2013 SCC 73.
945 *Agence du revenu du Québec v. Groupe Enico inc.*, 2016 QCCA 76.
946 *Markarian v. Marchés mondiaux CIBC inc.*, 2006 QCCS 3314.
947 *Pearl v. Investissements Contempra ltée*, [1995] R.J.Q. 2697 (C.S.).
948 *Biondi v. Syndicat des cols bleus regroupés de Montréal (SCFP-301)*, 2016 QCCS 83.
949 *Whiten v. Pilot Insurance Co.*, 2002 CSS 18.

DRAFT

the law[950] and the wealth of the Appellants, the amounts granted in this case are genuinely rationally related 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 points out, compensatory damages and costs could be subject to tax deductions,[951] 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 his decision is not subject to our intervention.

[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 "distorting, sometimes reducing, sometimes amplifying prism".[952] 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.*, whose cardinal principle 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 it 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."[953]

[1127] ITL does not convince 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 is aware that he cannot use conduct prior to the coming into force of the provisions to determine the amount of damages. So he writes:

> [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

---

950 *Richard v. Time Inc.*, 2012 CSS 8, paragr. 206.
951 Judgment, paragr. 1067.
952 *Vidéotron v. Girard*, 2018 QCCA 767, paragr. 99, application for leave to appeal to the Supreme Court dismissed, 21 February 2019, No. 38225.
953 Judgment, para. 1081; see also para. 1058.

DRAFT

> 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.
>
> [Renvoi omis]

[1130] When analyzing ITL's conduct,[954] the Judge lists, 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 CCFPT. Some other events reported by the Judge occurred just before or after the *Charter* came into force, including ITL's handling of the Green Alert launcher or the use of surveys to probe public awareness, which continued after 1976.

[1131] That being said, the majority of the reprehensible conduct mentioned by the Judge occurred after the coming into force of the *Charter* and the *C.P.A.*, such as ITL's deep knowledge of its consumers, its lack of efforts to warn them of the dangers of tobacco, its efforts 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 not of consequence, because the evidence on which he relies 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 violations of the members' fundamental rights or prohibited and vexatious trade practices. In addition to the evidence on which he explicitly relies, additional examples can be cited from extensive evidence.

[1134] In the case of ITL, the Judge notes 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. There were about 100 research reports in its possession that were written by various scientists over time, many of which were from England or Germany. It was agreed that after their destruction, ITL's parent company, BAT, would fax the reports if ITL scientists

[954] Judgment, paragr. 1076-1078.

wanted to consult them. The lawyer appointed by ITL at the time wrote the following to BAT on 5 June 1992 to BAT:[955] :

> 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 rightly numbered "RD1789", is a research report dated March 25, 1981, written by a man named S.R. Massey. The summary of the report indicates [956] :

DRAFT

[955] Exhibit 58, p. 2 and 3.
[956] Exhibit 58.4, p. 1.

> 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 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:[957]

> [Translation] Imperial Tobacco firmly stated today that it has not destroyed 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 than the company's assertions suggest. Like any other company, ITL regularly reviews its files of documents that it no longer needs. All the studies reported 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.
>
> [Underlining in the 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 records it no longer needs", as it states 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. By retaining this episode to increase the punitive damages award against ITL, the Judge did not commit an error[958].

[1138] The Judge also considered that ITL had played an important role in the CCFPT, an organization which, it should be recalled, brought the Appellants together in their then corporate form. By studying the role of this organization, it appears that it was involved in public misinformation until the 1990s.

---

[957] Exhibit 57A.

[958] See Judgment, paras. 361-362, where the judge relates this episode in fine detail.

[1139] 1139] CCFPT's records also show its strategy of pushing tobacco regulation as far back as possible. In the minutes of a meeting held on February 24, 1988, it states[959] :

> 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, CCFPT controlled the *Société pour la liberté des fumeurs* ("SLF"), an organization that aims, as its name suggests, to promote the individual freedom of smokers. The minutes of a meeting of the CCFPT Board of Directors held on December 10, 1991, specify the content of the funding that CCFPT would provide to SLF[960]. The minutes of a meeting held on 13 March 1990 show that the CCFPT exercises power that is more direct than strictly financial.[961]

[1141] In December 1994, when all residents of Québec were, according to the Appellants, deemed to have known 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[962].

[1142] Finally, it should be recalled that ITL pleaded guilty to the criminal offence of assisting individuals between 1989 and 1994 to sell and be in possession of tobacco manufactured in Canada without being packaged and bearing the tobacco stamp provided for in the Act, contrary to the *Excise Act.*[963] 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, his 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.[964] This conclusion relating to an event prior to the coming into force

---

959 Exhibit 333, p. 2.
960 Exhibit 433B, p. 4.
961 Exhibit 433H, p. 26205 (a.c.).
962 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.* […] »
963 *Excise Act, R.S.C.* 1985, v. E-14, s. 240(1)(a); see Exhibit 521.
964 Judgment, para. 1090.

DRAFT

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 a determining factor.

[1144] RBH was a member of the CCFPT.[965] 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 (CCFPT) dated April 12, 1995[966] :

> • 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 full-fledged campaign if deemed appropriate. This, in my opinion, is essential.

[1145] According to the latter document, even in 1995, a few months after the date on which all Québec residents were – according to the Appellants – deemed to know that cigarettes were addictive, the official position of the CCFPT was "adequately reflected"[967] in a report written by David Warburton,[968] 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 CCFPT.

[1147] In 2008, as previously mentioned, a JTM executive replied, in a discovery interview, that he was not sure that smoking caused even one type of cancer,[969] 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

---

[965] Though it left at one time, its participation in the organization is not in question (see Judgment, para. 475, footnote 252) and the examples given above on the role of the CCFPT apply equally to RBH and the other Appellants.

[966] Exhibit 61, p. 3.

[967] Exhibit 61, p. 3.

[968] Exhibit 430.

[969] See paragraph [1109]. It should also be noted that as late as 2012, JTM admitted on its website, with all the caution that characterizes 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.

Québec. [970] This criminal history may be taken into account, as we have seen, in the assessment of punitive damages.

[1149] The Judge therefore correctly concludes 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. With regard more particularly to vexatious commercial 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.[971]

[1150] The amounts awarded in the Létourneau case 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 considers 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 prohibited business practices or unlawful and intentional violations of the members' fundamental rights. However, as the Judge pointed out, these faults are practically the same in both cases and it would have been unfair to punish the Appellants twice, thus violating the principle of moderation and avoid exceeding the minimum amount necessary to ensure the preventive function of punitive damages (art. 1621 para. 1 *C.C.Q.*). Moreover, the Judge pointed out, the Létourneau Class could have been a sub-group of the Blais case.[972] We cannot find any error in this highly discretionary exercise of quantifying punitive damages and this ground of appeal must therefore be dismissed.

[1153] As for the distribution of the overall amount of punitive damages based on the two cases, 90% for the Blais Class and 10% for the Létourneau Class, this is also a highly discretionary exercise, which is also consistent with the equally important principle that the impact of misconduct on members' rights must be taken into account. The Judge is well aware of this when he writes:

> [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

---

[970] The evidence in support of this event was produced under seal. Consequently, it will not be discussed in further detail.

[971] See in particular the additional examples, supra, note 789.

[972] Judgment, para. 1028.

DRAFT

> 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 cases. His review of the symptoms and impacts of disease and addiction on the lives of members earlier in the judgment[973] provides an adequate basis for his finding as to the impact of the Appellants' faults and strongly supports the allocation between the cases.

[1155] The Appellants do not show 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 $103,000,000,000 to take into account the various contractual mechanisms it established in the late 1990s. He considers 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.*

[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 him to an amount that could have a dissuasive impact on his conduct. If we could only rely 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

---

[973] Judgment, paras. 940-944, 979-984, 989-991 and 999-1001.

DRAFT

"situation patrimoniale / patrimonial situation" to more technical concepts such as assets and liabilities or financial statements.

[1159] This decision in no way contradicts the Superior Court's 2013 decision on the Respondents' motion for a safeguard order[974] with respect to payments made by JTM to a related company. This 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,[975] which are not part of this decision.

[1160] The second dimension is whether the Judge was entitled to consider this corporate planning in determining the amount of punitive damages for which JTM is liable at 125% of its putative annual income. In other words, it is worth considering 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 conviction.

[1161] The Judge accepted the testimony of Mr. Poirier, who admitted unequivocally that the transactions in question were intended to protect JTM from its creditors[976] :

> [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] The Judge therefore did not commit an error in taking into account JTM's corporate planning. After a review of the Judge's reasons and the evidence in support of them, which is subject to a confidentiality and sealing order, it should be noted that the judgment undertaken contains no error of fact on this issue.

[1163] 1163] In short, the Appellants show no flaws in the judgment undertaken that would justify overturning the punitive damages award or altering its quantum. Therefore, their arguments in this respect must be dismissed.

4.5. Cross-Appeal

[1164] In their cross-appeal, the Respondents asked the Court to increase the quantum of punitive damages in the Blais case in the event that the moral damages award was to

---

[974] *Quebec Council on Tobacco and Health v. JTI-MacDonald Corp. 2013 QCCS 6085, para. 84.*

[975] *Al Arbash International Real Estate Company v. 9230-5929 Quebec inc.*, 2016 QCCA 2092, para. 91-95.

[976] Judgment, para. 1097.

be decreased. In view of the conclusions drawn as to the Appellants' liability for compensatory damages, this cross-appeal has become moot.

4.6. Summary

[1165] In summary, the Appellants showed no 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 complies 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 link between the amount of convictions granted and the objectives of deterrence, prevention and denunciation is not subject to intervention.

5. INTEREST AND ADDITIONAL COMPENSATION

[1166] The Appellants complain that the Judge erred in determining the starting point for calculating the interest and additional compensation applicable to the amount of compensatory damages he awarded to the members of the Blais Class. The Appellant ITL expresses this grievance 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 <u>all</u> 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.
>
> [Underlining in the original; references omitted]

[1167] The Appellant JTM raises an identical ground at paragraphs 395 to 397 of its argument, which the Appellant RBH claims to share in paragraph 9 of its argument.

[1168] 1168] The Respondents concede the point and, recognizing the merits of this grievance, explain its origin in these terms:[977]

> [Translation] The Appellants argue that interest and additional compensation cannot accrue from that date for members whose illness had not yet been diagnosed.
>
> However, on the issue of interest, Judge Riordan corrected in his judgment, at the Respondents' request, a clerical error that was the source of an

[977] Respondents' Argument Plan, para. 398-399.

DRAFT

> inconsistency. However, the Respondents admit that they inadvertently misled the Judge on this occasion. Indeed, the Appellants are correct in asserting that, for members whose illness was diagnosed after November 20, 1998, interest and additional compensation should only accrue from the date of diagnosis. However, the Judge made no error 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 Québec for that period and who had smoked at least 12 pack years before the diagnosis. From this number of people, they established capital ranges for each of the years, considering that the interest and additional compensation 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 sets the amount of compensatory damages he awards 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 like the Trial Judge.

[1171] Thus, the capital ranges resulting from diagnoses received before January 1, 1998 will bear interest and additional compensation from the service of the motion for authorization of the class actions, i.e. from November 20, 1998. For capital ranges resulting from diagnoses received on or after January 1, 1998, interest and additional compensation 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 additional compensation 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, for each of the diseases in question. Once completed and consolidated, the calculation of these amounts gives the following figures, which should be included in the operative part of the judgment :

Year of diagnosis	Capital to be paid	Starting date of the interest calculation and additional compensation
1995	$353,485,440	November 20, 1998
1996	$356,231,040	November 20, 1998

DRAFT

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	

6. APPROPRIATE METHOD OF RECOVERY

[1173] Having concluded that he would partially grant the Respondents' claims, 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 addressed elsewhere 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 that the trial judge opted for collective recovery in the Blais and Létourneau actions. In the Blaise action, 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 members of the three sub-classes he had defined. In the Létourneau action, 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 provision reads as follows:

> **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

> **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

DRAFT

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.	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.

[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 members.

[1178] Arguments (b) and (d) specifically concern assessment of the harm suffered by the members, an issue that comes up elsewhere in this judgment and that the trial judge considers 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[978] 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.

[978] As 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 compenents of that number , namely the number of 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.

DRAFT

[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 thereof, by the clerk or the institution in question.[979] 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*[980] confirmed regarding 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 had done 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 caselaw has shed useful light on the principles that must guide the court in matters of collective recovery. In *Marcotte v. Banque de Montréal*, Gascon, J, then at the Superior Court of Quebec, had the following to say on the subject:[981]

> [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.

---

979 Shaun E. Finn, *L'action collective au Québec*, Cowansville, Yvon Blais, 2016, p. 65-66; Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice : impact et évolution*, Cowansville, Yvon Blais, 2006, p. 193.

980 *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, paras 111-112 and 114-116.

981 *Marcotte v. Banque de Montréal*, 2009 QCCS 2764.

DRAFT

> [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 weightings.
>
> [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 confirmed the order of collective recovery for the four remaining Defendants, against whom it also upheld the initial condemnation, but in part only.[982] Their appeal to the Supreme Court of Canada was susequently dismissed, and the collective recovery order therefore remained intact in its principle.[983]

[1187] The above observations by Gascon, J were repeated in the decision he rendered in *Marcotte v. Fédération des caisses Desjardins du Québec*[984] and are similar to those he made around the same time in *Adams v. Amex Bank of Canada.*[985]

[1188] Clearly, there is a difference between "accurate" and "sufficiently accurate,"[986] since the expression "with sufficient accuracy" leaves the trial judge some margin of appreciation and, as 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."[987] Similarly, it is certain that the "total amount" in qestion in these provisions suggests an assessment of the sum of the members' individual injuries and, as pointed out by the

---

982 *Bank of Montreal v. Marcotte*, 2012 QCCA 1396. In this unanimous decision written by Dalphond, J., the Court notes 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)."

983 *Bank of Montreal v. Marcotte*, 2014 SCC 55.

984 *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, para. 9 and 32.

985 *Adams c. Amex Bank of Canada*, 2009 QCCS 2695, reversed 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.

986 For example, see *Fédération des médecins spécialistes du Québec v. Conseil pour la protection des malades*, 2014 QCCA 459, para. 69-70.

987 Going by the comments of the Minister of Justice regarding new article 595, it seems he had no intention to alter the state of previous law regarding the criterion of "sufficiently accurate" or "sufficiently precise". (Ministère de la justice and SOQUIJ, *Commentaires de la ministre de la Justice, Code de procédure civile, chapitre C-25.01*, Montréal, Wilson & Lafleur, 2015, p. 432).

DRAFT

Supreme Court of Canada in *St. Lawrence Cement Inc. v. Barrette*, "the trial judge has considerable discretion in in the context of a class action."[988]

[1189] A study of the caselaw in other actions and class actions shows similarities with a specific case worth examining. In *Curateur public v. Syndicat national des employés de l'hôpital Saint-Ferdinand (C.S.N.),*[989] 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*,[990] 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.

[1190] Regarding the difficulty of assessing the compensatory damages[991] sustained by the victims, Lesage, J. made the following comments, which remain relevant today [Translation]:[992]

> [Tanslation:]
>
> Honorine Abel [for whom the Public Curator was the ex officio curator] 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 features of the predominant economic and social relations in today's world. Decisions affect the masses. Rights are subject to

DRAFT

[988] *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, para 112.
[989] *Curateur public v. Syndicat national des employés de l'hôpital Saint-Ferdinand (C.S.N.)*, [1990] R.J.Q. 359 (C.S.).
[990] *Public Curatorship Act*, R.S.Q., c. C-80.
[991] The expression "moral damages" is not used in the Superior Court judgment.
[992] *Curateur public v. Syndicat national des employés de l'hôpital Saint-Ferdinand (C.S.N.)*, [1990] R.J.Q. 359, p. 396 (C.S.).

> computerized and standardized forms; exercising those rights often depends on fitting into 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 an 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 almost illusory.

[1191] The comments of Lesage, J. on the difficulty of assessing compensatory damages of this type – and they are definitely moral damages – were echoed a few years later in a Supreme Court decision that basically confirmed the judgment of first instance. Writing the unanimous decision of the Court, L'Heureux-Dubé, J. stated:[993]

> 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 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 must 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 must refer certain types of claims, including contested claims, to him.

[1193] The Court of Appeal unanimously rejected the appeal filed by the Syndicat and the Fédération des affaires sociales.[994] The Public Curator's cross appeal on the claim for exemplary damages, which had beed 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 "to be used for the benefit of current and future patients of the Hospital." Nichols and Fish, JJ. formed the majority, with Tourigny, J. dissenting. In addition, Nichols, J. would have allowed he

[993] *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, para. 85.

[994] *Syndicat national des employés de l'hôpital Saint-Ferdinand v. Québec (Curateur public)*, [1994] R.J.Q. 2761 (C.A.).

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 dismiised that part of the cross claim.

[1194] It was this last judgment that the Supreme Court confirmed in all respects a few years later.[995]

[1195] Conceptually and legally, all the components underlying the implementation of collective recovery in the judgment under appeal are already present and were fully approved by the Supreme Court of Canada in the *Hôpital St-Ferdinand* case: class-wide assessment of the moral harm suffered by each class member (or sub-class member as in *St. Lawrence Cement*[996]), 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 *Hôpital St-Ferdinand* seems negligible. Of course, the quantum of the damages awarded is of a different magnitued, 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.

7. INTERLOCUTORY JUDGMENTS AND EVIDENCE

7.1. Background

[1197] The judge rendered several interlocutory judgments concerning the admissibility of evidence, which the appellants are challenging on appeal. However, before the hearing of the appeals, they limited their claims to certain categories of judgments which could 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 under appeal, which admitted the introduction of exhibits qualified as “2m”, i.e. admitted by virtue of the principle of the May 2, 2012 judgment[997], 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 under 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)

---

[995] *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211.

[996] *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64.

[997] See *supra*, paragraphs [73] to [75].

DRAFT

Exhibits 154 and 154B-2m, the Policy Statement and its appendices; (v) Exhibit 1337-2m, 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.

7.2. Analysis

A. Mootness of 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 under appeal 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 land mark decision on the mootness of an appeal is *Borowski v. Canada (Attorney General)*[998], rendered by the Supreme Court in 1989. This was an appeal in which the appellant challenged the validity of subsections 251(4), (5) and (6) Cr.C. then in effect relating to abortion. The Supreme Court decided to dismiss the appeal because, prior to the hearing, it had already declared section 251 Cr.C. to be inoperative in *R. v. Morgentaler*[999]. 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 describes as moot the question whose answer will have no practical effect on the rights of the parties in dispute and calls upon the courts, in such a case, to refuse to judge. To conclude that a question is moot, the Court uses the criterion of the current dispute. The Supreme Court concludes that the appellant's appeal does not meet this criterion because “[n]one of the relief claimed in the statement of claim is relevant”[1000]. In fact, it dictates a two-step analysis when mootness is at stake[1001]:

> 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

---

[998] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342.
[999] *R. v. Morgentaler*, [1988] 1 S.C.R. 30.
[1000] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342, p. 357.
[1001] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342, p. 353.

> the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. […]

[1202] However, when the court concludes that a case is moot, 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.[1002]

[1203] With regard to the adversary system, the Supreme Court mentions 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[1003]. 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[1004].

[1204] With regard to the concern for judicial economy, the Supreme Court states that there is a need to "ration" [1005] judicial resources among claimants. It mentions that the concern for conserving judicial resources will be answered in cases that have become moot if the Court's decision "will have some <u>practical effect</u> on the rights of the parties" notwithstanding that it will not have the effect of determining the controversy which gave rise to the action"[1006]. It adds 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[1007]. Finally, the Supreme Court states 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[1008].

[1205] With regard to the court's role, the Supreme Court calls upon the courts to proceed with caution and not depart from the traditional role of resolving disputes and contributing to law-making without intruding into the roles of the executive or legislative branches[1009].Moreover, the Supreme Court even 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."[1010]

[1002] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342, p. 358-363.
[1003] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342, p. 358-359.
[1004] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342, p. 359.
[1005] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342, p. 360.
[1006] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342, p. 360 [Underligning added].
[1007] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342, p. 360-361.
[1008] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342, p. 361-362.
[1009] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342, p. 362-363.
[1010] *Borowski v. Canada (Attorney general)*, [1989] 1 S.C.R. 342, p. 363.

[1206] Since *Borowski v. Canada (Attorney General),* several decisions have been rendered by the Supreme Court[1011] and by the country's various courts of appeal, including this Court[1012], in accordance with the mootness doctrine. Without reviewing them all, the principles of *Borowski v. Canada (Attorney General)* remain applicable[1013].

[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[1014], 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 mentions that government action would likely have negative effects by limiting the freedom of citizens[1015].

[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"*[1016].

[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.

[1011] 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.

[1012] See *Société de l'assurance automobile du Québec c. Propriété Provigo ltée*, 2013 QCCA 1509 (St-Pierre, j.c.a.); *Québec (Procureur général) c. 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. c. Thanabalsignham*, 2018 QCCA 197, notice of appeal to the Supreme Court, no. 37984.

[1013] *R. v. Oland*, 2017 SCC 17, paragr. 17.

[1014] Then President of ITL.

[1015] Exhibit 2, p. 4.

[1016] Exhibit 2, p. 2-3.

[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, partially based on this exhibit, that the industry had not complied with its obligation to disclose the risks associated with 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”[1017]. If the privilege has not been authoritatively established, the court must go on to the second step[1018]. 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[1019]. The party who seeks to rely on the privilege has the onus of establishing its existence and scope[1020].

[1214] In this regard, witnesses before parliamentary committees, like Mr. Paré, are also protected by parliamentary immunities in relation to their testimony[1021]. 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 state of mind on the topics addressed.

[1017] *Canada (House of Commons) v. Vaid*, 2005 SCC 30, paragr. 39 [Underligning added].
[1018] See, in general, Peter W. Hogg, *Constitutional Law of Canada*, vol. 1, 5th ed., Toronto, Thomson Reuters, 2007 (loose sheets, update no. 2018-1), p. 1-13; see also Henri Brun, Guy Tremblay et Eugénie Brouillet, *Droit constitutionnel*, 6th ed., Cowansville, Yvon Blais, 2014, p. 329-336; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, paragr. 40, p. 687; *Lavigne v. Ontario (Attorney General)*, 91 O.R. (3d) 750, 2008 CanLII 89825 (ONSC), paragr. 48.
[1019] *Canada (House of Commons) v. Vaid*, 2005 SCC 30, paragr. 41-46.
[1020] *Canada (House of Commons) v. Vaid*, 2005 SCC 30, paragr. 29.
[1021] J.P. Joseph Maingot, *Parliamentary Immunity in Canada*, Toronto, LexisNexis, 2016, p. 17, 31, 36-38.

DRAFT

[1216] In *Ouellet v. R.*[1022], Assistant 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 criminal prosecution under the *Combines Investigation Act*[1023].

[1217] To the same effect, in *Pankiw v. Canada (Human Rights Commission)*[1024], Justice Lemieux of the Federal Court confirmed the jurisdiction of the Human Rights Tribunal to hear nine complaints against a member of parliament in which the complainant alleged 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 case law examples that indicate 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 its *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 his claims might have been different, as demonstrated by the judgment of Justice Conway of the Superior Court of Justice in *Ontario v. Rothmans*[1025].

[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

---

[1022] *Ouellet c. R.*, [1976] C.S. 503.
[1023] *Combines Investigation Act*, R.S.C. 1970, c. C-23.
[1024] *Pankiw v. Canada (Human Rights Commission)*, 2006 FC 1544.
[1025] *Ontario v. Rothmans et al*, 2014 ONSC 3382.

> 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 significant as 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 is essentially to 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 suggested that ITL had knowledge of their authenticity[1026].

[1224] Article 403 f.C.C.P. aims to speed up the investigation so that it focuses only on documents that are genuinely disputed and states the following :

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.	**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.
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	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

[1026] *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCCS 1870, paragr. 26-28.

DRAFT

> 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.
>
> Le refus injustifié de reconnaître la véracité ou l'exactitude d'une pièce peut entraîner condamnation aux dépens qu'il occasionne.

> 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.
>
> The unjustified refusal to admit the genuineness or correctness of an exhibit may result in a condemnation to the costs resulting therefrom.

[1225] The Court specified that this article cannot be used to prove the genuiness of the content of an exhibit[1027]. It can, however, be used to prove the authenticity of its preparation[1028]. Thus, if the party responds to the formal notice by acknowledging the genuiness 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. This article provides that :

> **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.
>
> 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.
>
> 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

> **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.
>
> 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.
>
> The party having been given the formal notice admits or denies the origin or integrity of the evidence in

[1027] *Vincent c. Joubert*, J.E. 81-890, AZ-81011160 (C.A.).
[1028] *Vincent c. Joubert*, J.E. 81-890, AZ-81011160 (C.A.).

DRAFT

ses motifs; elle notifie cette déclaration à l'autre partie dans un délai de 10 jours.	an affidavit giving reasons, and notifies the affidavit to the other party within 10 days.
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.	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.

[Underligning added]

[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[1029]:

> [Unofficial Translation] This article includes part of the previous rules, but rephrases them to take into account, among other things, the new procedural context. 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. 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 stability and required perennity to the information.
>
> 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 case, it seems appropriate to leave it to the one intending to use the document to prove the value of its content. The court may, when deciding on legal costs, sanction inappropriate conduct, if any.

[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[1030] and not the genuiness 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 stricken[1031]. What is the situation in this case?

[1029] Ministry of Justice, *Commentaires de la ministre de la Justice : Code de procédure civile. Chapitre C-25.01*, Montréal, Wilson & Lafleur, 2015, art. 264, p. 214.
[1030] *Lacasse c. Lefrançois*, 2007 QCCA 1015, paragr. 64.
[1031] *Schwartz Levitsky Feldman, l.l.p. v. Werbin*, 2011 QCCS 6863.

DRAFT

[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 resultings 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 powers to sanction procedural impropriety[1032], codified in articles 54.1 and following f.C.C.P.*:*

> **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.
>
> 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.
>
> **54.3.** 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.
>
> […]

> **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.
>
> 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.
>
> **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.
>
> […]
>
> [Underligning added]

[1032] *Aliments Breton (Canada) inc. c. Bal Global Finance Canada Corporation*, 2010 QCCA 1369, paragr. 36. See also *Fabrikant c. Swamy*, 2010 QCCA 330.

DRAFT

[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*[1033]. In the explanatory notes preceeding the preamble of the Act, it is stated 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, are they really?

[1232] The first exhibit the admissibility of which is contested by the appellants is Exhibit 1337-2m. It is cited by the judge in paragraph 131[1034] of the judgment under appeal 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. The judge mentions in this paragraph that, since the survey was cited in an expert report of the appellants, that of Professor Duch, its authenticity and genuineness are acknowledged[1035].

[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 case[1036]. The respondents replied that Professor Duch was supposed to produce the studies referred to in his expert report, but that he failed to do so[1037]. The respondents therefore filed them independently, hence the suffix 2m[1038].

[1234] The judge did not commit an obvious and significant error by withdrawing this suffix in paragraph 131 of the judgment under appeal. The exhibit was properly produced on the basis of the May 2, 2012 judgment[1039], 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 does not err by referring to this survey, among other evidence, to determine the knowledge date of the Létourneau case, 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 relies on to determine this date.

[1033] *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.
[1034] Judgment under appeal, paragr. 131.
[1035] Judgment under appeal, paragr. 131.
[1036] Response of Me François Grondin to Me Bertrand Gervais, October 3, 2016 (consulted in the Appeal Court file).
[1037] Respondents' arguments, paragr. 419.
[1038] Respondents' arguments, paragr. 419.
[1039] *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCCS 1870.

DRAFT

[1235] With respect to Exhibit 154, this 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 draws a conclusion of collusion from this Statement of Principle[1040]. 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[1041].

[1237] Here again, the appellants are wrong. In fact, Exhibit 154B-2m and Exhibits 154A and 154 (i.e. the complete Policy Statement) are used by the judge to conclude that there was collusion, without verifying whether the content of these exhibits is genuine or whether there was any follow-up. Moreover, the judge did not make an obvious and significant error in the conclusion reached based on Exhibit 154, as it was produced by the appellant JTM itself. He did not commit an obvious and significant 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 acknowleded as authentic. Again, it should be noted that these are not the only exhibits used by the judge 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 American judgment and owing to its availability on the Internet[1042]. The letter and its content were indeed readily available to all and could not, therefore, be protected by solicitor-client privilege.

7.3. 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

[1040] Response of Me François Grondin to Me Bertrand Gervais, October 3, 2016 (consulted in the Appeal Court file).
[1041] Respondents' arguments, paragr. 417.
[1042] Judgment under appeal, paragr. 1137-1138.

conclusions of fact from an internal publication that ITL claimed to be protected by parliamentary privilege. Nor did he err in mentioning 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.

8. TRANSFER OF THE OBLIGATIONS OF MTI

8.1. 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 under appeal:

> [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".
>
> [Citation omitted]

[1241] The juge rejected these claims.

[1242] Firstly, in the 1978 Agreement[1043], 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 mentions 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"*[1044]. 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.

[1043] Exhibit 40596, p. 4.

[1044] Judgment under appeal, paragr. 1109.

DRAFT

[1243] Finally, the judge found that MTI's legal advisers knew of 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.

[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.*"[1045]

[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 <u>causes of action, pending or available to anyone</u> against MTI.*"[1046]

8.2. 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*[1047]:

> [Unofficial 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

[1045] Exhibit 40596, p. 7.
[1046] Exhibit 40596, p. 4 [Underligning added].
[1047] *Administration portuaire de Québec c. Fortin*, 2017 QCCA 315.

> in particular on the Supreme Court of Canada's judgment in *Sattva Capital Corp. v. Creston Moly Corp.*
>
> [Citation omitted]

[1250] The most important factual element retained by the judge in his analysis is that the 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 refers 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 such 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.

9. DESTRUCTION OF DOCUMENTS BY ITL

9.1. 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 (Roger Ackman) and outside (Lyndon Barnes and Simon Potter) counsel[1048]. He described those circumstances as follows at the end of paragraph 1077 of the judgment:

> - IT'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[1049]:

> - Was it ITL's intention to use the destruction of the documents as a means to avoid filing them in trials?

[1048] Impugned judgment, paragr. 357-378.
[1049] Impugned judgment, paragr. 367.

- 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 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 around one hundred research documents held by ITL[1050]. 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] Firstly, in the context of the constitutional challenge to certain sections of the *Tobacco Products Control Act*[1051] limiting the advertising of tobacco products taken by two tobacco companies against the Attorney General of Canada[1052], Chabot, J. of the Superior Court allowed an objection by ITL to the production of those documents, which said that they were no longer in its possession. 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[1053].

[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 par.

[1050] 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 public archives created by an order of an American court. The list of documents appears in Exhibit 58.

[1051] *Tobacco Products Control Act*, S.C. 1988, ch. 20.

[1052] See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Canada (Procureur général) v. R.J.R. - MacDonald inc.*, [1993] R.J.Q. 375 (C.A.); *Imperial Tobacco Ltd. v. Canada (Procureur général)*, [1991] R.J.Q. 2260 (S.C.).

[1053] Exhibit 68, p. 1.

DRAFT

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, that tobacco consumption is widespread in Canadian society and that it poses serious risks to the health of a great number of Canadians"[1054]. The harmful effects of tobacco products has 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 impugned judgment then mentions the testimony of Mtre. Barnes, who acknowledged that ITL filed an affidavit in order to avoid producing the documents in the Ontario case of *Spasic Estate v. Imperial Tobacco Ltd.*[1055]. That was a claim 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 is deceased, her estate took over the case.

[1262] In an amended motion to institute proceedings, the estate claimed that the tobacco companies had committed the delict of destruction of evidence[1056]. Writing for the Ontario Court of Appeal, Borins, J. summarized the elements of that claim in an interlocutory judgment[1057]:

> […]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 attorneys' failure to comply with the applicable requirements regarding the determination of the 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*

[1054] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, paragr. 30.
[1055] *Spasic Estate v. Imperial Tobacco Ltd.*, 2003 CanLII 32909 (Ont.S.C.).
[1056] In common law, "*tort of spoliation*".
[1057] *Spasic Estate v. Imperial Tobacco Ltd.*, 49 OR (3d) 699, paragr. 4.

DRAFT

Tobacco Ltd.[1058] 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.

9.2. Analysis

[1265] ITL's main claim 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's 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[1059]:

> - 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 which 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 in 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[1060]. With regard to the third case,

[1058] *Caputo v. Imperial Tobacco Ltd.*, 236 DLR (4th) 348 (Ont.S.C.).
[1059] Impugned judgment, paragr. 361.
[1060] See *supra*, notes 1052 and 1058.

DRAFT

in which the plaintiffs claim the delict of destruction of evidence[1061], 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 the judge ordered ITL to pay?

[1272] The answer to that question is no.

[1273] Firstly, the relevance of that evidence must be analyzed based on the objective of prevention of punitive damages, namely deterrence, punishment and denunciation[1062], 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*[1063], writing 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"[1064].

[1275] Before granting punitive damages taking into account these objectives, there must be a rational link 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 which ITL knew to potentially be 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 Supreme Court jurisprudence 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

[1061] See *supra*, note 1055.
[1062] *Richard v. Time inc.*, 2012 SCC 8, paragr. 188.
[1063] *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, paragr. 196, cited with approval by this Court recently in *Ville de Sainte-Marthe-sur-le-Lac v. Expert-conseils RB inc.*, 2017 QCCA 381, paragr. 79.
[1064] See also J.-L. Baudouin and P.-G. Jobin, *supra*, note 210, paragr. 803.

DRAFT

assessment of the evidence, or a serious error in the assessment of the amount[1065]. ITL was unable to demonstrate such errors.

V. CONCLUSION

[1277] In appeal, the Appellants failed to demonstrate 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 impugned judgment, 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, including a linguistic impropriety which 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 which affected the exact total amount of compensatory damages granted in the Blais matter, which drops from $6,858,864,000 to $6,857,854,080 due to the calculations illustrated in section IV.6[1066].

[1279] With respect to legal costs in appeal, given the very mitigated success of the appeals, it is appropriate to order that the legal costs in appeal be granted entirely in favour of the respondents in connection with the main appeal. Given the henceforth theoretical nature of the incidental appeal and the respondents' success in appeal, the incidental appeal will be dismissed without costs.

WHEREFORE THE COURT UNANIMOUSLY:

[1280] **ALLOWS** in part the appeals in files No. 500-09-025385-154, 500-09-025386-152 and 500-09-025387-150;

[1281] **QUASHES** in part the Superior Court judgment;

[1282] **STRIKES OUT** paragraphs 1208 to 1213 of the judgment and **SUBSTITUTES** the following paragraphs for them:

> [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 :

[1065] See *Cinar Corporation v. Robinson*, 2013 SCC 73, paragr. 134; *Richard v. Time*, 2012 SCC 8, paragr. 188-190; *Québec (Curateur public) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, paragr. 122, 125-126 and 129.

[1066] See also, *supra*, note 978.

DRAFT

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 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 **reçu un diagnostic d'une de ces maladies** avant le 12 mars 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.

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.

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 **$6,857,854,080** 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

DRAFT

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;**

DRAFT

> [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 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 Superior Court judgment on all other aspects;

[1284] **THE WHOLE**, with legal costs in favour of the respondents; and

[1285] **DISMISSES** the incidental appeal, without legal costs.

YVES-MARIE MORISSETTE, J.C.A.

ALLAN R. HILTON, J.C.A.

MARIE-FRANCE BICH, J.C.A.

NICHOLAS KASIRER, J.C.A.

ÉTIENNE PARENT, J.C.A.

Mtre. Deborah Glendinning
Mtre. Thomas Craig Lockwood
Mtre. Mahmud Jamal
Mtre. Alexandre Fallon
OSLER, HOSKIN & HARCOURT
For Imperial Tobacco Canada Ltd.

DRAFT

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

DRAFT

SCHEDULES

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.
Impugned judgment	*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

DRAFT

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

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

DRAFT

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

DRAFT

EMPHYSEMA				
Year diagnosed	**Number of diagnoses[1067]**	**-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

DRAFT

[1067] 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, p. 41.)

SCHEDULE III: Definitions of Blais and Létourneau Classes

February 21, 2005 –AUTHORIZATION JUDGMENT[1068]	
Blais File	**Létourneau File**
All persons residing in Quebec who, when the motion was served, suffered from cancer of the lung, the larynx or throat or emphysema, or who since the motion was served have been diagnosed with cancer of the lung, the larynx or the throat or have suffered from emphysema after directly inhaling cigarette smoke, after smoking a minimum of 15 cigarettes per 24-hour period for an extended and uninterrupted period of at least 5 years and the heirs of persons deceased since the motion was served who satisfied the criteria mentioned herein.	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 heirs of persons who were included in the class when the motion was served but who later died without quitting smoking.
July 3, 2013 – CLASS AMENDING JUDGMENT[1069]	
Blais File	**Létourneau File**
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) 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)	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 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; 3) They were still smoking the defendants' cigarettes on February 21, 2005, or until their death, if it occurred before that date.

[1068] *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, J.E. 2005-589, 2005 CanLII 4070 (S.C.).
[1069] *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2013 QCCS 4904.

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 satisfy the criteria mentioned herein.	The class also includes the heirs of the members who satisfy the criteria described herein.
June 9, 2015 – IMPUGNED JUDGMENT[1070]	
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.

[1070] Impugned judgment, paragr. 1208.

DRAFT

SCHEDULE IV: Extracts from the "*Special Report on Smoking and Health*", *The Leaflet*, Vol. 5, No. 5, June 1969 (Exhibit 2, p. 1 and ff. – see *supra*, note 580)

- 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;

DRAFT

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."

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

DRAFT

> 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.

DRAFT

EXHIBIT "D"

This is Exhibit "B" referred to in the affidavit of Robert McMaster sworn before me, this 1st day of April, 2019

[signature]

A COMMISSIONER FOR TAKING AFFIDAVITS

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO.: **500-06-000076-980**

(CLASS ACTION)

SUPERIOR COURT

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ, and JEAN-YVES BLAIS,

PLAINTIFFS

v.

JTI-MACDONALD CORP., and IMPERIAL TOBACCO CANADA LTÉE, and ROTHMANS, BENSON & HEDGES INC.,

DEFENDANTS

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO.: **500-06-000070-983**

(CLASS ACTION)

SUPERIOR COURT

CÉCILIA LÉTOURNEAU,

PLAINTIFF

v.

JTI-MACDONALD CORP., and IMPERIAL TOBACCO CANADA LTÉE, and ROTHMANS, BENSON & HEDGES INC.,

DEFENDANTS

AFFIDAVIT OF MARY CAROL HOLBERT

I, the undersigned, MARY CAROL HOLBERT, retired lawyer, residing at 661 Broadoak Loop, Sanford, Florida, United States of America, being duly sworn, do depose and say:

1. I am a retired lawyer, formerly employed by the R.J. Reynolds tobacco group ("**RJR**"). During my career, I specialized in taxation, including international taxation. I first joined

RJR in the United States, and later transferred to the tax department of R.J. Reynolds Tobacco International, S.A. ("**RJRI**") in Geneva, Switzerland, where I was in 1999. I remained employed in the same position until I retired in 2004.

2. On March 9, 1999, RJR announced that it had reached agreement with Japan Tobacco Inc. ("**JT**") to sell its international, non US, tobacco assets. It was known at the time that RJR had been seeking bids for the acquisition of its international assets, and that major international tobacco groups had participated in the bidding process. JT was a large company in Japan, with only limited presence abroad. My understanding is that it had limited experience in international acquisitions. The announcement of March 9, 1999 that JT had won the bid contest was a surprise at RJRI as well as among informed industry participants and observers.

3. When JT acquired the international assets of RJR on May 11, 1999, the RJRI Geneva headquarters transitionally became the Swiss Branch of JT International B.V., a Dutch company, until JT International S.A. was organized.

RJRI pre-acquisition: tax planning including a leveraged buy-out

4. Forthwith after March 9, 1999, the head of the RJRI tax department began assisting JT and its tax advisors, Ernst & Young PLC of the United Kingdom ("**E&Y**"), in the planning of the closing of the worldwide acquisition and integrations of RJRI into JT.

5. At or about that time, my understanding was that it was initially contemplated that the closing would take place on or about May 20, 1999 and that the intention was that much of the integration steps would be accomplished by the day of the acquisition, including, for Canada, that:

   a) JT would constitute a new Canadian company destined to acquire the shares of RJR-Macdonald;

   b) The new Canadian company would amalgamate with RJR-Macdonald. As a result, the assets of the amalgamated company and its subsidiaries would have to be stepped up to their fair market value at the time of the acquisition.

6. From the very beginning, it was understood that, for tax-planning purposes, the Canadian acquisition would be a leveraged buy-out leaving the Canadian operating company with a debt and interest that would be deductible from its earnings.

7. However, at some point, the closing, which ultimately took place on May 11, 1999, could not allow for the completion of all the necessary planning and implementation steps required to integrate this enormous acquisition, as the task of planning and implementing integration proposals worldwide was too considerable. Many of the proposals which were targeted to be implemented at closing therefore had to be postponed, including the leveraging of the Canadian operating company.

8. The intention to execute a leveraged buyout explains the capitalization of the Canadian company at the time of closing with redeemable preferred shares, which would subsequently facilitate the implementation of the said debt structure.

9. In this context, JT advised the RJRI tax department that it would be assigned the task of spearheading the planning and implementation of the integration proposals with the objective of creating tax effective integrations of the RJR subsidiaries in the new international group. Acting under direction from the Head of Tax, I was ultimately assigned the responsibility for the project as regards the Americas, including Canada.

10. The RJRI tax department thus continued to assist JT and its advisors to help them understand the legal structure and tax strategies of the existing RJR international group, and to identify pre-closing and post-closing issues and opportunities triggered by JT's acquisition of RJRI. A tax planning meeting was held in Geneva on April 16, 1999, for which the RJRI tax department prepared a Power Point presentation. I produce herewith, under seal, the extracts of the Power Point presentation that are relevant to the Canada proposals, as **Exhibit MCH-1**. I cannot remember whether I attended the meeting of April 16, 1999, but Exhibit MCH-1 is consistent with the status of the project as I was aware of it and understood it at the time.

11. Slide 3 of the presentation (MCH-1) describes the corporate structure put in place for the acquisition. Actually, the said structure had been implemented one week prior to the meeting, with the constitution on April 9, 1999 of JT Canada LLC ("**LLC**") and of JT Nova Scotia Corp. ("**JT NS**").

12. Slide 5 of Exhibit MCH-1 is entitled "Post Closing/Canada Debt Push Down". It was understood at the time that JT was taking on debt in the amount of approximately US$5 billion for the purposes of its acquisition of the international assets of RJR. The concept of a debt pushdown as illustrated in slide 5 is that a portion of the debt taken by the acquirer of international assets is transferred to an acquired entity that generates earnings. This is a typical form of leveraged buy-out accomplished by replacing equity by debt. As illustrated on slide 5, such a recapitalization is accomplished by taking on a loan and using the proceeds of the loan to redeem preferred shares.

13. Slide 6 (MCH-1) sets forth the expected tax benefits of the contemplated leveraging of the Canadian operating company, including the fact that the loan interest would be tax deductible.

14. Slide 7 (MCH-1) refers to the two Canadian entities created by JT for the purpose of the acquisition, already mentioned in paragraph 11 of my Affidavit. It makes the point that capitalizing the Canadian entities with redeemable preferred shares gives flexibility for the purpose of introducing debt after the acquisition, as illustrated in slide 5.

15. It was well known among international tax practitioners at the time, and I was personally well aware, that Canada had high rates of corporate income taxation. It was also known at the time that the Canadian income tax burden of RJR-Macdonald represented about one third of RJRI's income tax expense. Also, the Canadian legislation allowed foreign investors to leverage their acquisitions by capitalizing the acquired company within the limit of a prescribed ratio of debt to equity. These provisions of Canadian tax legislation are widely referred to as the thin capitalization rules. In 1999, the prescribed debt to equity ratio was 3:1.

16. The JT acquisition was the occasion for using the thin capitalization rules to satisfy tax saving needs as well as financial needs for cash and re-deployment of assets in the international corporate structure just acquired.

17. The closing of the transaction took place on May 11, 1999. LLC and JT NS were actually capitalized with a substantial proportion of redeemable preferred shares. JT NS acquired all the shares of RJR-Macdonald Corp. for an amount of approximately $3.2 billion, with funds made available to it by JT.

Post-acquisition involvement

18. After the meeting of April 16, 1999, the focus of the RJRI tax department was to continue planning for the post-acquisition integrations.

19. Among other things, we analysed the Canadian situation in further detail and turned our attention to the issue of trademarks. As a result of the acquisition, the assets of the acquired company needed to be increased, or stepped up, to their fair market value for accounting and tax purposes. In the context of a going concern generating the levels of earnings of RJR-Macdonald, the trademarks were bound to be estimated at a very high value. We knew that this would in turn trigger the imposition of a substantial capital tax on the operating company.

20. To address this issue, a typical tax planning arrangement was used, which consisted of transferring the trademarks into a wholly-owned subsidiary in consideration for the issuance of shares. We knew that as a result, the operating company's asset would be reported as an investment in a subsidiary, which would not be included in the capital value of the company.

21. In addition, the trademark holding company could conveniently be located in Quebec, where RJR-Macdonald had its manufacturing facilities, thus benefiting from the lower Quebec corporations' income tax rates, an additional tax saving.

22. We had a concern, however, that such a transaction could be seen by fiscal authorities as an avoidance transaction or an abuse of the provisions of tax legislation. In 1999, the

general anti-avoidance rules ("GAAR") were still creating uncertainty. I understood that our concern regarding GAAR could be resolved if the trademark related transactions were positioned as being effected for a business purpose, in addition to a tax benefit.

23. It became apparent that the most defensible business purpose under the circumstances would be to position the transactions as being effected to afford protection to a portion of JT's investment in Canada by placing the trademarks in a "bankruptcy remote" position, that is, to ensure that JT could recover them in the event of a bankruptcy of the operating company.

24. On April 28, 1999, my superior Anthony Maggiore issued an invitation to all persons involved in the implementation of post-acquisition initiatives to meetings to be held the week of May 17, 1999. I was assigned the task of making a number of presentations at these meetings regarding Canada and other countries of the Americas. I prepared Power Point presentations on all of the said issues. I produce herewith, under seal, *en liasse*, the relevant extracts as Exhibit **MCH-2** a one-page document entitled Project Infinity/Post Acquisition Implementation Meetings, the April 28 invitation to the meetings, and the Canada-related Power Point presentations prepared for these meetings.

25. As appears from the relevant extracts of the Power Point Presentation MCH-2, the Canadian Capital Restructure with an initially contemplated leveraged debt of $900 million would generate expected annual tax savings of $14.8 million, without even discussing the trademark rollover.

26. My first presentation dealt with the Canada Capital Restructure. Slides 2 to 9 (MCH-2) illustrate a concept of using new Austrian holding companies and a Canadian Non-Resident Owned company to channel the loan structure with tax benefits in Europe. This concept was ultimately dropped.

27. Slides 10 to 15 (MCH-2) set forth the concept of substituting debt to equity to the extent of 75% of the capital value of the Canadian parent LLC. At that stage, we did not have the required evaluations, so that our numbers were only rough estimations. Otherwise,

the manner of establishing a debt and returning capital reflects what was ultimately implemented in Canada, as was contemplated right from the start.

28. My other presentation related to Canada dealt with the Finco BV acquisition by JTIH-BV. In order to cover all aspects of the Canadian plan including the transfer of trademarks, which was not on the initial agenda of the meetings, I added to my presentation a section covering "Other consequences of Amalgamation and Step up" (Slides 10 and following).

29. In slide 11 (MCH-2), I explain the capital tax impact of the step-up in the value of the trademarks, and the capital tax benefit for the operating company of holding an investment into a subsidiary instead of maintaining the trademarks in its own balance sheet.

30. In slide 12 (MCH-2), I suggest that a trademark holding company should be established as a first tier subsidiary of RJR-Macdonald. In view of our GAAR concern two business purposes other than the tax savings were identified as readily discernible for effecting the transfer of the trademarks, that is, to provide a level of protection by making the trademarks bankruptcy remote, and also to ensure maintenance of the integrity of the trademarks via quality assurance oversight. In the next two slides, I provide additional comments and explanations regarding the tax benefits.

31. By the end of May, the RJRI's tax department's planning phase was complete. I was made aware that JT had arranged through Ernst &Young to seek a ruling from the Canadian tax authorities on the planned amalgamation of JT NS and JTI-Macdonald Corp. I produce herewith, under seal, Ernst & Young's letter to the Canada Customs and Revenue Agency dated May 31, 1999 as Exhibit **MCH-3**. We received a favourable response to our request by letter dated August 11, 1999 from CCRA to Ernst & Young, which I produce, under seal, as Exhibit **MCH-4**.

32. The next step was to present and explain our integration proposals to JT, for which a trip to Tokyo was scheduled. Before then, we arranged for a meeting in Geneva on June 2, 1999 with representatives of JT in order to fully brief them first on all aspects of our

integration proposals and work out with them how the case could most properly be presented to JT. I produce herewith, under seal, the relevant extracts of the Power Point presentation used for the June 2, 1999 meeting as Exhibit **MCH-5.**

33. Pursuant to the said meeting, a more streamlined Power Point Presentation was prepared, which I understand was used for the Tokyo meeting. I produce, under seal, its relevant extracts as Exhibit **MCH-6.**

34. The next step for us was to move to obtain internal approval of the various integration projects. For Canada, an Authorization Request Form was prepared on June 17, 1999. I produce, under seal, a copy of the Form and its annexes as Exhibit **MCH-7.**

35. Meanwhile, I was still giving consideration to the GAAR issue raised by the trademark transfer plan. It was my understanding that, in order to pass scrutiny by the fiscal authorities, we would need to demonstrate that the transactions by which it was put in place were both useful and effective at achieving the purpose of protecting the trademarks.

36. In this regard, we realized that, in the event of a bankruptcy of JTI-M, which was to remain an unlimited liability company for at least two years after the closing, its unpaid liabilities would pass to LLC as sole shareholder. Under our plan, LLC was also the company that would hold the mortgage on the trademarks. Hence our plan could not be demonstrated to fiscal authorities to be effective at achieving its business purpose of protecting the trademarks.

37. In order to resolve this deficiency, we had to add a step to our integration plan consisting of interposing a second limited liability holding, eventually JT Canada LLC II, between LLC and JT NS, the company that was destined to amalgamate with RJR-Macdonald to form JTI-M.

38. According to our internal arrangements at the time, this additional step of creating a new company required express approval. On July 2, 1999, I sent a note to Mr. Mark Hawley with two Power Point slides in order to complete our authorization request for the Canadian project. I produce, under seal, these documents as Exhibit **MCH-8.**

39. As appears from the said authorization request form (MCH-7), the then finalized restructuring plan was to generate the following savings:

a) Leveraging the Canadian operating company (now JTI-M) would generate annual tax savings of approximately $18 million;

b) The transfer of the trademarks to a trademark holding company (now JTI-TM) would generate capital and tax savings of $5 million, on a yearly basis.

40. On August 5, 1999, JT confirmed the approval of the Canadian project, among others. I produce, under seal, as Exhibit **MCH-9** an email from Mr. Roland Konstantos dated August 9, 1999 containing the JT confirmation email of August 5. I also produce, under seal, as Exhibit **MCH-10** the complete Authorisation Request documents for Canada, as signed by the RJRI representatives and the members of the JTIH board.

41. This is the basis on which the plan was approved and later implemented by the end of 1999. I remained heavily involved, coordinating the work and liaising with our Treasury and Legal departments as well as outside advisors. From a tax and business perspective, it was paramount that all the transactions be made on a fair market value and fair market term basis, that we had the professional evaluations needed to evaluate the companies and the trademarks and make the proper tax calculations, and that the operating company's capacity to service debt be estimated. The financial adjustments resulting from this work did not require any further authorization from JT. The integration transactions in Canada were implemented in accordance with the planning that the RJRI tax department had finalized on June 2, 1999, except for the additional step recommended on July 2, 1999 to add LLC II as an additional holding company between LLC and JT NS.

Conclusions

42. As evidenced in Exhibit MCH-7 and as already mentioned, Canada represented by far the largest tax burden of the RJRI portfolio of international companies purchased by JT. All the aforementioned transactions were planned by the RJRI tax department and motivated by tax efficiency, to achieve optimal tax savings. The particular treatment given to the trademark transfer component of the Canadian project was developed primarily as a

response to a tax concern arising out of the uncertainty created by GAAR and the requirement that for JTI-M to benefit from the tax treatment afforded to the trademarks in the transfer to JTI-TM, a business purpose had to exist. In this regard, it made complete business sense to secure the trademarks, considering the size of JT's investment in Canada, against the possibility, though remote, of bankruptcy.

43. I never received suggestions or instructions from anyone to develop such a plan to counter any actual or threatened litigation involving RJR-Macdonald.

44. In fact, I was not myself aware of the existence of litigation against RJR-Macdonald at the time, including the Plaintiffs' motion for authorization to institute class actions in which I understand JTI-M is currently involved. This was irrelevant to the instructions I had and to my work as a tax specialist resulting from the said instructions.

45. At all times, it was my understanding that it was legitimate for an acquirer such as JT, who had invested considerable amounts in the assets of RJR and taken debt for it, to take steps to protect a portion of its investment in the manner it was done with the trademarks in Canada.

46. All the facts stated in this Affidavit are true.

AND I HAVE SIGNED:

Mary Carol Holbert
MARY CAROL HOLBERT

STATE OF FLORIDA
COUNTY OF Volusia

Sworn to (or affirmed) and subscribed before me this 12th day of Sept, 2012, by (name of person making statement). Mary Carol Holbert

CHRISTINA M. GORMAN
MY COMMISSION # EE 182909
EXPIRES: April 25, 2016
Bonded Thru Budget Notary Services
(NOTARY SEAL)

Christina M. Gorman
(Signature of Notary Public-State of Florida)
(Name of Notary Typed, Printed, or Stamped)

Personally Known ______ OR Produced Identification X
Type of Identification Produced US Passport

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO.: **500-06-000076-980**

(CLASS ACTION)

SUPERIOR COURT

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ, and JEAN-YVES BLAIS,

PLAINTIFFS

v.

JTI-MACDONALD CORP., and IMPERIAL TOBACCO CANADA LTÉE, and ROTHMANS, BENSON & HEDGES INC.,

DEFENDANTS

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO.: **500-06-000070-983**

(CLASS ACTION)

SUPERIOR COURT

CÉCILIA LÉTOURNEAU,

PLAINTIFF

v.

JTI-MACDONALD CORP., and IMPERIAL TOBACCO CANADA LTÉE, and ROTHMANS, BENSON & HEDGES INC.,

DEFENDANTS

LIST OF EXHIBITS

EXHIBIT MCH-1 : Copy of relevant extracts of the Power Point pertaining to the Canada proposals presented at a tax planning meeting held in Geneva on April 16, 1999;

EXHIBIT MCH-2 : Copy of relevant extracts of the document entitled Project Infinity/Post Acquisition Implementation Meetings, the April 28 invitation to the meetings, and the Canada-related Power Point, *en liasse*;

EXHIBIT MCH-3 : Copy of Ernst & Young's letter to the Canada Customs and Revenue Agency dated May 31, 1999;

EXHIBIT MCH-4 : Copy of a letter dated August 11, 1999 from CCRA to Ernst & Young;

EXHIBIT MCH-5 : Copy of relevant extracts of the Power Point presentation used for the June 2, 1999 meeting;

EXHIBIT MCH-6 : Copy of the relevant extracts of the Power Point Presentation prepared and used for the Tokyo meeting;

EXHIBIT MCH-7 : Copy of an Authorization Request Form prepared on June 17, 1999;

EXHIBIT MCH-8 : Copy of the July 2, 1999 note to Mr. Mark Hawley accompanied by two Power Point slides to complete the Authorization Request Form;

EXHIBIT MCH-9 : Copy of an email from Mr. Roland Konstantos dated August 9, 1999 containing the JT confirmation email of August 5;

EXHIBIT MCH-10 : Copy of the complete authorisation request documents for Canada, as signed by the RJRI representatives and the members of the JTIH board.

Montreal, September 12th, 2013

(signed) Borden Ladner Gervais

BORDEN LADNER GERVAIS LLP
Attorneys for Defendants

QUEBEC CLASS ACTIONS 500-06-000070 3 AND 500-06-000076-980 CONFIDENTIAL

PROJECT INFINITY

TAX PLANNING
PRE & POST CLOSING
GENEVA, 16 APRIL 1999

PIÈCE/EXHIBIT
MCH-1
Borden Ladner Gervais
514-879-1212

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

INTRODUCTION

- RJRI Tax Department has been assisting:
  - Ernst & Young
  - Gilbert, Segall & Young
  - Baker McKenzie
- To help them understand existing RI group legal structure and tax strategies
- To identify pre and post closing issues and opportunities triggered by JT's acquisition of RJRI
- Today's presentation is organized in two parts:
  - Pre-closing issues and opportunities
  - Post-closing issues and opportunities

PRE CLOSING

CANADA STRUCTURE AT COMPLETION

JT

JTEH BV

JTIH BV

RI COMPANIES

JT CANADA HOLDING LTD

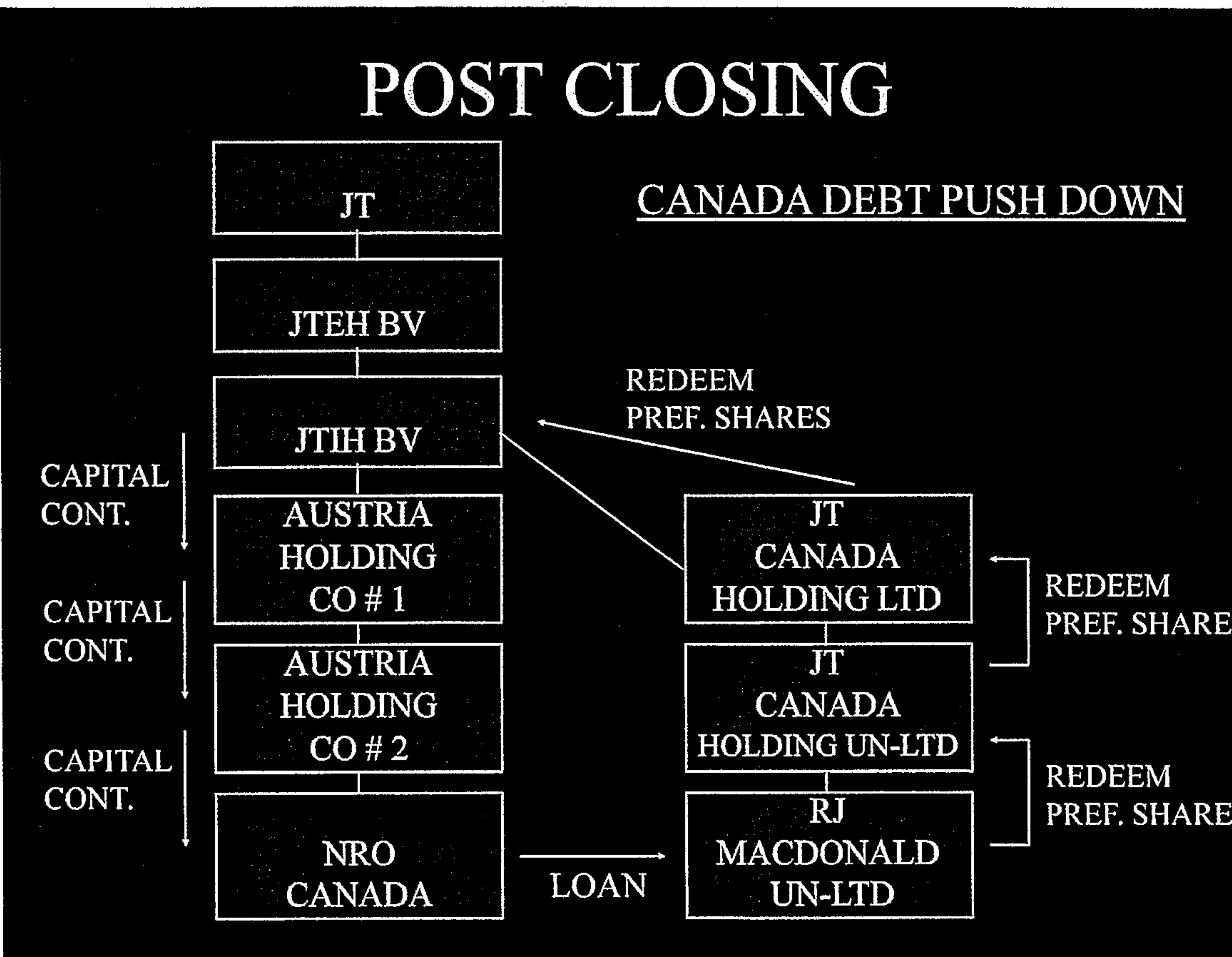
JT CANADA HOLDING UN-LTD

RJ MACDONALD UN-LTD

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

POST CLOSING INTRODUCTION

- RJRI's Tax Department will organize meetings with:
  - Ernst & Young
  - Gilbert, Segall & Young
  - Baker McKenzie
- To assume responsibility for pre-closing transactions
- To initiate approved post-closing transactions
- To coordinate efforts with advisors and assign responsibilities


POST CLOSING
CANADA DEBT PUSH DOWN
JT
JTEH BV
JTIH BV
AUSTRIA HOLDING CO # 1
AUSTRIA HOLDING CO # 2
NRO CANADA
CAPITAL CONT.
CAPITAL CONT.
CAPITAL CONT.
REDEEM PREF. SHARES
JT CANADA HOLDING LTD
JT CANADA HOLDING UN-LTD
RJ MACDONALD UN-LTD
REDEEM PREF. SHARES
REDEEM PREF. SHARES
LOAN

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

POST CLOSING

Canada debt push down :

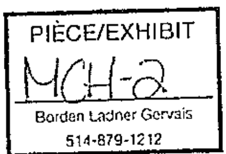
- Participation exemption in Austria
- Two Austrian companies for capital duty planning
- Canadian Non Resident Owned Co (NRO)
  - taxed at 25%
  - tax refunded when distribution made
  - notional withholding tax of 10% on distribution
- Loan interest paid by RJRMac tax deductible
- Interest should not be taxed in Japan

QUEBEC CLASS ACTIONS 500-06-00007C 33 AND 500-06-000076-980 CONFIDENTIAL

POST CLOSING

Canada :

- JT Canada Holding Ltd has limited liability
- JT Canada Holding UnLtd has unlimited liability
- Redeemable preference shares give flexibility
- Potential to introduce debt post completion



QUEBEC CLASS ACTIONS 500-06-000070 33 AND 500-06-000076-980 CONFIDENTIAL

PROJECT INFINITY

POST ACQUISITION IMPLEMENTATION MEETINGS

	CONTENTS	PRESENTOR
1.	Meeting invitation and agenda	
2.	Thailand Integration	Mary Wong
3.	Canada Capital Restructuring	Mary Carol Holbert
4.	Russia Trademarks	Todd Madden
5.	Puerto Rico	Mary Carol Holbert
6.	Taiwan Integration	Mary Wong
7.	RJRI Migration & Capital Augmentation	Anthony Maggiore
8.	US International Assignees	Mary Carol Holbert
9.	Finco Restructuring	Mary Carol Holbert
10.	Tutun (Turkey) Acquisition	Mary Carol Holbert
11.	Integration of JT & RI – New proposals	Anthony Maggiore
12.	WBI & Transnational Services	Mary Carol Holbert
13.	RI Duty Free	Mary Carol Holbert
14.	Bahama Commissionaire	Mary Carol Holbert

R.J. REYNOLDS INTERNATIONAL

ANTHONY J. MAGGIORE
VICE PRESIDENT - TAX

INTER-OFFICE CORRESPONDENCE

Date: April 28, 1999

To: Distribution

cc: Jack Koach
Mark Hawley

Subject: Post Acquisition Implementation Meetings

Japan Tobacco has confirmed that persons participating in the implementation of approved post acquisition initiatives should meet during the week of May 17th to establish implementation responsibilities and schedules. These meetings will include some of our traditional advisors, and certain JT advisors.

RI personnel participating in the meetings with the advisors scheduled for May 19th through May 21st, are requested to participate in preparatory meetings and / or conference calls scheduled for Tuesday, May 18th. Attached you will find a proposed schedule of meetings and conference calls. RI personnel may propose additional participants that would facilitate these initiatives.

Please let me know if you have any questions.

Regards,

Tony

R.J. REYNOLDS INTERNATIONAL B.V. (HILVERSUM) GENEVA BRANCH
14, CHEMIN RIEU CH-1211 GENEVA 17 / SWITZERLAND
TELEPHONE 022/7030 441 TELEX 412 050 TELEFAX 022 / 7030 638

DISTRIBUTION:

Tax:
Mary Carol Holbert
Todd Madden
Mary Wong
Sylvia Chan

HQ Legal:
Denis Mylonas
Bruce Ventura
Paul Bourassa

HQ Finance:
Tom Younan
Steve Gilboy
Sam Ong
Kurt Albrecht
Bob Marioni
David Twine

HQ HR:
Paul Pittman

CIS:
Nick Ringer
Martin Braddock
Andy Reay

Asia / Pacific:
Jean Luc Perreard
Elton Chiu
Francois Stettler

Americas:
Bradley Price
Richard LaRocca
Angel Soto

Turkey:
Kamil Yavuz

WBI:
Stavros Michaelides

Advisors – JT "Team Leaders":
Masaaki Inoue – EY, Tokyo
Noel Davidson – EY, London
Mark Stone – GS&Y, NY
Jeff Kaye – BM, London

Advisors:
Jeroen Davidson – EY, Amsterdam
Bill Henry – EY, Moscow
Martin Carsley – DT, Toronto
Yvon de Coulon – DT, Geneva
John Cifor – DT, Bangkok
Margerita Serapion – Sierra, Serapion, PR
Heinz Kroppen – DT, Dusseldorf
Zeki Kurtcu – DT, Istanbul
Phil Clifford – DT,Brussels (US Desk)
Bell Cheng – EY, Taipei
Owen Crassweller – EY, London
Wolfgang Wildner – EY, Vienna
Donna Holmes – GS&Y, NYC
Kevin Atkins – DT, Tokyo

JTI – USA:
GS&Y will identify a contact person

JTA – USA:
GS&Y will identify a contact person

CONFIDENTIAL

PROJECT INFINITY
PROPOSED TAX INITITIATIVE IMPLEMENTATION
SCHEDULE OF MEETINGS AND CONFERENCE CALLS – WEEK BEGINNING MAY 17TH

DATE	PROJECT / SITE		RI TAX	RI LEGAL	RI OPS	ADVISORS
			REQUESTED PARTICIPANTS (* will participate by conference call unless otherwise requested)			
TUESDAY, 18 MAY						
08:00	RJR Thailand Inc - JTI acquisition & maintenance of 'Treaty of Amity' benefits		M. Wong, S. Chan	F. Stettler* D. Mylonas	JL Perreard*	N/A
09:00	RJR Taiwan Inc - JT's Taiwan sub acquire and liquidate		M. Wong, S. Chan	F. Stettler* D. Mylonas	E. Chiu*	N/A
10:00	Russia - RJRI's acquisition of RJR Petro trademarks		T. Madden	B. Ventura D. Mylonas	M. Braddock N. Ringer*?, A. Reay* ?	N/A
11:00	JT Canada – ➢ Debt Push Down		MC Holbert	P. Bourassa D. Mylonas	B. Price, T. Younan, S. Gilboy	N/A
	➢ JTIH BV acquisition of Turkey ?		MC Holbert	D. Mylonas	K. Yavuz* B. Price, S. Gilboy	N/A
	Sandwich lunch in conference room					
13:00	RJRI BV & Swiss Branch - ➢ 'All Swiss' implementation ➢ Merging RJRI / TISA w/OFC & Finco SA		MC Holbert	D. Mylonas	S. Ong, T. Younan B. Marioni, K. Albrecht, S. Gilboy, P. Pittman D. Twine	N/A
	➢ USA JTI's Newco for IA costs		MC Holbert	P. Bourassa D. Mylonas	P. Pittman, B. Marioni	N/A
15:00	RJR Finco BV & Swiss Branch - JTIH BV acq. of RJR Finco, then RJR Finco merger into JTIH BV		MC Holbert	D. Mylonas	S. Gilboy, B. Price. P. Pittman	N/A
16:00	Puerto Rico - PR Newco tax ruling		MC Holbert	P. Bourassa D. Mylonas	S. Ong, P. Pittman PR Newco Mgmt *?	N/A
17:00	JTI - USA 'Stripped Distributor' for RI Duty Free		MC Holbert	P. Bourassa D. Mylonas	S. Ong, K Albrecht. R. LaRocca*, P. Pittman, D. Twine, B. Price	N/A
	➢ Bahamas - RI Comm for LA Duty Free		MC Holbert	P. Bourassa	S. Ong, K. Albrecht, R. LaRocca*, P. Pittman, D. Twine	N/A

...AND 980-00-000076-980 CONFIDENTIAL

DATE	PROJECT / SITE	RI TAX	RI LEGAL	RI OPS	ADVISORS
		REQUESTED PARTICIPANTS (EY, GS&Y, BM "Team Leaders" at their discretion, in person or by conference call) (* will participate by conference call unless otherwise requested)			
WEDNESDAY, MAY 19					
09:00	RJR Thailand Inc - JTI acquisition & maintenance of 'Treaty of Amity' benefits	M. Wong, S. Chan	F. Stettler* D. Mylonas	JL Perreard*	J. Cifor – DT*
11:00 – 15:00	JT Canada – ➢ Debt Push Down	MC Holbert	P. Bourassa D. Mylonas	B. Price, T. Younan, S. Gilboy	M. Carsley – DT W. Wildner – EY* O. Crassweller – EY J. Davidson - EY
15:00	Russia - RJRI's acquisition of RJR Petro trademarks	T. Madden	B. Ventura D. Mylonas	M. Braddock N. Ringer*?, A. Reay* ?	B. Henry – EY*
	Sandwich lunch in conference room				
16:00 – 18:00	Puerto Rico - PR Newco tax ruling	MC Holbert	P. Bourassa D. Mylonas	S. Ong, A. Soto* PR Newco Mgmt *?	M. Serapion, S&S*
THURSDAY, MAY 20					
09:00	RJR Taiwan Inc - JT's Taiwan sub acquire and liquidate RJR Taiwan Inc ?	M. Wong, S. Chan	F. Stettler* D. Mylonas	E. Chiu*	B. Cheng - EY *
11:00 – 17:00	RJRI BV & Swiss Branch – ➢ 'All Swiss' implementation ➢ Merging RJRI / TISA w/OFC & Finco SA	MC Holbert	D. Mylonas	S. Ong, T. Younan B. Marioni, K. Albrecht, S. Gilboy, P. Pittman D. Twine	J. Davidson – EY Y. de Coulon – DT
	➢ USA JTI's Newco for IA costs	MC Holbert	P. Bourassa D. Mylonas	P. Pittman	D. Holmes – GSY*
	Sandwich lunch in conference room				
17:00	RJR Finco BV & Swiss Branch - JTIH BV acq RJR Finco, then RJR Finco merger into JTIH BV	MC Holbert	D. Mylonas	S. Gilboy, B. Price. P. Pittman	J. Davidson – EY Y. de Coulon – DT H. Kroppen* – DT (Ger RE tax)
FRIDAY, MAY 21					
09:00	➢ Turkey - JTIH BV acquisition ?	MC Holbert	D. Mylonas	K. Yavuz* B. Price	Z. Kurtcu – DT*
11:00 - 13:00	JT sub integration (Sandwich lunch in conference room)	MC Holbert, T. Madden, M. Wong, S. Chan	D. Mylonas	S. Ong	J. Davidson – EY K. Atkins – DT * P. Clifford - DT
13:00	JTA – USA acquisition of WBI & Transnational Services	MC Holbert	B. Ventura D, Mylonas	S. Michaelides JTA – USA Mgmt *?	P. Clifford - DT
14:00	JTI - USA 'Stripped Distributor' for RI Duty Free	MC Holbert	P. Bourassa D. Mylonas	S. Ong , P. Pittman, R. LaRocca*, D. Twine, B. Price, K. Albrecht JTI – USA Mgmt *?	P. Clifford - DT
	➢ Bahamas - RJ Comm for LA Duty Free	MC Holbert	P. Bourassa D. Mylonas	S. Ong, P. Pittman, R. LaRocca*, D. Twine, K. Albrecht	P. Clifford - DT

Canada Capital Restructure

May 1999

Canada Capital Restructure

We anticipate that:

•JT Canada Holding borrows money -- gives lender note
•NRO Canada buys note from lender

JT

JTEH BV

JTIH BV

Austria Holdco 1

Austria Holdco 2

NRO Canada

JT Canada Holding Limited

RJR Macdonald Nova Scotia ULC

Capital Contribution

Capital Contribution

Capital Contribution

NOTE

Redeem Preferred Shares

Redeem Preferred Shares

CONFIDENTIAL

Canada Capital Restructure

- Dual Austrian Holding Company
  - Capital Tax benefit
    - If provide informal capital to second tier Austrian Holding Company, can avoid Austrian capital tax on the informal capital contributed (EY)
  - May provide mechanism to get participation exemption under Dutch tax regime -- to be fleshed out by EY

Canada Capital Restructure

- Two Austrian holding companies -- preserve participation exemption in Holland
  - Still may be subject to attack in Holland
    - Abuse of law
    - Look through to Austrian Holdco 2 because no substance in Austrian Holdco 1
  - Participation exemption regime in Austria
  - Best if Austrian Holdco 1 performs other activities than simply holding Austria Holdco 2

Canada Capital Restructure

- Capital contributions:
  - Capital contribution from JTIH BV to Austria Holding Company #1 and down to Austria Holding Company #2
  - Informal capital contribution from JTIH BV to Austria Holding Company #2 ("Contribution by Indirect Shareholder")
  - Capital contribution from Austria Holding Company #2 to NRO Canada

...00 AND 500-00-000076-980 CONFIDENTIAL

Canada Capital Restructure

- Canadian Non Resident Owned Company (NRO)
  - Canadian corporation
  - All shares, bonds, debentures and funded indebtedness owned by nonresidents
  - Income must be from specific sources
  - Principal business must not be the making of loans or dealing in debt securities

Canada Capital Restructure

- Need loan vehicle between NRO and JT Canada Holding Limited
  - Revenue Canada has issued advance rulings to the effect that the acquisition of a debt claim by a corporation constitutes neither the making of loans nor the trading or dealing in debt securities
  - Issue: Will NRO acquire a note representing a debt owed by JT Canada Holding Limited to a bank or other entity?

Canada Capital Restructure

- NRO
  - Receives interest in year one, and must pay 25% refundable tax
    - Tax on 1999 income must be paid by end of February 2000
    - Refund benefit will be taken against next year's tax payment, so will receive benefit 12 months after initial tax payment
  - Pays dividend in year two, at which time 10% withholding tax applies

Canada Capital Restructure

- If NRO holds note, sample tax calculation:

$100	Interest received in 1999
($25)	Tax (paid in 2000 / refundable in 2001)
$75	Net income in 1999

- In order to pay out $100 distribution, and thus receive a full refund of $25, NRO will have to utilize interest income received in 2000, or utilize a note

Canada Capital Restructure

- JTCHC 1 borrows funds and gives note
- JTCHC 1 makes loan to RJR Macdonald at small spread (e.g. 1/8 %)
- Loan proceeds will be used by RJR Macdonald to redeem preferred shares
- Proceeds received from share redemption by JTCHC 1 will be used to redeem preferred shares

Canada Capital Restructure

- Treatment of interest payments:
  - Interest paid by RJR Macdonald Corp will be tax-deductible at ETR of 43%
  - Net spread between interest income earned and interest expense paid by JTCHC 1 will be taxed to JTCHC 1
  - Interest income taxed at Canadian NRO at 25% refundable rate
  - Interest earned by NRO should not be taxed in Japan, since it is subject to 25% tax in Canada, even though that tax will be refunded upon distribution of the subject income (Per EY)

Canada Capital Restructure

- Operation of Thin Capitalization Rules
  - Do not operate between JT Canada Holding Limited and RJR Macdonald Corp
  - Operate between JT Canada Holding Limited and Canada NRO
- Debt outstanding to NRO may not exceed three times the capital of JT Canada Holding Limited

Canada Capital Restructure

- Capital Structure of JT Canada Holding Limited
  - $2.268 Billion in initial capital
  - Reduced by Finco ($873MM) FMV to be confirmed
  - Reduced by Tutun ($165MM) FMV to be confirmed
- After reductions, remaining capital is approximately $1.2 Billion

Canada Capital Restructure

- Capital Structure in Canada
  - Leave 25% of capital ($300MM)
  - Substitute debt for remaining capital ($900MM)
- Average interest rate is between 5-6%
- Annual pre-tax profit in Canada is approximately $90 - 100MM

Canada Capital Restructure

- Tax Savings assuming $900MM debt and 5% Interest

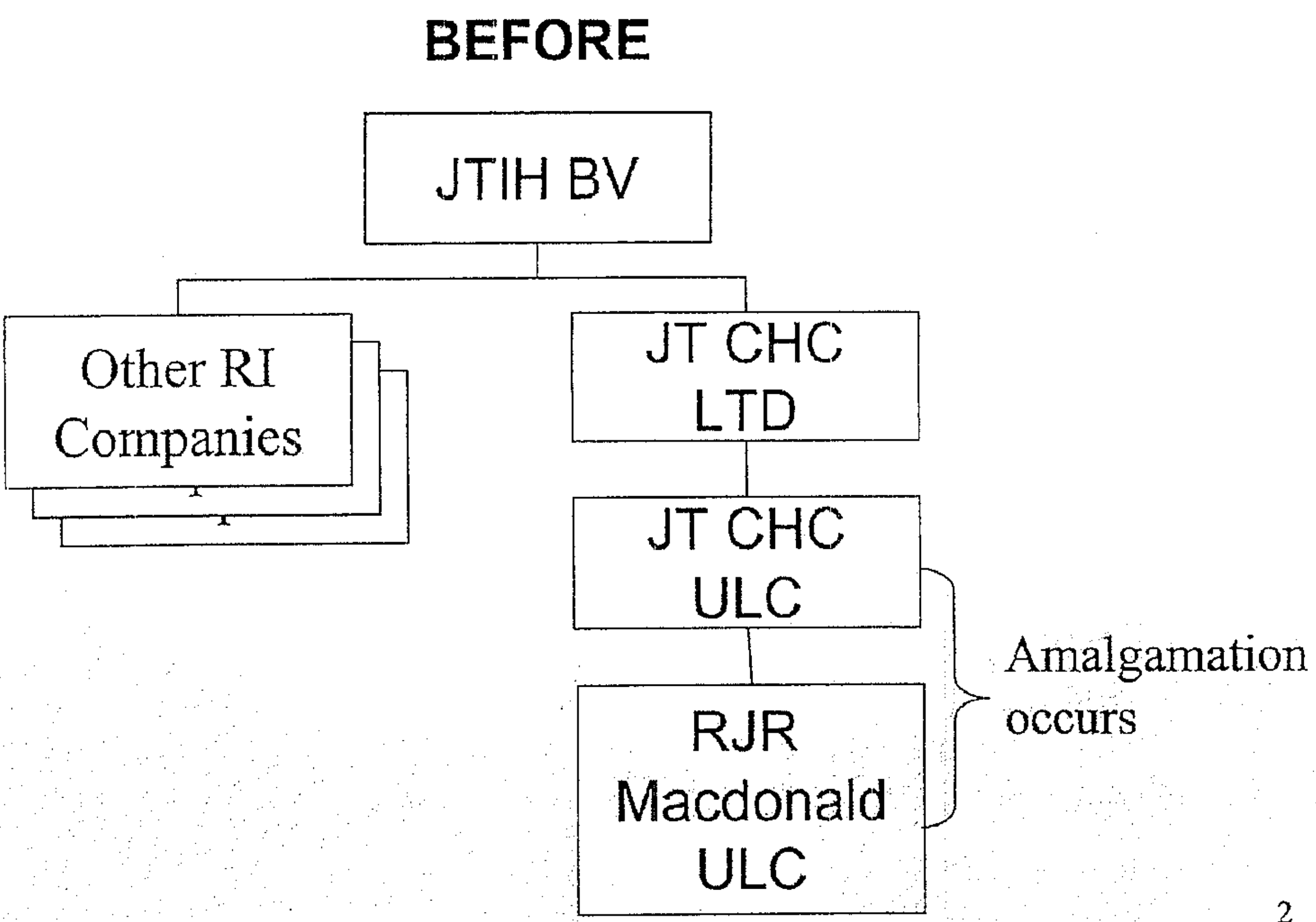
Interest Expense $900MM @ 5%	$45.0 MM
Tax Benefit @ 43%	19.3 MM
Less 10% w/h on dividend	(4.5)MM
Net tax benefit	**$14.8 MM**

QUEBEC CLASS ACTIONS 500-06-00007[illegible]3 AND 500-06-000076-980 CONFIDENTIAL

JTIH BV Acquisition of Finco

May 1999

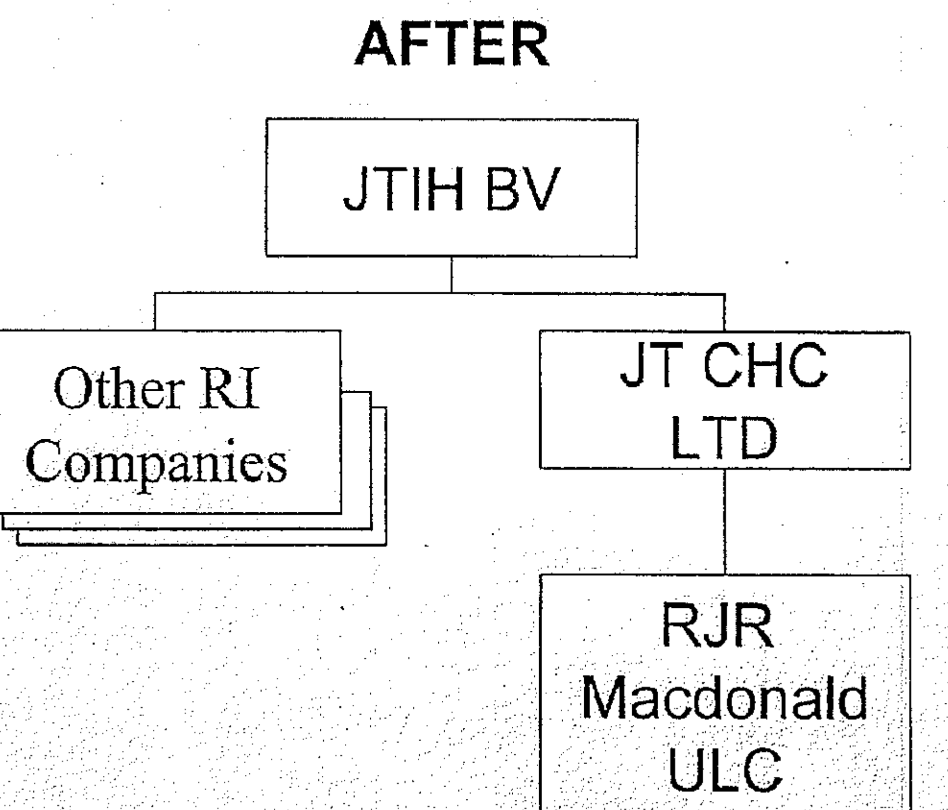
Canadian Amalgamation



QUEBEC CLASS ACTIONS 500-06-000070 3 AND 500-06-000076-980 CONFIDENTIAL

Canadian Amalgamation

AFTER

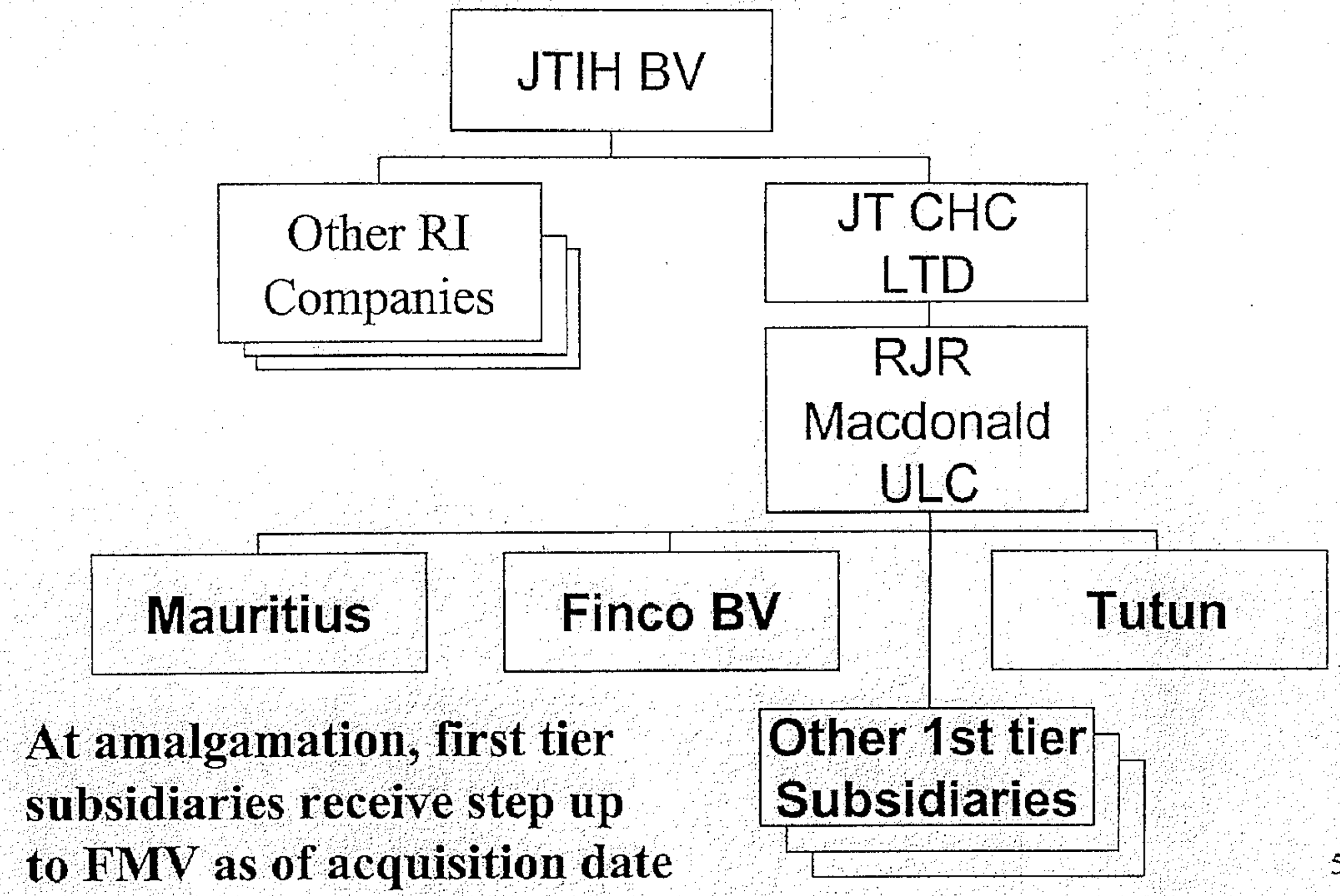


QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

Amalgamation

- Upon acquisition by a third party, and subsequent amalgamation, RJR Macdonald receives a step up in the tax basis of its non-depreciable first tier investments in subsidiaries and partnership interests
- For accounting purposes, RJR Macdonald will receive a step up to FMV in share capital and in all of its assets, which increase may impact capital tax liability (Estimated at C$ 8MM / year)

Step Up to Fair Market Value (FMV)



At amalgamation, first tier subsidiaries receive step up to FMV as of acquisition date

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

Finco and Tutun

- As first tier subsidiaries of RJR Macdonald, the tax basis of Finco and Tutun will be adjusted to their fair market value, as of the date of acquisition of RJR Macdonald by JTCHC ULC.

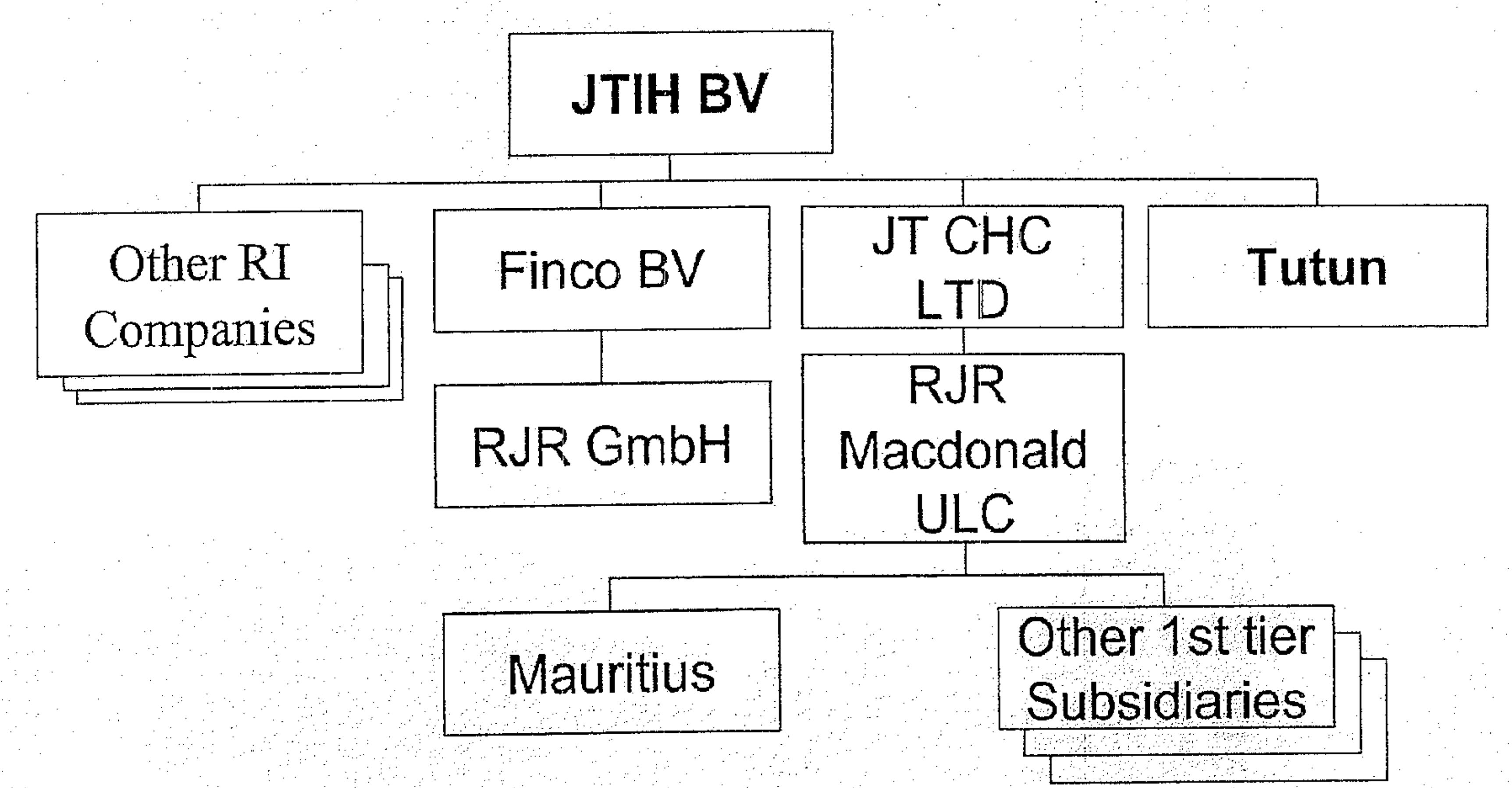
	Original Tax Basis	After Step Up
– Finco	$270MM	US $ 873MM
– Tutun	$86.9MM	US $ 165MM

Return of Capital (ROC)

- Finco and Tutun could be distributed up the chain to JTIH BV as a tax free ROC
- The only gain or loss for tax purposes in Canada would be the difference between the fair market value (FMV) on the date of acquisition and the FMV on the date of distribution
- The longer the delay in the distribution, the more opportunity for changes in the FMV

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

JTIH BV Acquisition of Finco



QUEBEC CLASS ACTIONS 500-06-000070 3 AND 500-06-000076-980 CONFIDENTIAL

JTIH BV
Acquisition of Finco BV

- Finco BV can be distributed as a ROC from RJR Macdonald to its parent JTIH BV with no Dutch tax consequences
- Movement of Finco BV out from under Canada provides more flexibility for Finco's financing transactions, as its actions will no longer be limited by Canadian GAAR or FAPI considerations

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

Other Consequences of Amalgamation and Step Up

May 1999

QUEBEC CLASS ACTIONS 500-06-000070 3 AND 500-06-000076-980 CONFIDENTIAL

Trademarks and Purchased Goodwill

- For accounting purposes, all assets will receive a step up in basis to FMV
- The share capital section of the owners equity account is increased to reach FMV
- Capital tax is calculated on the accounting value of shareholder's equity
- In the calculation of capital tax, an allowance is provided for investments in subsidiaries

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

TM Holding Company

- JT should establish a TM holding company as a first tier subsidiary of RJR Macdonald
- The business purposes for such a corporation are readily discernable:
  - Provide a level of protection by making the TM bankruptcy remote
  - Ensure maintenance of the integrity of the trademarks via quality assurance oversight

Additional Tax Benefit

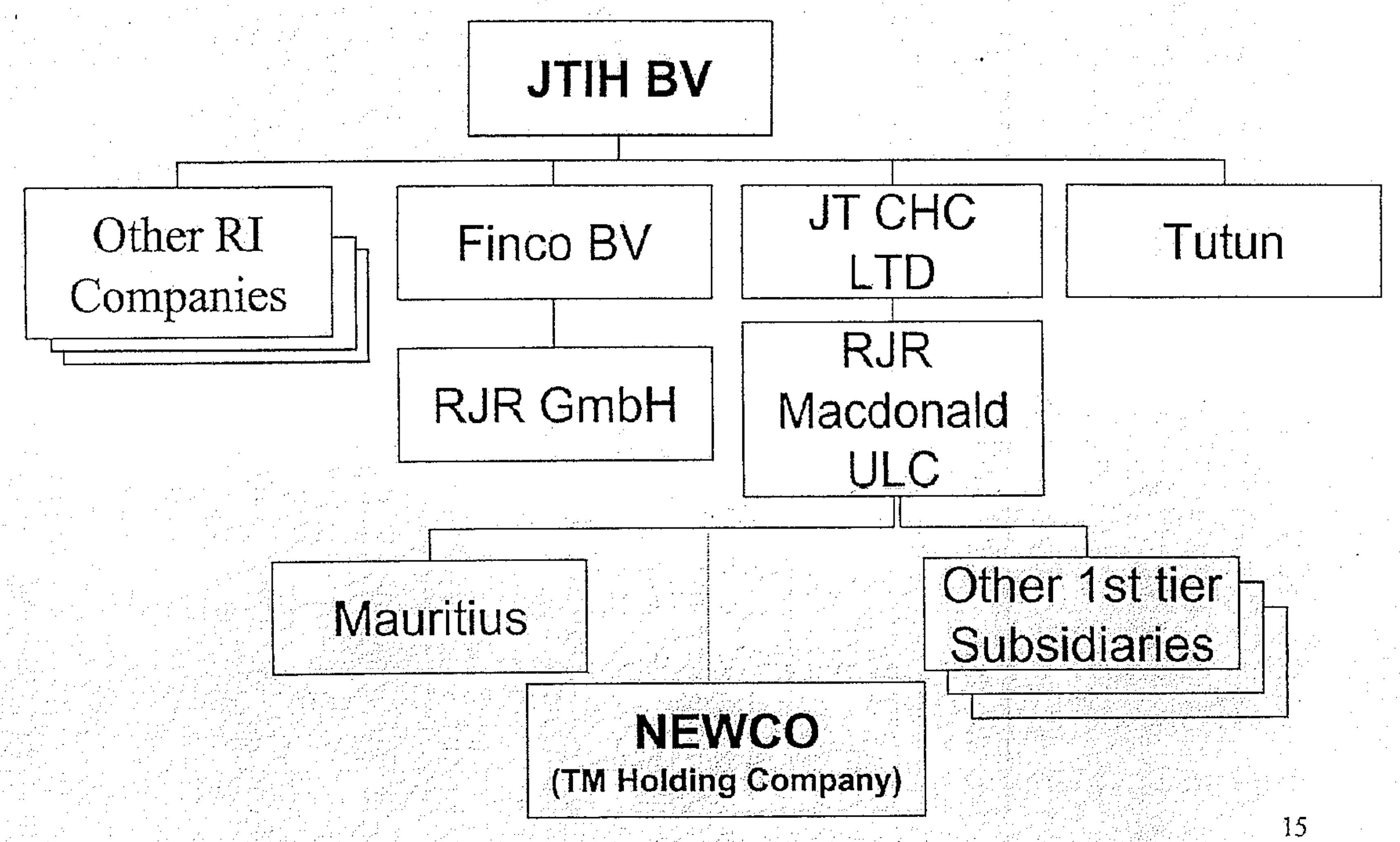
- Prior to the amalgamation, the trademarks would be contributed by RJR Macdonald to the Newco at a rollover basis in exchange for shares
  - Tax/accounting value of TM contributed-- rollover basis
  - Tax /accounting value of shares -- rollover basis
- At the time of the amalgamation, for tax purposes, the basis in all non-depreciable capital assets held by RJR Macdonald at the date of acquisition will be adjusted to reflect FMVas of that date
- For accounting purposes, the share capital account is credited in the amount of the purchase price, and that value is allocated over all the assets of the company

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

Additional Tax Benefit

- For capital tax calculation RJR Macdonald will receive an investment allowance equal to the value of its accounting basis in Newco, which will be set at FMV
- Second tier subsidiaries' assets are not stepped up, so that the value of the trademarks in Newco would remain at rollover basis for tax and accounting purposes
- Use of a Quebec entity which would receive royalty income from RJR Macdonald could result in additional favorable tax consequences

Newco Trademark Holding Company



QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

Mauritius

- A third party held an option to purchase Mauritius which was valid through the end of April
- The option to purchase was not exercised
- As a result of the amalgamation, Mauritius would be reset to its fair market value, which is potentially less than RJR Macdonald's investment in the subsidiary

Mauritius

- Argument should be made to preserve as much value as possible in Mauritius
- If ultimately determined that Mauritius should be disposed of, a capital loss could be carried back against any capital gains for three years
  - Strongest argument for recognition of capital loss can be made through sale to third party
  - There should be significant time before any recognition of capital loss were to occur
  - Loss could potentially offset any capital gain incurred because of delay in amalgamation and ROC of Finco and Tutun
- May be able to utilize swap transaction to offset any capital loss

QUEBEC CLASS ACTIONS 500-06-00007(33 AND 500-06-000076-980 CONFIDENTIAL

ERNST & YOUNG

Becket House
1 Lambeth Palace Road
London SE1 7EU

Phone: 011
Fax: 011
CDE & LDE

PIECE/EXHIBIT
MCH-3
Borden Ladner Gervais
514-879-1212

Fax Message

For the attention of	Mary Carol Holbert	Date	3 Jun 99
Company	R.J. Reynolds International	No. of pages (including this)	13
Fax number	00 41 22 7030 638		
From	Ernst & Young	Serial No.	
Direct Fax number	0171 928 1780		
Direct Telephone number	0171 951 4983 - Secretary		

If there are any problems with this transmission please contact the fax operator.

Please find attached a copy of the Canadian Ruling Request that was submitted to Revenue Canada. I will keep you informed of its progress. We hope to have some indications soon about how long it is likely to take.

Regards,

Owen

Owen Crassweller

This fax may contain confidential information for the addressee(s) only. If a transmission error has misdirected the fax, please notify us on 0500-521746 (toll-free - UK only) or +44 171-928 9190 (International), then destroy the fax communication. We will reimburse the cost of international calls. You should not use, disclose, distribute or copy this communication. Thank you. A copy of the original fax is stored for a period by Ernst & Young.

A list of partners' names is available for inspection at the above address, the partnership's principal place of business. Authorised by The Institute of Chartered Accountants in England and Wales to carry on investment business.

The United Kingdom firm of Ernst & Young is a member of Ernst & Young International.

ERNST & YOUNG

Ernst & Young LLP
Chartered Accountants
Ernst & Young Tower
P.O. Box 251, 222 Bay St.
Toronto-Dominion Centre
Toronto, Canada M5K 1J7

Phone: 416 864-1234
Fax: 416 864-1174

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

May 31, 1999

VIA COURIER

Revenue Canada, Customs, Excise & Taxation
Income Tax Rulings and Interpretations Directorate
Policy and Legislation Branch
15th Floor, Albion Tower
25 Nicholas Street
Ottawa, Ontario
K1A OL8

Attention: Mr. Michael Hiltz

Dear Mr. Hiltz:

Re: JT Nova Scotia Corporation

We are writing to request advance income tax rulings under the *Income Tax Act (Canada)* (the "Act") and the *Income Tax Regulations* (the "**Regulations**") in connection with the proposed transactions described in this letter, on behalf of JT Nova Scotia Corporation ("**CHC2**").

We enclose a duplicate copy of this letter, written authorization from CHC2 to seek the advance tax rulings requested herein and a cheque in the amount of $481.50 in payment of the required deposit. We undertake to pay any further fees arising from this request. We also enclose a signed consent to release the advance tax ruling to the public, a signed authorization regarding facsimile correspondence and a diskette containing the relevant information to expedite this request.

We are advised that, to the best knowledge of CHC2, the issues involved in this advance income tax ruling request are not in an earlier return of CHC2 or of any of the other companies noted in this ruling request or of any other related person. Furthermore, these issues are not under objection or appeal and are not being considered by any of District Taxation Office or Taxation Centre of Revenue Canada in connection with any tax return already filed and they are not the subject of a ruling previously issued by the Rulings Directorate.

19242

Should the advance income tax ruling arising out of this request be published, we ask that all references to CHC2 and all of the other identified companies be deleted prior to publication.

Facts

The relevant facts, the proposed transactions and the purposes of the proposed transactions are as follows:

1. RJR-MacDonald Corp. (**"RJR Mac"**) is an unlimited liability company incorporated in Nova Scotia and is a "taxable Canadian corporation" as defined in subsection 89(1) of the Act. RJR Mac conducts a business of manufacturing and distributing cigarettes and tobacco products in Canada.

2. RJR Mac owns all of the capital stock of various Canadian subsidiaries incorporated and resident in Canada, R.J. Reynolds Tutun Sanayi, S.A., a Turkish subsidiary (**"RJR Turkey"**), RJR Mauritius Private Limited, a Mauritius subsidiary (**"RJR Mauritius"**) and R.J. Reynolds International Finance B.V. (**"BV Finco"**), a corporation incorporated and resident in the Netherlands. BV Finco directly and indirectly owns the shares of various subsidiaries incorporated and resident in France, Germany and the UK. RJR Mauritius owns 50% of the shares of an Indian company.

3. The current estimated fair market values of the shares of BV Finco and RJR Turkey are as follows:

BV Finco	$1,264,046,710
RJR Turkey	$ 239,022,466

4. The adjusted cost bases (**"ACB"**), as defined in section 54 of the Act, of the shares of BV Finco and RJR Turkey are as follows:

BV Finco	$ 347,866,945
RJRTurkey	$ 115,034,875

5. An abbreviated organizational chart for RJR Mac before the transactions described in paragraph 6 below is attached as Schedule A.

6. Japan Tobacco Inc. (**"JT"**), a corporation incorporated under the laws of Japan, entered into a Purchase Agreement dated March 9, 1999 (the **"Purchase Agreement"**) with RJR Nabisco Inc. (**"RJR Nabisco"**) a corporation resident in the United States and incorporated under the laws of Delaware, and its affiliate, R. J. Reynolds Tobacco Company (**"RJR Tobacco"**) a New Jersey Company, (collectively the **"Sellers"**) pursuant to which JT agreed to acquire the world-wide tobacco operations of RJR Tobacco, including the shares of RJR Mac (the **"Acquisition"**) from RJR Tobacco International Holding III BV (**"BV3"**), a Dutch indirect wholly-owned subsidiary of RJR Tobacco. JT deals at arm's length with the Sellers.

QUEBEC CLASS ACTIONS 500-06-000070 3 AND 500-06-000076-980 CONFIDENTIAL

7. The Purchase Agreement provided, among other things, that JT (or its designated subsidiaries) would acquire RJR Nabisco's non-US tobacco subsidiaries, including RJR Mac, and certain other assets from the Sellers (or from subsidiaries of the Sellers) for total cash consideration of US$7,892,539,000 (of which, subject to adjustments at closing, US$2,238,678,000 was attributable to the shares of RJR Mac), such consideration to be paid by JT to the Sellers at closing.

8. JT formed the following companies to complete the Acquisition: JTUK Holding Unlimited (**"JTUKH"**) a U.K. incorporated company which is wholly-owned by JT; JT European Holdings Inc. (**"JTEH"**), a Dutch incorporated company which is wholly-owned by JTUKH; a new Dutch company, JT International Holding BV (**"JTIH"**), which is wholly-owned by JTEH; a new Nova Scotia limited liability company, JT Canada LLC Inc. (**"CHC1"**) which is wholly-owned by JTIH and, a new Nova Scotia unlimited liability company, JT Nova Scotia Corporation (**"CHC2"**), which is wholly-owned by CHC1; all of which are indirectly wholly-owned by JT.

9. An abbreviated organizational chart for JT's Canadian companies immediately before completion of the Acquisition is attached as Schedule B.

10. As part of the formation of JT's pre-acquisition corporate structure in Canada (as set forth on Schedule B), JT gave a promise to pay US$5,107,260,926.88 to JTUKH or its assigns (the **"Cash Undertaking"**) in connection with JT's subscription for shares of JTUKH. The Cash Undertaking was originally given by JT pursuant to Section 738 of the Companies Act 1985 (United Kingdom). JTUKH assigned the benefit of the Cash Undertaking to JTEH in exchange for shares of JTEH; thereafter, JTEH assigned the benefit of the Cash Undertaking to JTIH in exchange for shares. All of these transactions occurred on May 11, 1999.

11. Prior to the completion of the Acquisition, CHC1 was capitalized by issuing one million common shares (with a paid-up capital of $1,004,353) to JTIH and 3,238,803,224 redeemable preferred shares (with a paid-up capital of $3,252,914,120) to JTIH. The consideration for such shares was the direction by JTIH to JT to hold, and JT's agreement to hold, the benefit of US$2,238,678,000 in a bank account in trust for the benefit of CHC1 (or as CHC1 may direct). Such amount was paid by JT into such bank account to discharge JT's obligations pursuant to the Cash Undertaking. All of these transactions occurred on May 11, 1999.

12. Prior to the completion of the Acquisition, CHC2 was capitalized by issuing one million common shares (with a paid-up capital of $1,004,353) to CHC1 and 3,238,803,224 redeemable preferred shares (with a paid-up capital of $3,252,914,120) to CHC1. The consideration for such shares was the assignment by CHC1 to CHC2 of the benefit of the US$2,238,678,000 held in a bank account in trust by JT. This occurred on May 11, 1999.

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

13. Prior to the completion of the Acquisition, JT and CHC2 entered into an agreement (the "**Assignment Agreement**") pursuant to which: (A) JT assigned the right to acquire RJR Mac to CHC2; and (B) CHC2, as consideration for such assignment, agreed to pay the US$2,238,678,000 purchase price for the shares of RJR Mac.

14. As a result of the Assignment Agreement and JT's agreement to hold US$2,238,678,000 in trust for CHC2, immediately prior to the completion of the Acquisition: (A) CHC2 became entitled to acquire the shares of RJR Mac; (B) CHC2 became obligated to pay BV3 (or as BV3 may direct) US$2,238,678,000; and (C) CHC2 became the beneficiary of US$2,238,678,000 held in trust by JT (which CHC2 used to pay the purchase price for the shares of RJR Mac).

15. CHC2 then acquired the shares of RJR Mac and (A) CHC2, as the beneficiary of the trust held by JT, discharged its obligation to pay BV3 for RJR Mac by directing JT to pay BV3 US$2,238,678,000 from the trust account; and (B) JT performed its obligations as trustee by paying US$2,238,678,000 to BV3 (or as BV3 may direct) at closing. By so doing JT: (I) discharged CHC2's purchase price payment obligation to BV3; and (II) at the same time, discharged its obligations to CHC2 as trustee of the trust account. These transactions occurred on May 11, 1999.

16. Upon completion of the acquisition by CHC2 of the shares of RJR Mac: (A) BV3 received payment in full for RJR Mac from CHC2 and CHC2 became the registered and beneficial owner of all of the shares of RJR Mac; (B) JTIH became the registered and beneficial owner of one million common shares (with a paid-up capital of $1,004,353) in CHC1 and 3,238,803,224 redeemable preferred shares (with a paid-up capital of $3,252,914,120) of CHC1; and (C) CHC1 became the registered and beneficial owner of one million common shares (with a paid-up capital of $1,004,353) of CHC2 and 3,238,803,224 redeemable preferred shares (with a paid-up capital of $3,252,914,120) of CHC2.

17. Prior to the proposed amalgamation of RJR Mac and CHC2 described below, RJR Mac plans to transfer at fair market value the beneficial ownership of its trademarks and the associated right to sell goods bearing the trademarks to a wholly-owned Canadian subsidiary in exchange for shares of the subsidiary. The trademarks have a nil cost for tax purposes and the parties will file an election under subsection 85(1) of the Act to have the transfer take place at $1.00 for tax purposes. The transferee will then licence RJR Mac to use the trademarks to manufacture and sell goods bearing the trademarks.

Proposed Transaction

18. CHC2 and RJR Mac plan to amalgamate and continue as an unlimited liability company under the law of Nova Scotia ("MergeCo"). The terms of the amalgamation will provide that all of the rights, assets, privileges, liabilities and obligations of each of CHC2 and RJR Mac will become rights, assets, privileges, liabilities and obligations of MergeCo

QUEBEC CLASS ACTIONS 500-06-000070 3 AND 500-06-000076-980 CONFIDENTIAL

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

and that the authorized and issued capital of CHC2 will become the authorized and issued capital of MergeCo.

19. Immediately prior to the completion of the amalgamation, the capital property, as defined in section 54 of the Act, of RJR Mac will include the shares of BV Finco, RJR Turkey and RJR Mauritius. In connection with the amalgamation of RJR Mac and CHC2 to form MergeCo, a designation will be made under the provisions of subsection 87(11), and paragraph 88(1)(d) of the Act to increase, within the limits described in paragraphs 88(1)(d) of the Act, the ACB of certain capital property (other than ineligible property as defined in paragraph 88(1)(c) of the Act) owned by RJR Mac immediately before the amalgamation. More particularly, such property will include the shares of BV Finco and RJR Turkey.

Purpose of the Proposed Transaction

20. The purpose of the proposed transaction is to permit JT to reorganize its corporate structure following the acquisition of the RJR Tobacco assets and subsidiaries. Following the amalgamation of RJR Mac and CHC2, MergeCo may sell the shares of BV Finco and RJR Turkey to other non-Canadian holding companies directly or indirectly wholly-owned by JT.

Rulings Requested

21. The following rulings are hereby requested in connection with the proposed transaction described in paragraphs 18 and 19 above:

a) Pursuant to subsection 87(11), and paragraphs 88(1)(c) and (d) of the Act, the cost to MergeCo of the property acquired by MergeCo on the amalgamation of CHC2 and RJR Mac will be deemed to be the amount deemed by paragraph 88(1)(a) of the Act to be the proceeds of disposition of the property to RJR Mac, plus, where the property is a capital property of RJR Mac at the time that CHC2 last acquired control of RJR Mac, subject to the provisions of subparagraphs 88(1)(d)(ii) and (iii), such portion of the amount, if any, by which:

i) the aggregate of the ACB to CHC2 of its shares of RJR Mac immediately before the amalgamation of RJR Mac and CHC2

exceeds

ii) the aggregate of the amounts determined under subparagraphs 88(1)(d)(i) and (i.1)

and as is designated by MergeCo in its return of income under Part I of the Act for its first taxation year commencing after CHC2 and RJR Mac are amalgamated.

b) Section 245 will not be applied as a result of the proposed transactions, in and by themselves, to redetermine the tax consequences.

Analysis of Tax Issues Related to the Rulings Requested

22. In the Federal Court of Appeal (the "Court") decision of Parthenon Investments Limited, the Court considered the concept of ultimate control as it related to the determination of a corporation's status as a Canadian-controlled private corporation ("CCPC"), as defined in subsection 125(7) of the Act as it read before 1996. A corporation could not be a CCPC if it was a corporation "controlled, directly or indirectly in any manner whatever, by one or more non-resident persons, by one or more public corporations (other than a prescribed venture capital corporation) or by any combination thereof". In the Parthenon decision, the Court concluded that although Parthenon's resident parent corporation was controlled by a U.S. corporation, control of Parthenon itself rested ultimately with Canadian residents and Parthenon was therefore a CCPC.

23. We understand that this has led the Department to consider whether, for purposes of provisions such as paragraph 88(1)(d) of the Act, a company such as CHC2 will have acquired control of RJR Mac where CHC2 is itself ultimately controlled by other companies further up in the JT group of companies. Paragraph 88(1)(c) of the Act provides that the cost to the 'parent' of capital property acquired by the parent as a consequence of receiving a distribution from the subsidiary may be increased where such property was capital property of the subsidiary at the time that the parent (i.e., CHC2) last acquired control of the subsidiary (i.e., RJR Mac) and was owned thereafter without interruption until such time as it was distributed to the parent on the winding-up. For purposes of this rule, CHC2 must have itself acquired control of RJR Mac in order to make a designation under paragraph 88(1)(d) of the Act in respect of the capital property acquired by MergeCo on the amalgamation of CHC2 and RJR Mac.

24. It is our view that in determining whether control of RJR Mac has been acquired, for the purpose of paragraph 88(1)(d) of the Act, the reasoning the Court used in the Parthenon case should not be applied. Such an interpretation would be counter to the intent of Parliament in drafting paragraph 88(1)(d) as the intent of the subsection is to allow an increase to the ACB of non-depreciable capital property owned by the subsidiary at the time the subsidiary was acquired where such property is distributed by the subsidiary to the parent on a winding-up transaction or where such property becomes the property of the amalgamated corporation on the merger of a parent and its wholly-owned subsidiary. This "bump" gives some recognition to the fact that on the winding-up on the subsidiary into the parent or on the amalgamation of the subsidiary and the parent, the parent's cost base in the shares of the subsidiary is eliminated. In these circumstances, it is appropriate, in effect, to transfer some of the parent's ACB in the shares of the subsidiary to the cost base of the non-depreciable capital property that is distributed to the parent on a winding-up transaction or that becomes the property of the amalgamated entity.

QUEBEC CLASS ACTIONS 500-06-00007C .3 AND 500-06-000076-980 CONFIDENTIAL

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

25. The wording of paragraph 88(1)(d) of the Act suggests an interpretation of control from the view point of the parent rather than the subsidiary. An acquisition of control of RJR Mac by CHC2 occurs at the time at which CHC2 acquires the shares of RJR Mac. Therefore, CHC2 should be entitled to make a designation under the provisions of paragraph 88(1)(d) to increase the cost of the qualified underlying non-depreciable capital property of RJR Mac.

Should you require any additional information with respect to the foregoing, please do not hesitate to contact the undersigned.

Yours truly,

Ernst & Young

Greg C. Boehmer/Sheila J. Smith
(416)943-3463/2047
Encl.

3

FAX TO MC e WP-S

Becket House
1 Lambeth Palace Road
London SE1 7EU

Phone: 0171
Fax: 0171
CDE & LDE

PIÈCE/EXHIBIT
MCH-4
Borden Ladner Gervais
514-879-1212

QUEBEC CLASS ACTIONS 500-06-000070 3 AND 500-06-000076-980 CONFIDENTIAL

Fax Message

For the attention of	Mary Carol Holbert	Date	27 Aug 99
Company	JT International	No. of pages (including this)	9
Fax number	00 41 22 7030 638		
From	Owen Crassweller	Serial No.	
Direct Fax number	[44] 171 951 1781		
Direct Telephone number	[44] 171 951 3395		

If there are any problems with this transmission please contact the fax operator.

Dear Mary Carol

I attach a copy of the Ruling received from Revenue Canada. I have read through it and it is what we were looking for. Specifically, the ruling confirms that the amalgamation will give an increase in the tax cost of the foreign shares to the fair market value at the date of acquisition and the General Anti-Avoidance Rule (section 245) will not apply. I will forward the original ruling to you shortly.

I will assume that you will distribute copies internally as appropriate unless I hear otherwise. At a minimum, Bradley Price should have a copy.

I see that you have been in correspondence with Heather Kerr regarding the loan.

It would be useful if we could speak to discuss any questions you have on the ruling and to get caught up on where we stand on the loan. I am in the office today and next week.

Best regards,

Owen

This fax may contain confidential information for the addressee(s) only. If a transmission error has misdirected the fax, please notify us on 0500-521746 (toll-free - UK only) or +44 171-528 9190 (international), then destroy the fax communication. We will reimburse the cost of international calls. You should not use, disclose, distribute or copy this communication. Thank you. A copy of the original fax is stored for a period by Ernst & Young.

A list of partners' names is available for inspection at the above address, the partnership's principal place of business. Authorised by The Institute of Chartered Accountants in England and Wales to carry on investment business.

The United Kingdom firm of Ernst & Young is a member of Ernst & Young International.

Canada Canada

Your file Votre référence

Our file Notre référence

991599
F. Francis

Ernst & Young LLP
Chartered Accountants
Ernst & Young Tower
P.O. Box 251, 222 Bay St.
Toronto-Dominion Centre
Toronto Ontario M5K 1J7

Attention: G. Boehmer

August 11, 1999

Dear Sirs:

Re: JT Nova Scotia Corporation ("CHC2")

This is in reply to your letters of May 31, 1999, and July 7, 1999, wherein you requested an advance income tax ruling in respect of the above-noted taxpayer.

We are advised that, to the best knowledge of the taxpayers, the issues involved in this advance income tax ruling request are not in an earlier return of CHC2 or of any of the other companies noted in this ruling request or of any other related person. Furthermore, these issues are not under objection or appeal and are not being considered by any of the tax services office or taxation centres in connection with any tax return already filed and they are not the subject of a ruling previously issued by the Directorate.

In this letter, any references to the "Act" are references to the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.), as amended to the date hereof, and unless otherwise stated, every reference herein is a reference to the relevant provision of the Act.

Our understanding of the relevant facts, the proposed transactions and the purposes of the proposed transactions is as follows:

.../cont'd

Income Tax Rulings and Interpretations Directorate
15th Floor, Albion Tower
25 Nicholas Street
Ottawa ON [illegible]
Tel/Tél. [illegible] - Fax/Télécopieur [illegible]

Direction des décisions et de l'interprétation de l'impôt
15e étage, Tour Albion
25, rue Nicholas
Ottawa ON [illegible]

Canada

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

Facts

1. RJR Nabisco, Inc. is a corporation resident in the United States and incorporated undur the laws of Delaware. R.J. Reynolds Tobacco Company ("R Tobacco"), an affiliate of RJR Nabisco, Inc., is a corporation resident in the United States and incorporated under the laws of New Jersey. In addition to their United States operations, R Tobacco and its subsidiaries conduct an international business involving (i) the manufacture, marketing, sale and distribution of tobacco products for sale outside of the United States, (ii) the manufacture of tobacco products in Puerto Rico for sale outside of the United States and (iii) a brand diversification business outside of the United States.

2. RJR Tobacco International Holding B.V., ("R International ") is a Dutch corporation and is an indirect wholly-owned subsidiary of R Tobacco. It is the principal international holding company for R Tobacco. RJR Tobacco International Holding III B.V. ("BV3"), is a Dutch corporation which is an indirect wholly-owned subsidiary of R Tobacco.

3. RJR-MacDonald Corp. ("R Mac") is an unlimited liability company incorporated in Nova Scotia and is a "taxable Canadian corporation" as defined in subsection 89(1). R Mac conducts a business of manufacturing and distributing cigarettes and tobacco products in Canada. By way of background, RJR-Macdonald Inc. (a limited liability corporation that was incorporated under the *Canada Business Corporations Act* on September 12, 1978) was wholly-owned by R International. In April 1999, RJR-Macdonald Inc. was continued under the laws of Nova Scotia and was then amalgamated with a new wholly-owned subsidiary that was a Nova Scotia unlimited liability company ("NSULC"), and the new corporation formed as a consequence of the amalgamation, R Mac, continued as an unlimited liability company. Prior to the amalgamation described above, all of the shares of RJR-Macdonald Inc. owned by R International were transferred to BV3 on April 21, 1999. It is your understanding that the purpose of this transfer was to limit R International's liability and that the transferee's only assets were the RJR-Macdonald Inc. shares.

4. R Mac owns all of the capital stock of various Canadian subsidiaries incorporated and resident in Canada, R.J. Reynolds Tutun Sanayi, S.A., a Turkish subsidiary ("R Turkey"), RJR Mauritius Private Limited, a Mauritius subsidiary ("R Mauritius") and R.J. Reynolds International Finance B.V. ("BV Finco"), a corporation incorporated and resident in the Netherlands. BV Finco directly and indirectly owns the shares of various subsidiaries incorporated and resident in France, Germany and the UK. R Mauritius owns 50% of the shares of an Indian company.

.../cont'd

QUEBEC CLASS ACTIONS 500-06-000070- 3 AND 500-06-000076-980.CONFIDENTIAL

5. The current estimated fair market values of the shares of BV Finco and R Turkey are as follows:

BV Finco	$1,264,046,710
R Turkey	$ 239,022,466

6. The adjusted cost bases ("ACB"), as defined in section 54, of the shares of BV Finco and R Turkey are as follows:

BV Finco	$ 347,866,945
R Turkey	$ 115,034,875

7. Japan Tobacco Inc. ("JT"), a corporation incorporated under the laws of Japan, entered into a Purchase Agreement dated March 9, 1999 and amended and restated on May 11, 1999, (the "Purchase Agreement") with RJR Nabisco Inc. and R Tobacco (collectively the "Sellers") pursuant to which JT agreed to acquire the world-wide tobacco operations of R Tobacco, including the shares of R Mac (the "Acquisition") from BV3. JT deals at arm's length with the Sellers.

8. The Purchase Agreement provided, among other things, that JT (or its designated subsidiaries) would acquire R Nabisco's non-US tobacco subsidiaries, including R Mac, and certain other assets from the Sellers (or from subsidiaries of the Sellers) for total cash consideration of US$7,832,539,000 (of which, subject to adjustments at closing, US$2,238,678,000 was attributable to the shares of R Mac), such consideration to be paid by JT to the Sellers at closing.

9. JT formed the following companies to complete the Acquisition: JTUK Holding Unlimited ("JTUKH") a U.K. incorporated company which is wholly-owned by JT; JT European Holdings Inc. ("JTEH"), a Dutch incorporated company which is wholly-owned by JTUKH; a new Dutch company, JT International Holding BV ("JTIH"), which is wholly-owned by JTEH; a new Nova Scotia limited liability company, JT Canada LLC Inc. ("CHC1") which is wholly-owned by JTIH and, a new Nova Scotia unlimited liability company, JT Nova Scotia Corporation ("CHC2"), which is wholly-owned by CHC1; all of which are indirectly wholly-owned by JT.

10. As part of the formation of JT's pre-acquisition corporate structure in Canada, JT gave a promise to pay US$5,107,260,926.88 to JTUKH or its assigns (the "Cash Undertaking") in connection with JT's subscription for shares of JTUKH. The Cash Undertaking was originally given by JT pursuant to Section 738 of the Companies Act 1985 (United Kingdom). JTUKH assigned the benefit of the Cash Undertaking to JTEH in exchange for shares of JTEH;

.../cont'd

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

thereafter, JTEH assigned the benefit of the Cash Undertaking to JTIIH in exchange for shares. All of these transactions occurred on May 11, 1999.

11. Prior to the completion of the Acquisition, CHC1 was capitalized by issuing one million common shares (with a paid-up capital of $1,004,353) to JTIIH and 3,238,803,224 redeemable preferred shares (with a paid-up capital of $3,252,914,120) to JTIIH. The consideration for such shares was the direction by JTIIH to JT to hold, and JT's agreement to hold, the benefit of US$2,238,678,000 in a bank account in trust for the benefit of CHC1 (or as CHC1 may direct). Such amount was paid by JT into such bank account to discharge JT's obligations pursuant to the Cash Undertaking. All of these transactions occurred on May 11, 1999.

12. Prior to the completion of the Acquisition, CHC2 was capitalized by issuing one million common shares (with a paid-up capital of $1,004,353) to CHC1 and 3,238,803,224 redeemable preferred shares (with a paid-up capital of $3,252,914,120) to CHC1. The consideration for such shares was the assignment by CHC1 to CHC2 of the benefit of the US$2,238,678,000 held in a bank account in trust by JT. This occurred on May 11, 1999.

13. Prior to the completion of the Acquisition, JT and CHC2 entered into an agreement (the "Assignment Agreement") pursuant to which: (A) JT assigned the right to acquire R Mac to CHC2; and (B) CHC2, as consideration for such assignment, agreed to pay the US$2,238,678,000 purchase price for the shares of R Mac.

14. As a result of the Assignment Agreement and JT's agreement to hold US$2,238,678,000 in trust for CHC2, immediately prior to the completion of the Acquisition: (A) CHC2 became entitled to acquire the shares of R Mac; (B) CHC2 became obligated to pay BV3 (or as BV3 may direct) US$2,238,678,000; and (C) CHC2 became the beneficiary of US$2,238,678,000 held in trust by JT (which CHC2 used to pay the purchase price for the shares of R Mac).

15. CHC2 then acquired the shares of R Mac and (A) CHC2, as the beneficiary of the funds held in trust by JT discharged its obligation to pay BV3 for R Mac by directing JT to pay BV3 US$2,238,678,000 from the trust account; and (B) JT performed its obligations as trustee by paying US$2,238,678,000 to BV3 (or as BV3 may direct) at closing. By so doing JT: (I) discharged CHC2's purchase price payment obligation to BV3; and (II) at the same time, discharged its obligations to CHC2 as trustee of the trust account. These transactions occurred on May 11, 1999.

16. Upon completion of the acquisition by CHC2 of the shares of R Mac: (A) BV3 received payment in full for R Mac from CHC2 and CHC2 became the

.../cont'd

QUEBEC CLASS ACTIONS 500-06-000070- 3 AND 500-06-000076-980 CONFIDENTIAL

registered and beneficial owner of all of the shares of R Mac; (B) JTIH became the registered and beneficial owner of one million common shares (with a paid-up capital of $1,004,353) in CHC1 and 3,238,803,224 redeemable preferred shares (with a paid-up capital of $3,252,914,120) of CHC1; and (C) CHC1 became the registered and beneficial owner of one million common shares (with a paid-up capital of $1,004,353) of CHC2 and 3,238,803,224 redeemable preferred shares (with a paid-up capital of $3,252,914,120) of CHC2. JT did not, as part of the series of transactions described herein, acquire from the Sellers or a subsidiary of the Sellers, the shares of any company which controlled directly or indirectly, any of the shares of R Mac.

17. Prior to the proposed amalgamation of R Mac and CHC2 described below, R Mac plans to transfer at fair market value the beneficial ownership of its trademarks and the associated right to sell goods bearing the trademarks to a wholly-owned Canadian subsidiary in exchange for shares of the subsidiary. The trademarks have a nil cost for tax purposes and the parties will file an election under subsection 85(1) to have the transfer take place at $1.00 for tax purposes. The transferee will then licence R Mac to use the trademarks to manufacture and sell goods bearing the trademarks.

Proposed Transaction

18. CHC2 and R Mac will amalgamate and continue as an unlimited liability company under the law of Nova Scotia ("MergeCo"). The terms of the amalgamation will provide that all of the rights, assets, privileges, liabilities and obligations of each of CHC2 and R Mac will become rights, assets, privileges, liabilities and obligations of MergeCo and that the authorized and issued capital of CHC2 will become the authorized and issued capital of MergeCo.

19. Immediately prior to the completion of the amalgamation, the capital property, as defined in section 54, of R Mac will include the shares of BV Finco, R Turkey and R Mauritius. In connection with the amalgamation of R Mac and CHC2 to form MergeCo, a designation will be made under the provisions of subsection 87(11), and paragraph 88(1)(d) to increase, within the limits described in paragraphs 88(1)(d), the ACB of certain capital property (other than ineligible property as defined in paragraph 88(1)(c)) owned by R Mac immediately before the amalgamation. More particularly, such property will include the shares of BV Finco and R Turkey, but not the shares of the subsidiary described in paragraph 17 above. No property acquired by MergeCo on the amalgamation, or any other property acquired by any person in substitution therefor, will be acquired by a person or persons described in subclauses 88(1)(c)(vi)(B)(I), (II) or (III).

.../cont'd

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

Purpose of the Proposed Transaction

20. The purpose of the proposed transaction is to permit JT to reorganize its corporate structure following the acquisition of the R Tobacco assets and subsidiaries. Following the amalgamation of R Mac and CHC2, MergeCo may sell the shares of BV Finco and R Turkey to other non-Canadian holding companies directly or indirectly wholly-owned by JT.

Rulings

Provided that the above statements constitute complete and accurate disclosure of all the relevant facts, proposed transactions and purposes of the proposed transactions, we rule that:

a) Pursuant to subsection 87(11), and paragraphs 88(1)(c) and (d), the cost to MergeCo of the property acquired by MergeCo on the amalgamation of CHC2 and R Mac will be deemed to be the amount deemed by paragraph 88(1)(a) to be the proceeds of disposition of the property to R Mac, plus, where the property is a capital property of R Mac at the time that CHC2 last acquired control of R Mac, subject to the provisions of subparagraphs 88(1)(d)(ii) and (iii), such portion of the amount, if any, by which:

   i) the aggregate of the ACB to CHC2 of its shares of R Mac immediately before the amalgamation of R Mac and CHC2

   exceeds

   ii) the aggregate of the amounts determined under subparagraphs 88(1)(d)(i) and (i.1)

   and as is designated by MergeCo in its return of income under Part I of the Act for its first taxation year commencing after CHC2 and R Mac are amalgamated.

b) Section 245 will not be applied as a result of the proposed transactions, in and by themselves, to redetermine the tax consequences confirmed in the ruling given in paragraph (a) above.

These rulings are given subject to the limitations and qualifications set forth in Information Circular 70-6R3 dated December 30, 1996, provided that the proposed transactions are completed by December 31, 1999.

.../cont'd

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

These rulings are based on the Act as it currently reads and do not take into account any future amendments, whether currently proposed or not, to the Act.

Comments

Nothing in this letter should be construed as confirmation, express or implied, of:

(a) the determination of the fair market value, ACB, paid-up capital of any particular shares referred to herein; or

(b) the tax consequences of any of the transactions described in this letter other than as specifically described.

Yours truly,

for Director
Reorganizations and International Division
Income Tax Rulings and
Interpretation Directorate
Policy and Legislation Branch

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

QUEBEC CLASS ACTIONS 500-06-000070-3 AND 500-06-000076-980 CONFIDENTIAL

REVENUE CANADA \ REVENU CANADA
INCOME TAX RULINGS AND INTERPRETATIONS DIRECTORATE \
DIRECTION DES DÉCISIONS ET DE L'INTERPRÉTATION DE L'IMPÔT
15TH FLOOR, ALBION TOWER \ 15IÈME ETAGE, TOUR ALBION
25 NICHOLAS Street \ 25, rue NICHOLAS
Ottawa ON K1A 0L5

TELECOPIER MESSAGE \ MESSAGE ENVOYÉ PAR TÉLÉCOPIEUR

PLEASE DELIVER THE FOLLOWING PAGES: \ VEUILLEZ LIVRER LES PAGES SUIVANTES:

TO \ À: Greg Boehmer

FIRM \ COMPAGNIE:

TELEPHONE # \ Nº DE TÉLÉPHONE:

TELECOPIER # \ Nº DE TÉLÉCOPIEUR: 416-943-3792 SECURE NON-SECURE —

FROM \ DE: Fiona Francis

DATE: Aug 10/99

OUR FILE # \ Nº DE NOTRE DOSSIER:

NUMBER OF PAGES INCLUDING COVER PAGE: \ 8
NOMBRE DE PAGES INCLUANT LA PAGE COUVERTURE:

YOU MAY REACH US BY TELECOPIER AT (613) 957-2088 \
VOUS POUVEZ NOUS JOINDRE PAR TÉLÉCOPIEUR AU (613) 957-2088
PLEASE CALL IF ANY TRANSMISSION PROBLEMS (613) 957-8953 \
VEUILLEZ APPELER SI INCOMPLET AU (613) 957-8953

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS, UNDER THE CANADIAN FEDERAL INCOME TAX ACT, CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS. \

LES RENSEIGNEMENTS CONTENUS DANS CE MESSAGE ENVOYÉ PAR TÉLÉCOPIEUR SONT CONFIDENTIELS EN VERTU DE LA LOI CANADIENNE DE L'IMPÔT SUR LE REVENU ET NE S'ADRESSENT QU'À LA PERSONNE OU L'ENTITÉ DÉSIGNÉE CI-DESSUS. SI LE LECTEUR DU MESSAGE N'EST PAS LE DESTINATAIRE ATTITRÉ, L'EMPLOYÉ OU L'AGENT RESPONSABLE DE LA REMISE DU MESSAGE AU DESTINATAIRE ATTITRÉ, VOUS ÊTES PAR LA PRÉSENTE AVISÉ QU'IL EST STRICTEMENT DÉFENDU DE DIFFUSER, DE DISTRIBUER OU DE COPIER CE DOCUMENT. SI VOUS AVEZ REÇU CE DOCUMENT PAR ERREUR, VEUILLEZ IMMÉDIATEMENT NOUS EN FAIRE PART PAR TÉLÉPHONE ET ENVOYER LE MESSAGE ORIGINAL À L'ADRESSE INDIQUÉE CI-DESSUS.

MESSAGE:

QUEBEC CLASS ACTIONS 500-06-00007[illegible]3 AND 500-06-000076-980 CONFIDENTIAL

Tax Department Presentation
Integration of JT and RI

Geneva, 2nd June

PIÈCE/EXHIBIT
MCH-5
Borden Ladner Gervais
514-879-1212

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

Progress Report and Preliminary Review of Presentation Proposed for the Tax Department's visit to Japan Tobacco Headquarters in Tokyo.

QUEBEC CLASS ACTIONS 500-06-00007[illegible]83 AND 500-06-000076-980 CONFIDENTIAL

FIVE TOPICS HAVE BEEN SUGGESTED

Day 1 - Tokyo

- HUBCO and WBI Review
- Integration proposals with Tax motivations only
- Integration proposals with Operations and Tax motivation

Day 2 - Tokyo

- Integration proposals with Operations and Tax motivations (cont'd)
- Integration proposals affecting JT's Tax profile in Japan
- Tax Department "Mission Statement"

Note: Morning of Day 3 may be required to complete and discuss all the above.

QUEBEC CLASS ACTIONS 500 06 000070 983 AND 500 06 000076 980 CONFIDENTIAL

TODAY

We will review <u>all</u> Integration Proposals

QUEBEC CLASS ACTIONS 500-06-00007[illegible]3 AND 500-06-000076-980 CONFIDENTIAL

INTEGRATION PROPOSALS WITH TAX MOTIVATIONS

- Canada - Leveraging, before RJRI migration to Switzerland
  - Trademark holding company
  - Distribution of subsidiaries.
- RJRI - Migration to Switzerland, before 12/31/99
  - Assimilation of Financing Operations, before 12/31/99
  - Recapitalization, before migration.
- Russian trademark sale.

Note: The timing of these projects is critical and inter-related.

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

INTEGRATION PROPOSALS WITH TAX MOTIVATIONS

- Tax, Legal, Treasury and Advisors agree ……
- These projects must launch as soon as possible to achieve the intended goals.
- We require your approval to begin to make the necessary external contacts, and to confirm timing and responsibilities of all involved.

QUEBEC CLASS ACTIONS 500-06-00007[illegible]3 AND 500-06-000076-980 CONFIDENTIAL

INTEGRATION PROPOSALS WITH OPERATIONS AND TAX MOTIVATIONS

- Tax effective legal entity integrations of JT Tobacco subsidiary into JTIH BV.
- Tax effective operational integrations of JT and RI subsidiaries.

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

ENTITIES TARGETED FOR THESE PROPOSALS

JT (Japan) and JT International (Japan)

JTI (USA) and RI Duty Free, LA Sales, & IAs

JTA (USA) and WBI, TNS & GEM

JT Holdings (UK), JTI Europe (UK) and MTC (UK)

JT (Poland) and RJR (Poland)

JTI (Puerto Rico)

RJR/MC (Japan)

JT (Korea) and RJR China (HK)

JTI (Thailand) and RJR Thailand Inc.

JTI (Taiwan) and RJR Taiwan Inc.

JTI (Hong Kong) and Nabisco China Ltd.

JTI (Malaysia) and RJR Berhad (Malaysia)

JTI (Singapore) and RI Singapore Rep Office

JTI and RI China Rep Offices

Other JTI Rep Offices

RJR Mexico Inc.

RJR Korea Inc.

QUEBEC CLASS ACTIONS 500-06-00007[illegible]3 AND 500-06-000076-980 CONFIDENTIAL

INTEGRATION PROPOSALS WITH OPERATIONS AND TAX MOTIVATIONS

- Timing is less critical, but,

- It is critical that JT approved plans be communicated to the Field:
  - The Tax Department will communicate the approved plans to RI sites.
  - Once approved, you and your associates in JT must communicate the same to JT sites.
  - You might consider organizing meetings between appropriate persons in JT and RI Operations, and the RI Tax Department to launch the projects.

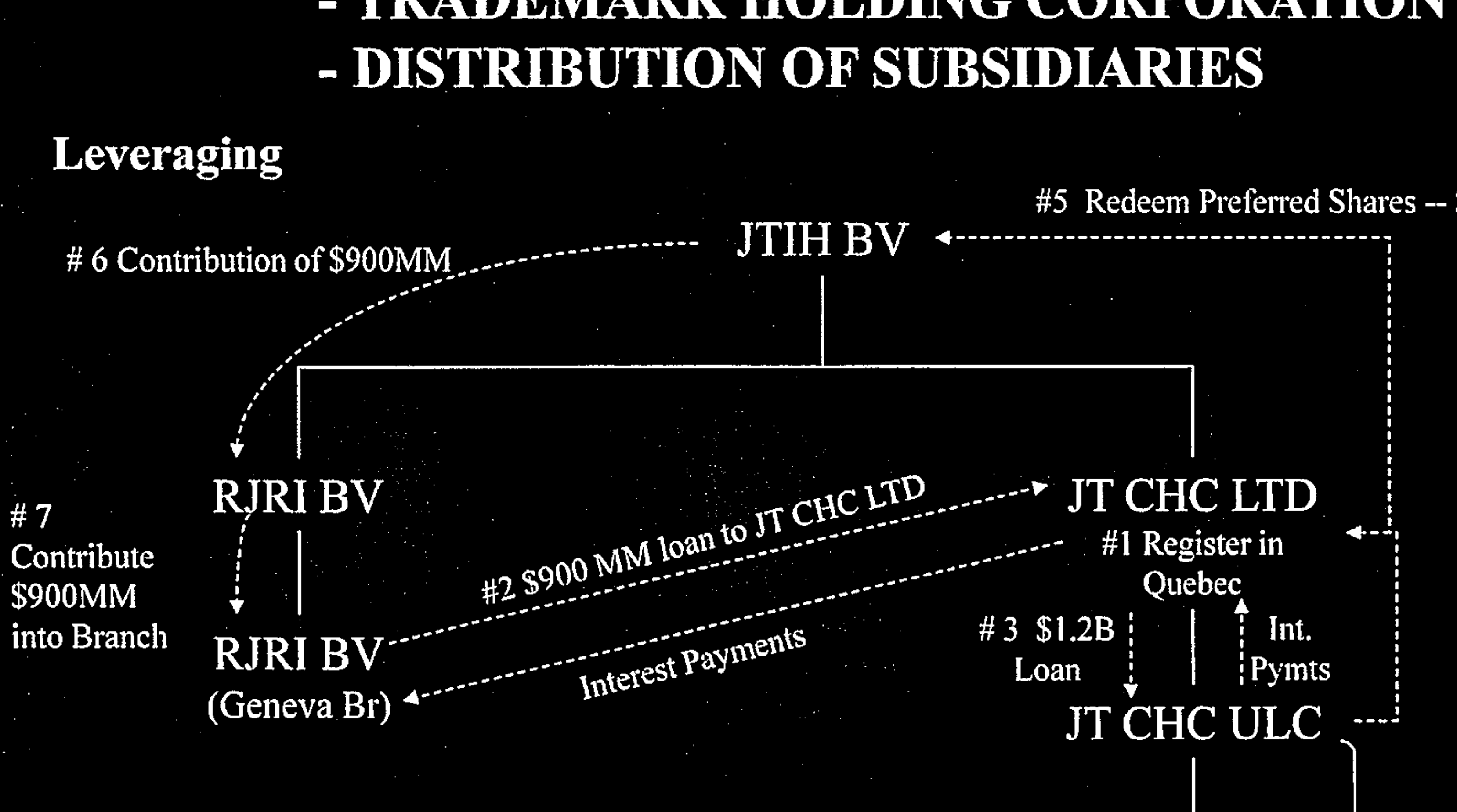
- Only then can the Tax Department develop implementation responsibilities and time line with JT and RI management.

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

PROPOSALS GROUP # 1

Integration proposals with tax motivations

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL



QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

TRADEMARK HOLDING COMPANY AND DISTRIBUTION OF SUBSIDIARIES

JTIH BV

Finco BV

JT CHC LTD

Tutun

#3

#3

JT CHC ULC

#2

Macdonald ULC

#1

Finco BV

Other Subs

Tutun

Newco Canada (TM)

QUEBEC CLASS ACTIONS 500-06-00007[illegible]-3 AND 500-06-000076-980 CONFIDENTIAL

CANADA

GOALS / BENEFITS

- Leverage Canada by replacing 75% of the equity in JT CHC LTD with debt, providing a tax benefit in Canada for the interest deduction of approximately $54MM, tax benefit @ 43%.

  Savings = $18MM per year (net of $5.4MM W/H -- efforts underway to further reduce the withholding via structured lending)

- Establish a new trademark holding company as a first tier subsidiary of Macdonald, to provide a level of protection for the trademarks by making them bankruptcy remote, to ensure the integrity of the trademarks is maintained, and to reduce Macdonald's capital tax burden.

  Savings = $5M per year (capital and income tax savings)

- After step up in value from amalgamation, effect a withholding tax-free return of capital, sending Finco BV and Tutun up to JTIH BV, providing greater operational and planning flexibility for the organization by relieving them of Canadian legal, tax, and accounting constraints.

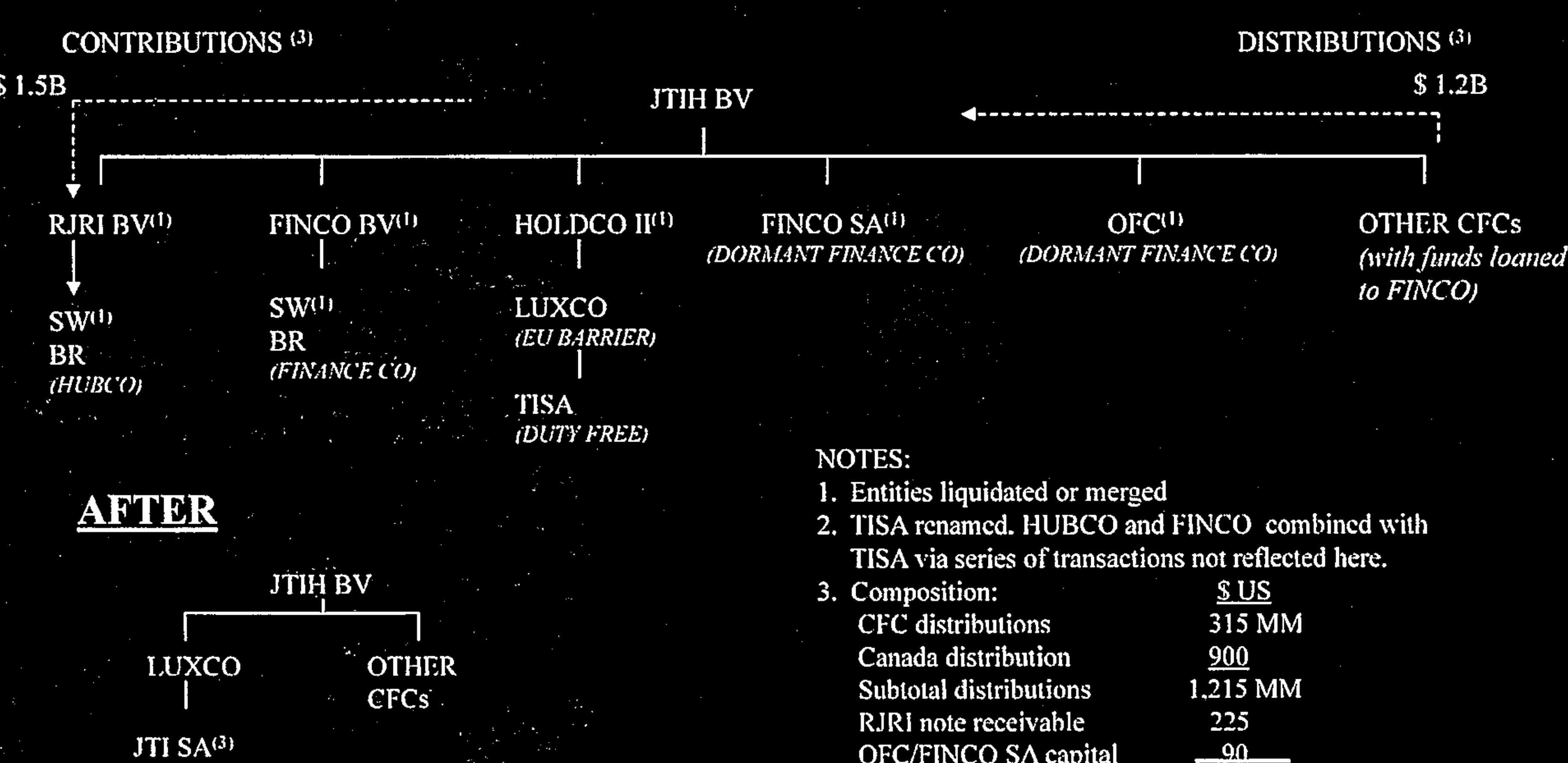
- **Savings** = $52MM (Dividend W/H reduction)

QUEBEC CLASS ACTIONS 500 06 000070 983 AND 500 06 000076 980 CONFIDENTIAL

TIMING	RESPONSIBILITIES	COSTS [1]
•To maximize tax benefit of the interest deduction, should occur ASAP.	Tax - educate all affected internal and external parties, and shepherd project to completion	Valuation for TM
•Amalgamation must be at least three weeks AFTER trademarks contributed to Newco Canada.	Treasury - affect funds movements and documentation	Budgets requested from DT, Geneva, DT, Toronto, EY, London (Canada desk), and EY, Amsterdam
•ROC of Finco and Tutun should occur ASAP after amalgamation.	Legal - establish, merge, liquidate entities, as required	
•Detailed timing responsibility charts will be prepared once projects approved	Acctg - Reflect these changes in books and records	
	DT, Geneva - Review with federal and cantonal tax authorities, update existing tax rulings	
	DT, Toronto - Review leverage plan, valuation of trademarks	
	EY, Amsterdam - Review with tax authorities, obtain capital tax ruling	

(1) Incremental timing for tax advisory costs committed by JT

QUEBEC CLASS ACTIONS 500-06-000070 3 AND 500-06-000076-980 CONFIDENTIAL



QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

RJRI
GOALS / BENEFITS

1. Prevent Japanese taxation of HUBCO profits via CFC rule
   Savings = HUBCO profits x JT's 51% effective tax rate.

2. Eliminate tax paid to Holland under RJRI's tax ruling.
   Savings = $ 10 M+ per year

3. Eliminate operating redundancy required to separate TISA's duty free business from RJRI's EU presence.
   Savings = $ 1 M+ per year

4. Eliminate non tax effective interest expense on RJRI loan payable to FINCO, **AND** eliminate non tax effective interest income paid by FINCO to CFCs.
   CFC savings = $ 1 MM per year
   One time cost = $ 0.7 MM (Germany Tax on UK dividend)

5. Take advantage of last opportunity to avoid Dutch capital tax and Swiss stamp tax on $ 1.5 B capital contributed via RJRI BV to JTI SA (HUBCO).
   One time savings = $ 30 MM

QUEBEC CLASS ACTIONS 500 06 000070 ... 3 AND 500 06 000076 980 CONFIDENTIAL

TIMING

Detailed timing/ responsibility charts will be prepared once projects approved.

COSTS [1]

Budgets requested from
DT, Geneva
EY, Amsterdam

(1) Incremental to tax advisory costs engaged by JT

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

END OF TODAY'S REVIEW

Requested input :

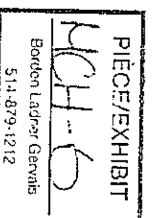
Group # 1 - Can we proceed immediately with implementation?

Group # 2 - Are there any integration topics not addressed?
- Can we proceed with developing implementation responsibilities and time line with RI and JT Management?
- Are there any proposals requiring immediate implementation?

Group # 3 - Should we present these in Tokyo in this form, or in some other manner?

Thank you.

INTEGRATION PROPOSALS



QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

"I'm all for progress ....

It's change I object to."

Mark Twain

QUEBEC CLASS ACTIONS 500-06-00007C ,3 AND 500-06-000076-980 CONFIDENTIAL

OBJECTIVES OF INTEGRATION PROPOSALS

- Tax effective legal entity integrations of JT Tobacco subsidiaries into JTIH BV.
- Tax effective operational integrations of JT and RI subsidiaries.

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

INTEGRATION PROPOSALS

RJRI BV (Holland)
- Migration to Switzerland
- Finance Company
- Recapitalization

JT (Japan) and JT International (Japan)

JT Holdings (UK), JTI Europe (UK) and MTC (UK)

JTI (USA) and RI Duty Free, LA Sales, & IAs

JTA (USA) and WBI & TNS

JT (Poland) and RJR (Poland)

JTI (Puerto Rico)

RJR/MC (Japan)

JT (Korea) and RJR China (HK)

RJR Macdonald (Canada)
- Leveraging
- Trademark Holding Co.
- Distribution of Subs.

Russian Trademark Sale

JTI (Thailand) and RJR Thailand Inc.

JTI (Taiwan) and RJR Taiwan Inc.

JTI (Hong Kong) and Nabisco China Ltd.

JTI (Malaysia) and RJR Berhad (Malaysia)

JTI (Singapore) and RI Singapore Rep Office

JTI and RI China Rep Offices

Other JTI Rep Offices

RJR Mexico Inc.

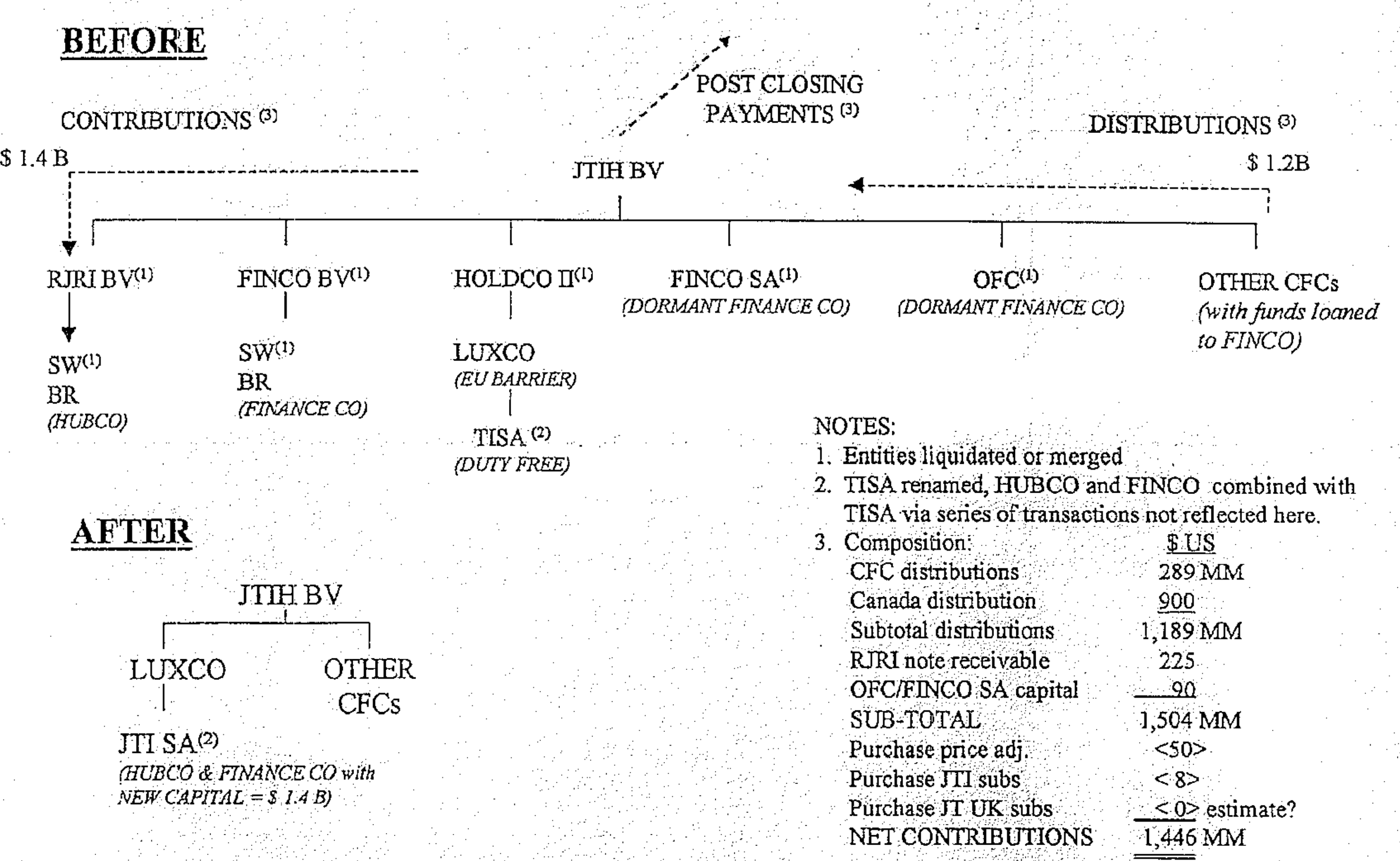
RJR Korea Inc.

INTEGRATION PLANNING FOR APPROVED PROJECTS

TIMING	RESPONSIBILITIES		COSTS [1]
Detailed timing/ responsibility charts will be prepared.	Examples:		Advisory budget to be solicited once projects are approved.
	Tax	- educate all affected internal and external parties, and shepherd project to completion	
	Treasury	- affect funds movements and documentation	
	Legal	- establish, merge, liquidate entities, as required	
	HR	- communicate impact of change to employees	
	IR	- Re-organize systems environment, as required	
	Acctg	- Reflect these changes in books and records	
	Advisors	- Specific activities, where required.	

(1) Incremental to tax advisory costs engaged by JT

RJRI - MIGRATION TO SWITZERLAND
- ASSIMILATION OF FINANCING ACTIVITY
- RECAPITALIZATION



NOTES:

1. Entities liquidated or merged
2. TISA renamed, HUBCO and FINCO combined with TISA via series of transactions not reflected here.
3. Composition:

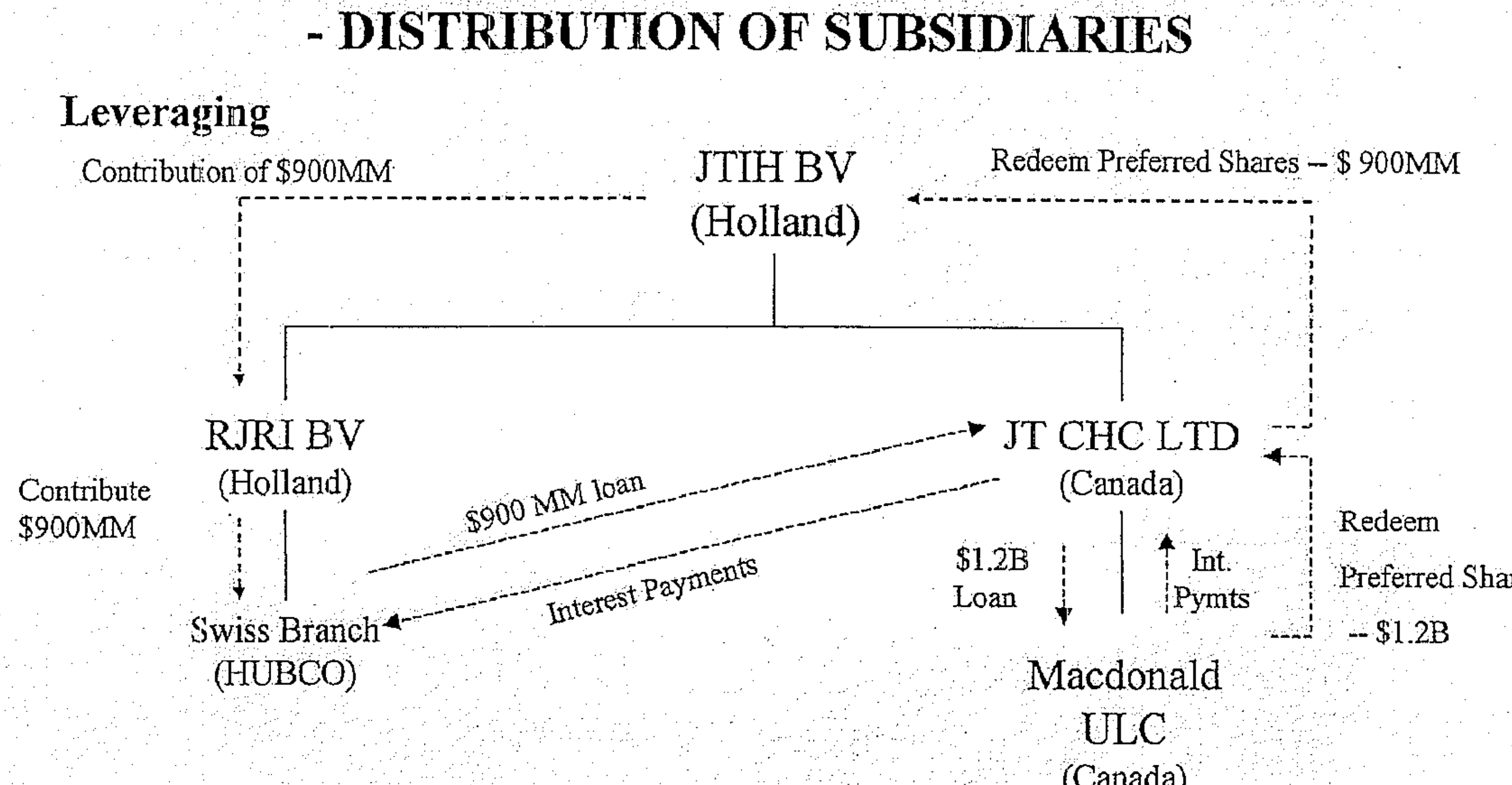
	$ US
CFC distributions	289 MM
Canada distribution	900
Subtotal distributions	1,189 MM
RJRI note receivable	225
OFC/FINCO SA capital	90
SUB-TOTAL	1,504 MM
Purchase price adj.	<50>
Purchase JTI subs	< 8>
Purchase JT UK subs	< 0> estimate?
NET CONTRIBUTIONS	1,446 MM

RJRI
GOALS / BENEFITS

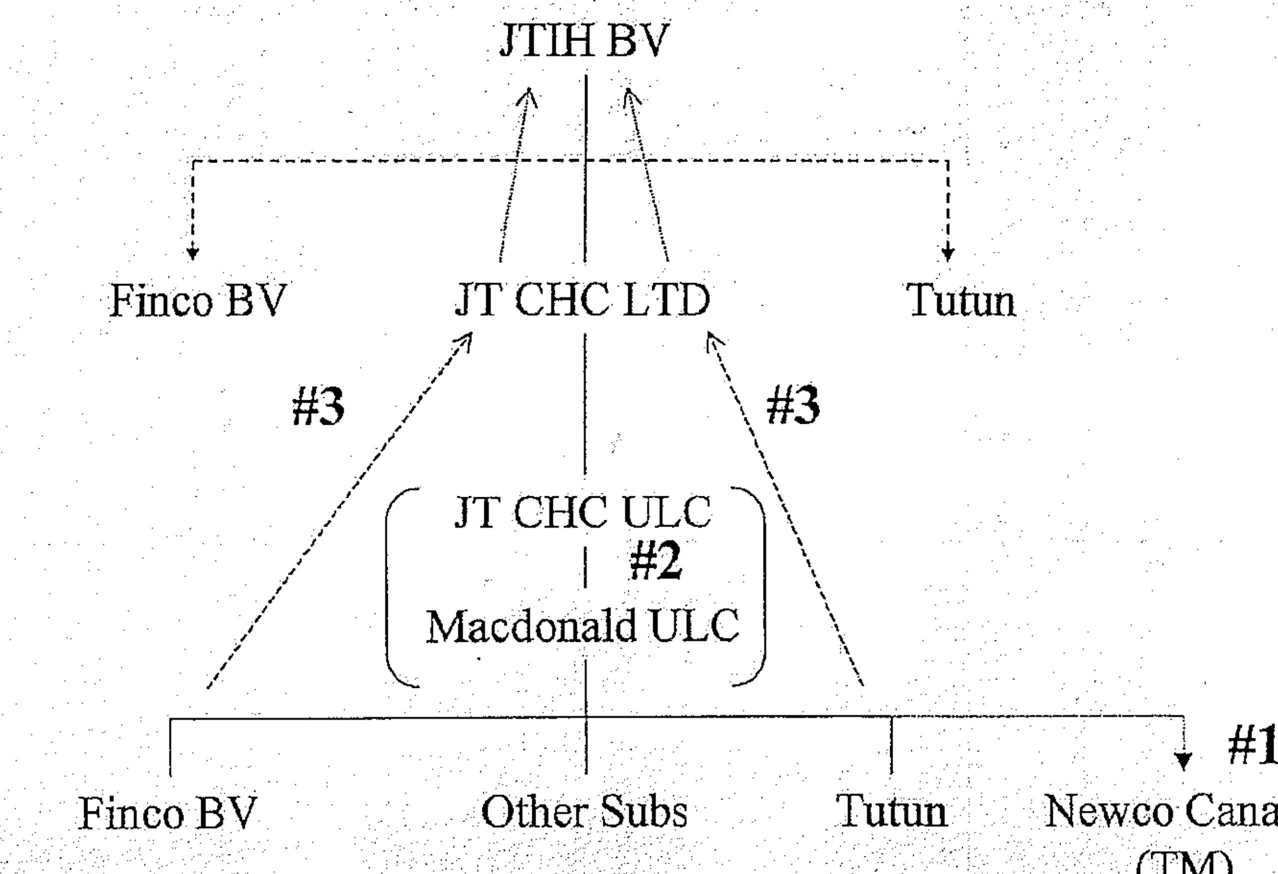
1. Prevent Japanese taxation of HUBCO profits via CFC rule
   Savings = HUBCO profits x JT's effective tax rate.
2. Eliminate tax paid to Holland under RJRI's tax ruling.
   Savings = $ 10 M+ per year
3. Eliminate operating redundancy required to separate TISA's duty free business from RJRI's EU presence.
   Savings = $ 1 M+ per year
4. Eliminate non tax effective interest expense on RJRI loan payable to FINCO, **AND** eliminate non tax effective interest income paid by FINCO to CFCs.
   Savings = $ 1 MM per year
   One time cost = $ 0.7 MM (Germany Tax on UK dividend)
5. Take advantage of last opportunity to avoid Dutch capital tax and Swiss stamp tax on $ 1.5 B capital contributed via RJRI BV to JTI SA (HUBCO).
   One time savings = $ 30 MM

CANADA - LEVERAGING
- TRADEMARK HOLDING CORPORATION
- DISTRIBUTION OF SUBSIDIARIES

Leveraging



TRADEMARK HOLDING COMPANY AND DISTRIBUTION OF SUBSIDIARIES



#1 Macdonald ULC forms Newco Canada, and contributes trademarks at least three weeks before amalgamation of JT CHC ULC and Macdonald
#2 Amalgamation of JT CHC LTD and Macdonald ULC
#3 Macdonald distributes Finco BV and Tutun as ROC to JT CHC LTD, who distributes ROC on to JTIH BV

CANADA
GOALS / BENEFITS

- Leverage Canada by replacing 75% of the equity in JT CHC LTD with debt, providing a tax benefit in Canada for the interest deduction of approximately $54MM, tax benefit @ 43%.

  <u>Savings</u> = $18MM per year (net of $5.4MM W/H -- efforts underway to further reduce the withholding via structured lending)
- Establish a new trademark holding company as a first tier subsidiary of Macdonald, establish royalty payments from a high to low tax jurisdiction, and to reduce Macdonald's capital tax burden.

  <u>Savings</u> = $5M per year (capital and income tax savings)
- After step up in value from amalgamation, distribute Finco BV and Tutun as a return of capital, to JTIH BV, providing greater operational and planning flexibility.

  <u>Savings</u> = $52MM (Dividend W/H reduction)

AUTHORIZATION REQUEST

Submittal Date: 17 June, 1999 Operating Unit: R.J. REYNOLDS INTERNATIONAL

CANADA

Project Title: LEVERAGING / TRADEMARK HOLDING CO. / DISTRIBUTION OF SUBSIDIARIES

Originator/Sponsor: A. J. Maggiore - VP Tax Operating Guidelines Ref.:

Unit Reference: RJRI HQ Reference:

SUMMARY

SEE ATTACHED

AUTHORITY REQUESTED ($M)

	Previously Approved	This Request	Total Request
Capital	$ -	$ -	$ -
Capital-Related Expense	-	-	-
PV of Lease Payments	-	-	-
Total Request	$ -	$ -	$ -

Local Currency Exchange Rate:

Will subsequent commitments be required? ☐ Yes ☐ No When?

Lease/Continuing Commitments

Relationship to Budget 1999

			Request	Budget	Variance
Minimum	$ -	Capital	$ -	$ -	$ -
For	Years	O.C.C.	$ -	$ -	$ -
		Cash Net Income	$ -	$ -	$ -

Start-up Date

Project Completion Date

Post Audit Date

FINANCIAL IMPACT ($M)

	YEAR				
	1999	2000	2001	2002	2003
O.C.C.	-	-	-	-	-
Cash Net Income	10'375	28'500	28'500	28'500	28'500
R.O.E.	- %	- %	- %	- %	- %
I.R.O.I.C.	- %	- %	- %	- %	- %

ECONOMIC IMPACT

Offshore I.R.R. NPV @ 11% After Tax Payback: yrs.

Onshore I.R.R. NPV @ 11% After Tax Payback: yrs.

APPROVALS

MARKET/SBU	REGION	ONLY HQ RJRI	RJRI

QUEBEC CLASS ACTIONS 500-06-000070. 3 AND 500-06-000076-980 CONFIDENTIAL

FINANCIAL IMPACT - CNI (Canada)	000's omitted					
	1999	2000	2001	2002	2003	
Leveraging	5'875	23'500	23'500	23'500	23'500	Max. debt/equity, WH mititgated by stru
Trademark Holdco	5'000	5'000	5'000	5'000	5'000	Capital & income tax saved*
Transaction costs (OCC impact)	-500	0	0	0	0	Estimated
TOTAL	**10'375**	**28'500**	**28'500**	**28'500**	**28'500**	

* These taxes result from the acquisition and would have impared the LE and SP if not for this transaction.

Part I – Leveraging

RJR Macdonald's ("MAC") Canadian income tax burden represents one third of RI's income tax expense. Efforts to significantly reduce MAC's tax burden included a Hubco implementation assessment which lead to the conclusion that Hubco implementation required that RJRI acquire MAC's trademarks. The trademark acquisition produced an up front tax cost, which extended the payback period unacceptably beyond three years. However, as a result of JT's acquisition of RI, a significant FMV has been assigned to MAC, providing the opportunity to leverage MAC's assets, significantly reducing MAC's tax burden. Leveraging will not add incremental long term debt. RJRI BV's Swiss branch ("SWBR") will borrow temporarily in order to extend a loan to JT Canada Holding Ltd ("JTCH"). JTCH will utilize these funds to make a loan to MAC. MAC will redeem preferred shares to JTCH. JTCH will redeem preferred shares to JTIH BV. Finally, JTIH BV will contribute the preferred share dividends to SWBR via a series of tax effective transactions (see AR re "RJRI – Migrations & Recapitalization"). The result will be a "roundtrip" of funds back to SWBR who will repay its borrowing, leaving only a debt payable between JTCH and SWBR (see attached chart "Canada – Leveraging"). Movement of funds versus only recording journal entries is required for substance, but the debt position should exist for only two days. Maximized to the limits of Canadian debt / equity rules, the resulting leverage will facilitate MAC's deduction of significant interest expenses at a tax rate of 44%, while SWBR will recognize interest income taxed at zero rate. It is proposed that JTCH and MAC be leveraged to the maximum tax effective amount to reduce RI's effective tax rate.

QUEBEC CLASS ACTIONS 500-06-000070-3 AND 500-06-000076-980 CONFIDENTIAL

Part II – Trademark Holding Company

Under Canadian tax law, as a result of JTCH's acquisition of MAC, and their subsequent "amalgamation" (merger) the tax basis of all of MAC's assets will be stepped up to FMV. Approximately half of that step up is attributable to investments in subsidiaries, while a majority of the other half is attributable to local trademarks. MAC is subject to a high level of capital taxation (tax on assets) in Ontario. As a result, the stepped up assets will attract significantly higher capital taxes, except for investments in subsidiaries, which are exempted via a credit. To minimize the capital tax on the highly valued trademarks, they must be contributed to a new Quebec subsidiary of MAC because Quebec has no capital tax. To maximize the tax benefit of this transaction, MAC would enter into a license with Newco Quebec, paying royalties deductible by MAC at its 44% effective tax rate, but included in Newco's taxable income at an effective rate of 38% (Quebec's tax rates are lower). Contribution of trademarks to Newco Quebec can only occur tax effectively BEFORE the amalgamation due to anti-abuse tax rules requiring a three week minimum waiting period between the contribution and amalgamation. It is proposed that MAC's trademarks be contributed to Newco Quebec as soon as possible to facilitate the leveraging described in Part I, to reduce capital tax costs and to reduce RI's overall Canadian income tax burden.

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

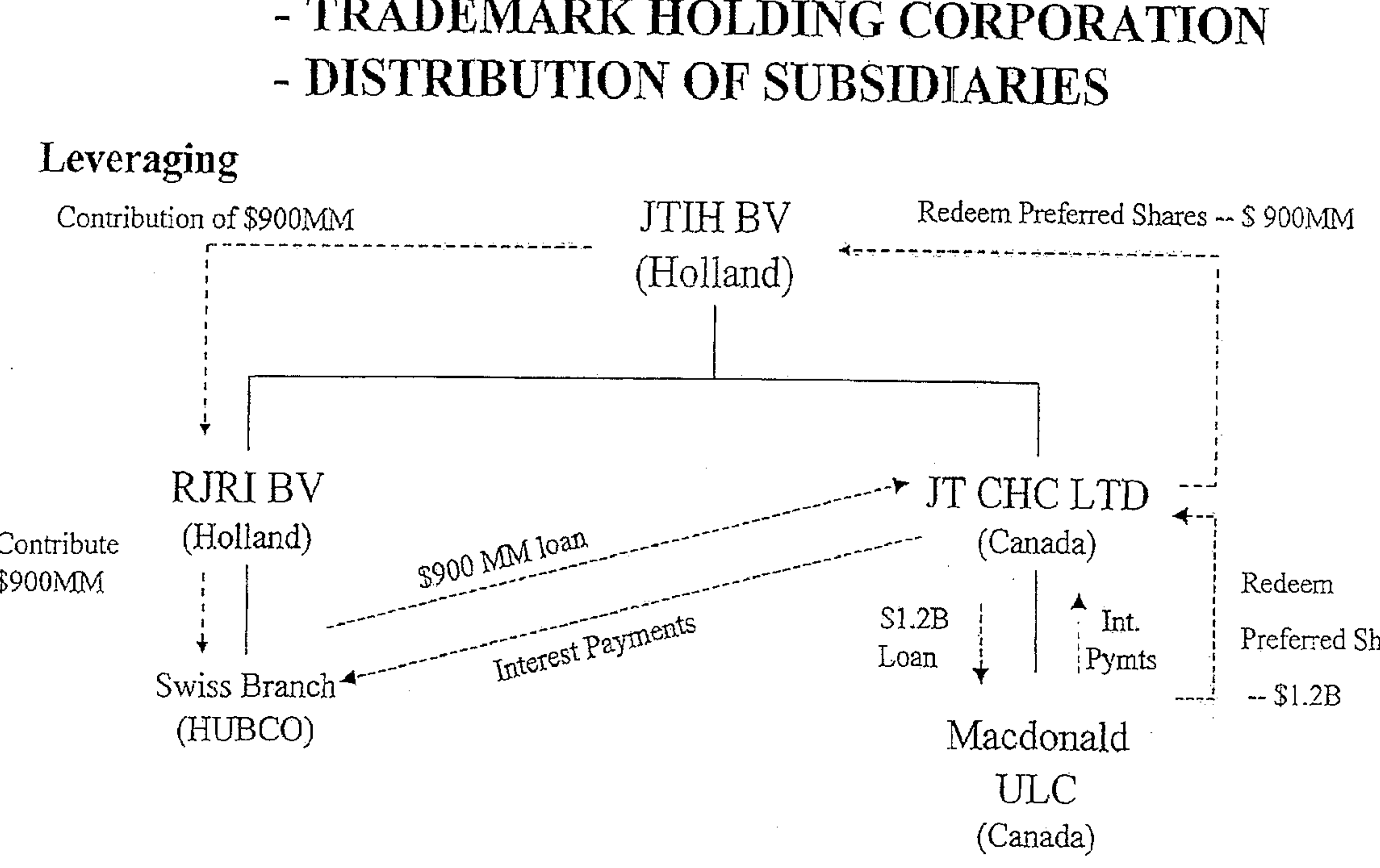
Part III – Distribution of Subsidiaries

MAC owns RJR Tutun, Turkey ("Tutun") and RJR Finance BV ("Finco"). Finco owns RJR Germany, which owns RJR UK and France. Finco must be transferred to JTIH BV tax effectively to facilitate the RJRI "Migration & Recapitalization" (see AR re "RJRI – Migration & Recapitalization"). Immediately after the required "amalgamation" (merger) of MAC and JTCH, Tutun and Finco will have a stepped up tax basis equal to their FMV. (see Part II). Immediately after the step up is the appropriate time for MAC to distribute the shares of Tutun and Finco as a tax free return of capital. Thereafter, any strengthening of the Canadian dollar versus the US dollar will create unrealized gains that would be taxable to MAC at 44%, if these subsidiaries were distributed at a later date. Finally, this distribution will allow the tax effective utilization of excess cash in RJR Germany and RJR UK in the recapitalization of RJRI without incurring withholding tax. It is proposed that MAC distribute its shares of Tutun and Finco immediately after the amalgamation.

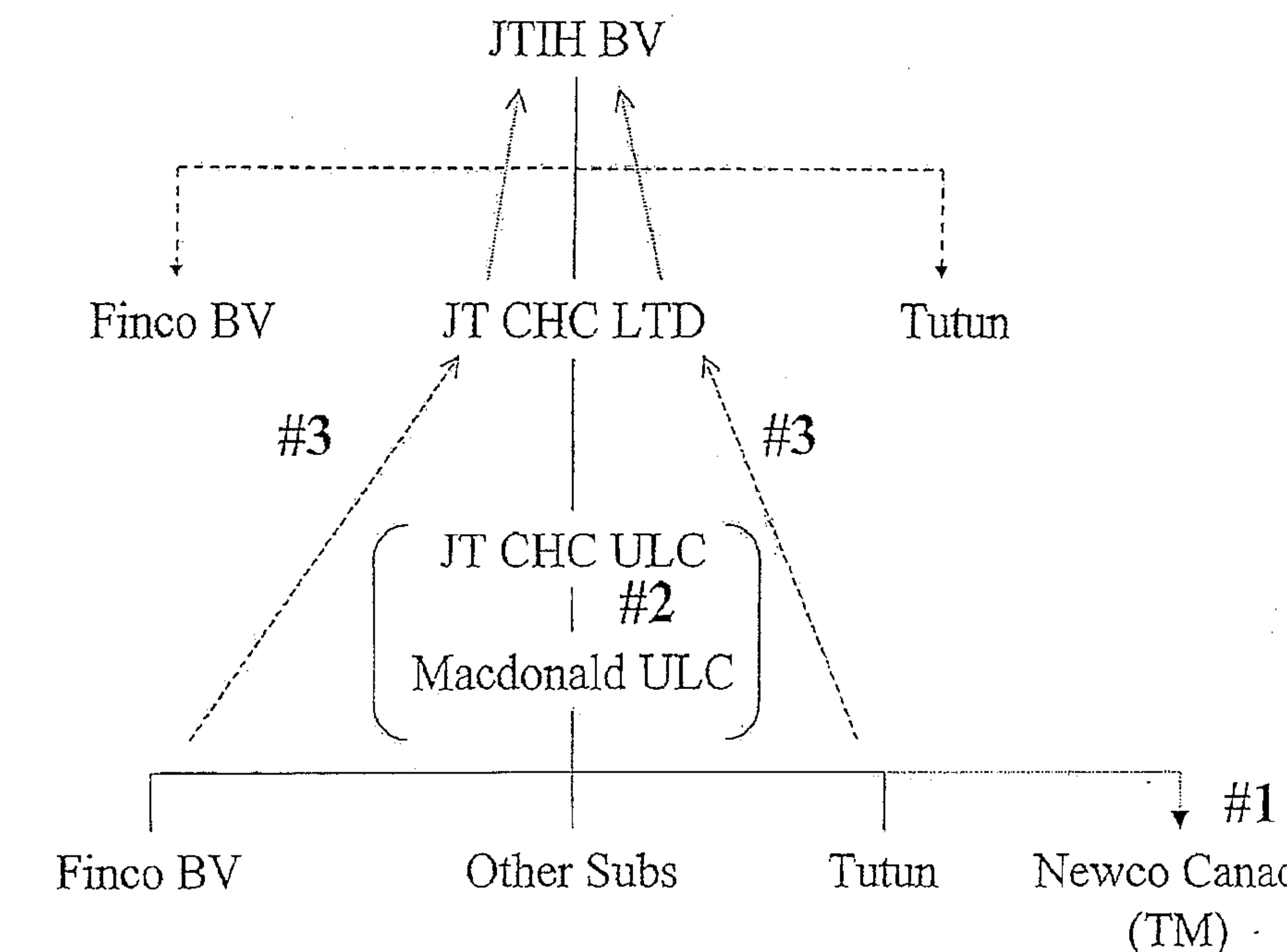
QUEBEC CLASS ACTIONS 500-06-000070 3 AND 500-06-000076-980 CONFIDENTIAL

CANADA - LEVERAGING
- TRADEMARK HOLDING CORPORATION
- DISTRIBUTION OF SUBSIDIARIES

Leveraging



TRADEMARK HOLDING COMPANY AND DISTRIBUTION OF SUBSIDIARIES



#1 Macdonald ULC forms Newco Canada, and contributes trademarks at least three weeks before amalgamation of JT CHC ULC and Macdonald

#2 Amalgamation of JT CHC LTD and Macdonald ULC

#3 Macdonald distributes Finco BV and Tutun as ROC to JT CHC LTD, who distributes ROC on to JTIH BV

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

CANADA

GOALS / BENEFITS

- Leverage Canada by replacing 75% of the equity in JT CHC LTD with debt, providing a tax benefit in Canada for the interest deduction of approximately $54MM, tax benefit @ 43%.

  Savings = $18MM per year (net of $5.4MM W/H -- efforts underway to further reduce the withholding via structured lending)
- Establish a new trademark holding company as a first tier subsidiary of Macdonald, establish royalty payments from a high to low tax jurisdiction, and to reduce Macdonald's capital tax burden.

  Savings = $5M per year (capital and income tax savings)
- After step up in value from amalgamation, distribute Finco BV and Tutun as a return of capital, to JTIH BV, providing greater operational and planning flexibility.

  Savings = $52MM (Dividend W/H reduction)

QUEBEC CLASS ACTIONS 500-06-00007( )3 AND 500-06-000076-980 CONFIDENTIAL

2 July 99

PIÈCE/EXHIBIT
MCH-8
Borden Ladner Gervais
514-879-1212

MEMORANDUM

TO: Mark Hawley

CC: Anthony Maggiore
Paul Bourassa
Bradley Price

FROM: Mary Carol Holbert

SUBJECT: Modificaton to "Canada Leveraging / Trademark Holding Co. / Distribution of Subsidiaries" AR

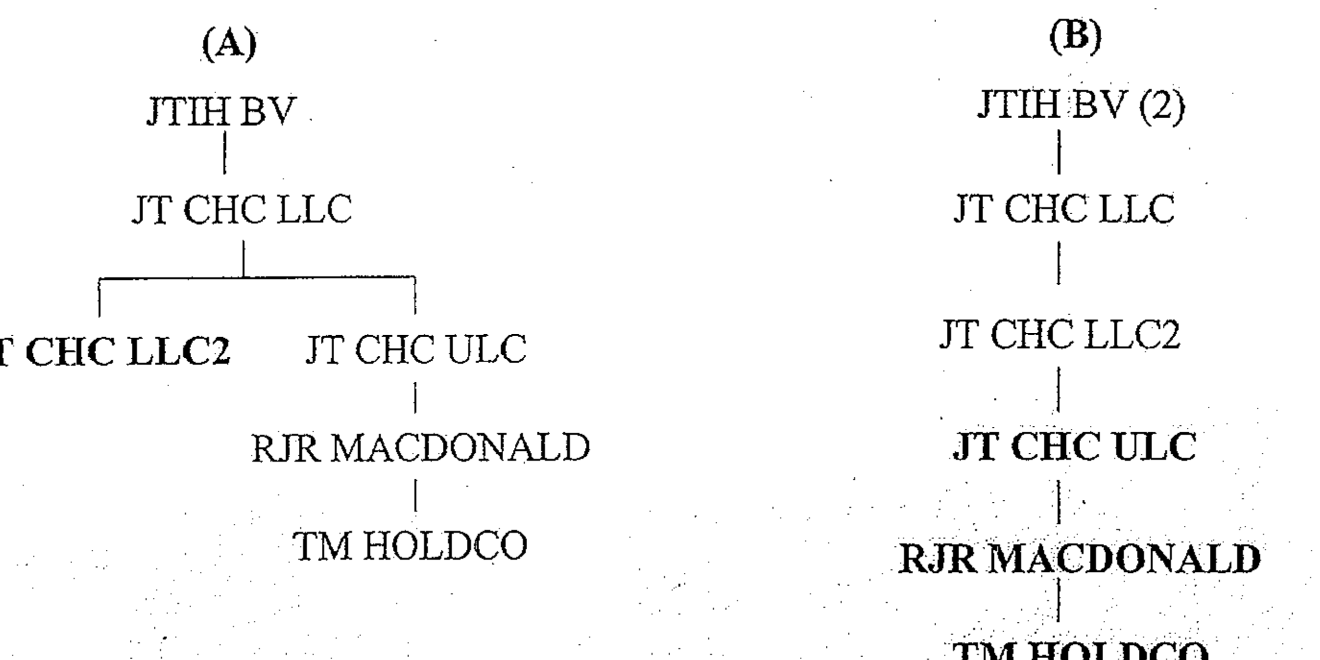
In order to better protect our Canadian trademarks in the event of bankruptcy, we should create a new JT Canadian Holding Limited Liability Corporation (JT CHC LLC2). I have set out in the attached two charts the steps for the formation of the company.

Through making the secondary loan from JT CHC LLC directly to the new Trademark Holding Company, secured by the trademarks held by that entity, JT CHC LLC obtains the first priority claims to those assets. Since the new JT CHC LLC 2 would be a subsidiary of JT CHC LLC, any liabilities of Macdonald which would come up the chain would only come up to the JT CHC LLC2. Creditors of Macdonald would be subordinated to the claims of JT CHC LLC with respect to the trademarks.

While the prospect of bankruptcy may be remote, it is nonetheless of concern. The modifications suggested will enhance our ability to protect our most valuable assets.

CANADA TRADEMARKS

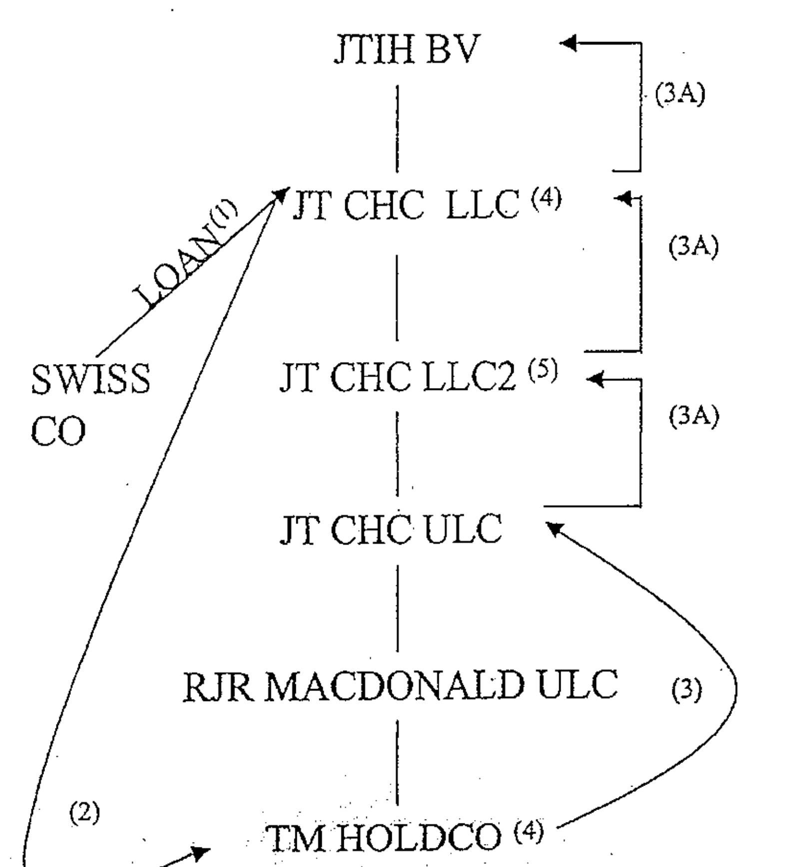
We need to establish a second JT Ca. Holdco LLC to make the case for the Trademark Holding Company. Commercially, it seems that we would want to do this, even if there were no tax benefit, to enhance protection of the trademarks.



JT CHC LLC forms new wholly owned subsidiary, JT CHC LLC2.

JT CHC LLC contributes JT CHC ULC to JT CHC LLC2.

CANADA TRADEMARKS



(1) Loan to JT CHC LLC from SwissCo. ($ 900 MM)

(2) Loan from JT CHC LLC to TM Holdco secured by trademark assets ($ 1.2 B)

(3) Loan from TM Holdco to JT CHC ULC (3A) begin redemptions of preferred stock

(4) In case of bankruptcy, first creditor of TM Holdco is JT CHC LLC, ahead of any 3rd party claims to assets

(5) All liabilities of ULCs flow thorough to JT CHC LLC2 but not to JT CHC LLC, ensuring that JT CHC LLC's first priority interest in the trademarks of TM Holdco is not compromised

PIÈCE/EXHIBIT
MCH-9
Borden Ladner Gervais
514-879-1212

Bouzon, Fabien

From: Kostantos, Roland
Sent: lundi, 9. août 1999 12:04
To: Pillinini, Lorenzo; Bouzon, Fabien; Murphy, Patrick A.
Subject: FW: JT Board Approval

Follow Up Flag: For Your Information
Flag Status: Flagged

-----Original Message-----
From: Ong, Sam
Sent: jeudi, 5. août 1999 16:11
To: Leroux, Jean-Francois; Gilboy, Steve; Marioni, Robert J.; Younan, Tom J; Kostantos, Roland; Everhart, Gary L; DiNapoli, Michael
Subject: FW: JT Board Approval

-----Original Message-----
From: Takagi, Ryuji
Sent: Thursday, August 05, 1999 9:45 AM
To: Hawley, Mark K; Maggiore, Anthony J; Holbert, Mary Carol; Madden, Todd; Ong, Sam; Wong, Mary
Subject: JT Board Approval

We obtained the JT board approvals for the following:

- Canada Leveraging / Trademark Holding Co. / Distribution of Subsidiaries (August 3)
- Poland Integration (July 23)

And we obtained the approvals of the Tobacco Business Group for the following:

- Thailand Reorganization (July 23)
- Taiwan Integration (July 23)

Please note that since the approvals are based on the ARs which were sent from Geneva, the contents of the approvals are basically same as those of ARs.

QUEBEC CLASS ACTIONS 500-06-000070-3 AND 500-06-000076-980 CONFIDENTIAL

QUEBEC CLASS ACTIONS 500-06-000070 33 AND 500-06-000076-980 CONFIDENTIAL

AUTHORIZATION REQUEST

Submittal Date: 17 June, 1999 **Operating Unit:** R.J. REYNOLDS INTERNATIONAL CANADA

Project Title: LEVERAGING / TRADEMARK HOLDING CO. / DISTRIBUTION OF SUBSIDIARIES

Originator/Sponsor: A. J. Maggiore - VP Tax
Unit Reference:
Operating Guidelines Ref.:
RJRI HQ Reference: HQ0/1999/0120

SUMMARY

SEE ATTACHED

AUTHORITY REQUESTED ($M)

	Previously Approved	This Request	Total Request
Capital	$ -	$ -	$ -
Capital-Related Expense	-	-	-
PV of Lease Payments	-	-	-
Total Request	$ -	$ -	$ -

Local Currency ______ Exchange Rate: ______
Will subsequent commitments be required? ☐ Yes ☐ No When? ______

Lease/Continuing Commitments

Minimum $ - For ____ Years

Relationship to Budget 1999

	Request	Budget	Variance
Capital	$ -	$ -	$ -
O.C.C.	$ -	$ -	$ -
Cash Net Income	$ -	$ -	$ -

Start-up Date
Project Completion Date
Post Audit Date

FINANCIAL IMPACT ($M)

YEAR	1999	2000	2001	2002	2003
O.C.C.	-	-	-	-	-
Cash Net Income	10'375	28'500	28'500	28'500	28'500
R.O.E.	-%	-%	-%	-%	-%
I.R.O.I.C.	-%	-%	-%	-%	-%

ECONOMIC IMPACT

Offshore I.R.R. ______ NPV @ 11% ______ After Tax Payback: ______ yrs.
Onshore I.R.R. ______ NPV @ 11% ______ After Tax Payback: ______ yrs.

APPROVALS

MARKET/SBU	REGION	ONLY HQ RJRI	JTI BOARD
		MKO [signature]	JAK [signature]
		MON [signature]	PDL [signature]
			HK [signature]
			EI [signature]
			SH [signature]
			HT [signature]
			[signature]

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

FINANCIAL IMPACT - CNI (Canada)	000's omitted					
	1999	2000	2001	2002	2003	
Leveraging	5'875	23'500	23'500	23'500	23'500	Max. debt/equity, WH militgated by stru
Trademark Holdco	5'000	5'000	5'000	5'000	5'000	Capital & income tax saved*
Transaction costs (OCC impact)	-500	0	0	0	0	Estimated
TOTAL	10'375	28'500	28'500	28'500	28'500	

* These taxes result from the acquisition and would have impared the LE and SP if not for this transaction.

QUEBEC CLASS ACTIONS 500-06-00007(;3 AND 500-06-000076-980 CONFIDENTIAL

Part I – Leveraging

RJR Macdonald's ("MAC") Canadian income tax burden represents one third of RI's income tax expense. Efforts to significantly reduce MAC's tax burden included a Hubco implementation assessment which lead to the conclusion that Hubco Implementation required that RJRI acquire MAC's trademarks. The trademark acquisition produced an up front tax cost, which extended the payback period unacceptably beyond three years. However, as a result of JT's acquisition of RI, a significant FMV has been assigned to MAC, providing the opportunity to leverage MAC's assets, significantly reducing MAC's tax burden. Leveraging will not add incremental long term debt. RJRI BV's Swiss branch ("SWBR") will borrow temporarily in order to extend a loan to JT Canada Holding Ltd ("JTCH"). JTCH will utilize these funds to make a loan to MAC. MAC will redeem preferred shares to JTCH. JTCH will redeem preferred shares to JTIH BV. Finally, JTIH BV will contribute the preferred share dividends to SWBR via a series of tax effective transactions (see AR re "RJRI – Migrations & Recapitalization"). The result will be a "roundtrip" of funds back to SWBR who will repay its borrowing, leaving only a debt payable between JTCH and SWBR (see attached chart "Canada – Leveraging"). Movement of funds versus only recording journal entries is required for substance, but the debt position should exist for only two days. Maximized to the limits of Canadian debt / equity rules, the resulting leverage will facilitate MAC's deduction of significant interest expenses at a tax rate of 44%, while SWBR will recognize interest income taxed at zero rate. It is proposed that JTCH and MAC be leveraged to the maximum tax effective amount to reduce RI's effective tax rate.

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

Part II – Trademark Holding Company

Under Canadian tax law, as a result of JTCH's acquisition of MAC, and their subsequent "amalgamation" (merger) the tax basis of all of MAC's assets will be stepped up to FMV. Approximately half of that step up is attributable to investments in subsidiaries, while a majority of the other half is attributable to local trademarks. MAC is subject to a high level of capital taxation (tax on assets) in Ontario. As a result, the stepped up assets will attract significantly higher capital taxes, except for investments in subsidiaries, which are exempted via a credit. To minimize the capital tax on the highly valued trademarks, they must be contributed to a new Quebec subsidiary of MAC because Quebec has no capital tax. To maximize the tax benefit of this transaction, MAC would enter into a license with Newco Quebec, paying royalties deductible by MAC at its 44% effective tax rate, but included in Newco's taxable income at an effective rate of 38% (Quebec's tax rates are lower). Contribution of trademarks to Newco Quebec can only occur tax effectively <u>BEFORE</u> the amalgamation due to anti-abuse tax rules requiring a three week minimum waiting period between the contribution and amalgamation. It is proposed that MAC's trademarks be contributed to Newco Quebec as soon as possible to facilitate the leveraging described in Part I, to reduce capital tax costs and to reduce RI's overall Canadian income tax burden.

QUEBEC CLASS ACTIONS 500-06-00007 83 AND 500-06-000076-980 CONFIDENTIAL

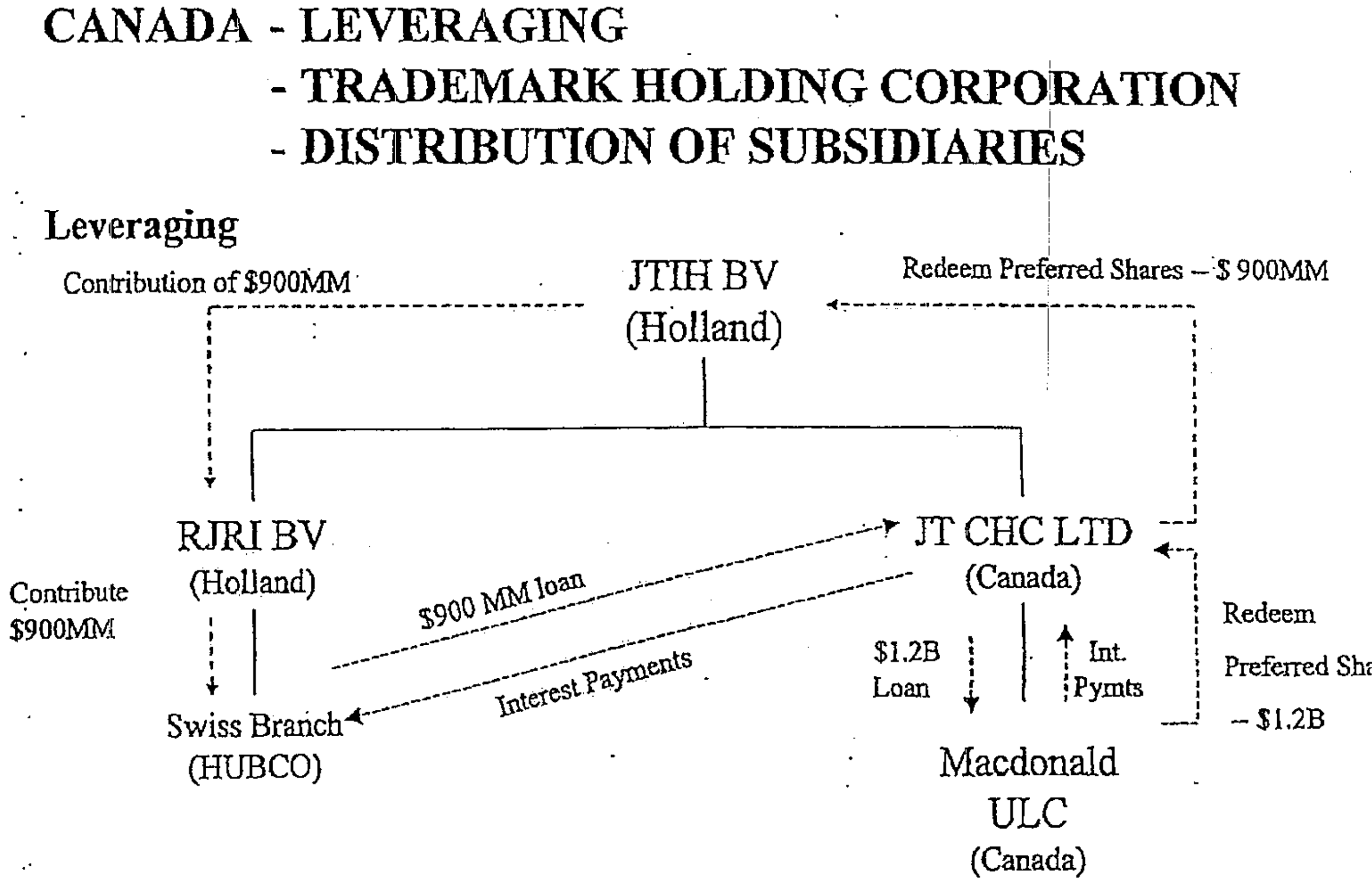
Part III – Distribution of Subsidiaries

MAC owns RJR Tutun, Turkey ("Tutun") and RJR Finance BV ("Finco"). Finco owns RJR Germany, which owns RJR UK and France. Finco must be transferred to JTIH BV tax effectively to facilitate the RJRI "Migration & Recapitalization" (see AR re "RJRI – Migration & Recapitalization"). Immediately after the required "amalgamation" (merger) of MAC and JTCH, Tutun and Finco will have a stepped up tax basis equal to their FMV. (see Part II). Immediately after the step up is the appropriate time for MAC to distribute the shares of Tutun and Finco as a tax free return of capital. Thereafter, any strengthening of the Canadian dollar versus the US dollar will create unrealized gains that would be taxable to MAC at 44%, if these subsidiaries were distributed at a later date. Finally, this distribution will allow the tax effective utilization of excess cash in RJR Germany and RJR UK in the recapitalization of RJRI without incurring withholding tax. It is proposed that MAC distribute its shares of Tutun and Finco immediately after the amalgamation.

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

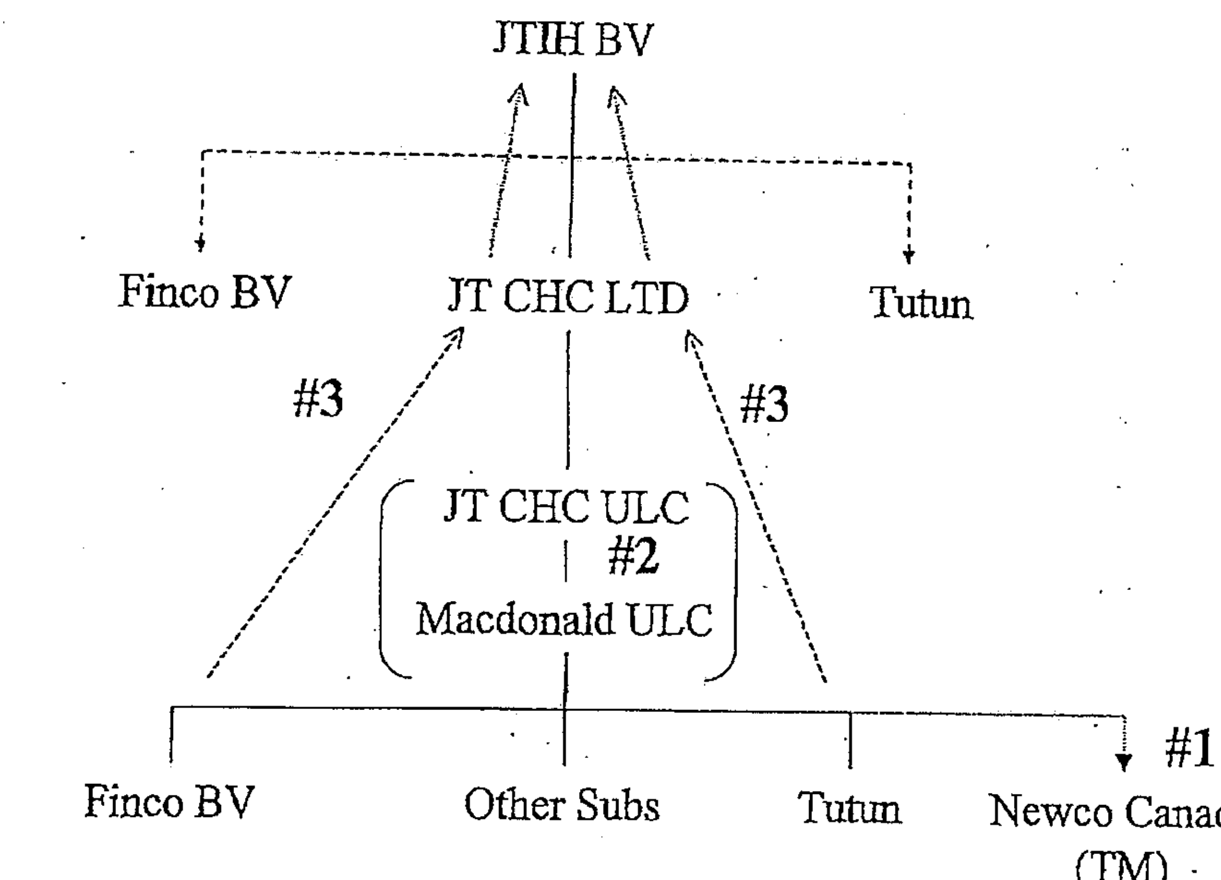
CANADA - LEVERAGING
- TRADEMARK HOLDING CORPORATION
- DISTRIBUTION OF SUBSIDIARIES

Leveraging



QUEBEC CLASS ACTIONS 500-06-00007. 33 AND 500-06-000076-980 CONFIDENTIAL

TRADEMARK HOLDING COMPANY AND DISTRIBUTION OF SUBSIDIARIES



#1 Macdonald ULC forms Newco Canada, and contributes trademarks at least three weeks before amalgamation of JT CHC ULC and Macdonald

#2 Amalgamation of JT CHC LTD and Macdonald ULC

#3 Macdonald distributes Finco BV and Tutun as ROC to JT CHC LTD, who distributes ROC on to JTIH BV

R.J. REYNOLDS INTERNATIONAL

MARK HAWLEY
Vice President Treasury & Tax

INTER-OFFICE CORRESPONDENCE

Date: July 2, 1999

To: AR File

cc: J. Koach

From: Mark Hawley

Subject: Modification to Canadian Restructuring

Please note that the attached modification needs to be made to the proposed restructuring in Canada.

Best Regards,

Mark K. Hawley

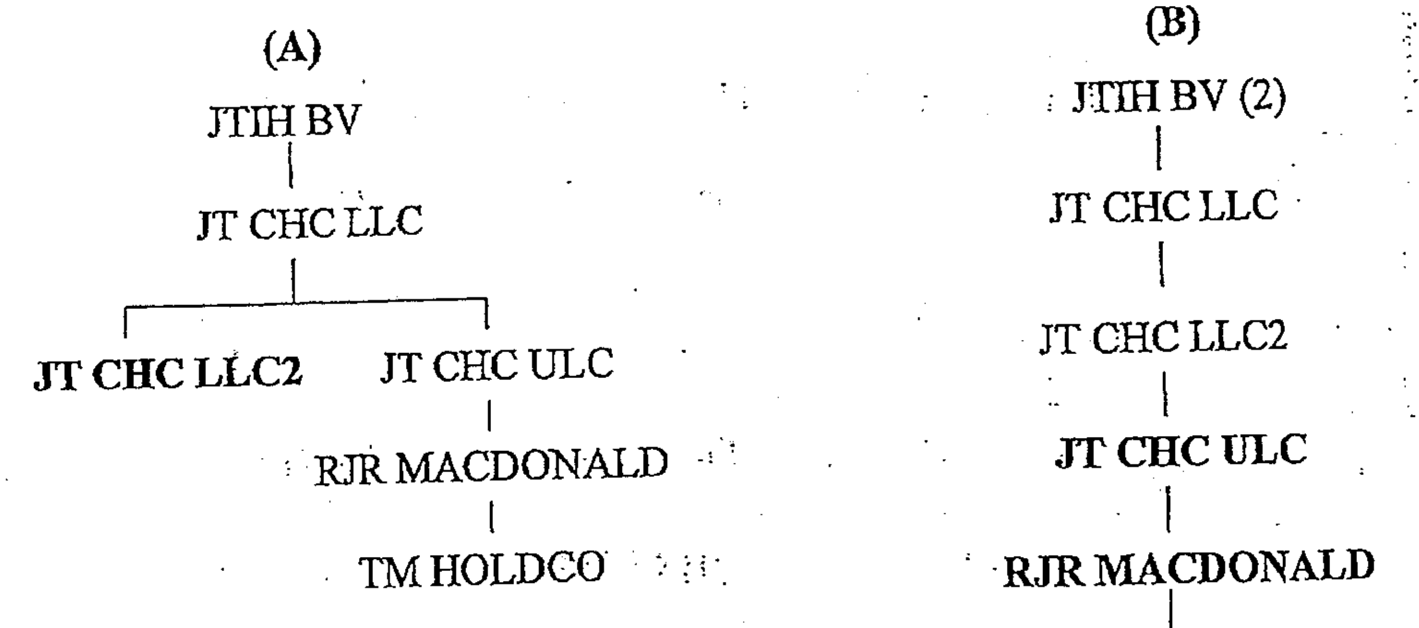
R.J. REYNOLDS INTERNATIONAL B.V. (HILVERSUM) GENEVA BRANCH
14, CHEMIN RIEU CH-1211 GENEVA 17 / SWITZERLAND
TELEPHONE 022/7030 441 TELEX 412 050 TELEFAX 022 / 7030 581

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

QUEBEC CLASS ACTIONS 500-06-00007 83 AND 500-06-000076-980 CONFIDENTIAL

CANADA TRADEMARKS

We need to establish a second JT Ca. Holdco LLC to make the case for the Trademark Holding Company. Commercially, it seems that we would want to do this, even if there were no tax benefit, to enhance protection of the trademarks.

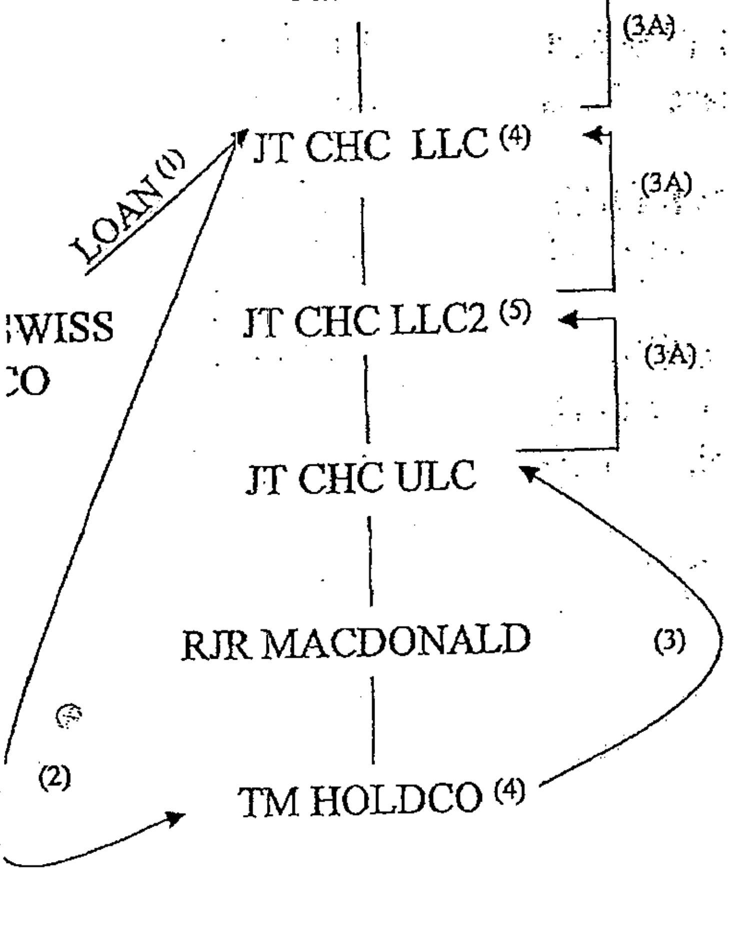


JT CHC LLC forms new wholly owned subsidiary, JT CHC LLC2.

JT CHC LLC contributes JT CHC ULC to JT CHC LLC2.

QUEBEC CLASS ACTIONS 500-06-000070-983 AND 500-06-000076-980 CONFIDENTIAL

CANADA TRADEMARKS



(1) Loan to JT CHC LLC from SwissCo. ($ 900 MM)

(2) Loan from JT CHC LLC to TM Holdco secured by assets ($ 1.2 B)

(3) Loan from TM Holdco to JT CHC ULC and begin redemptions of preferred (3A)

(4) In case of bankruptcy, first creditor of TM Holdco is JTIH BV, ahead of any 3rd party claims to assets

(5) All liabilities of ULCs flow thorough to JT CHC LLC2 but not to JT CHC LLC, so that JT CHC LLC is not subject to the liabilities of Macdonald

EXHIBIT “E”

This is Exhibit "E" referred to in the affidavit of Robert McMaster sworn before me, this 1st day of April 2019

[signature]

A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No. 04 CL 5530

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 JTI–MACDONALD CORP.

FOURTH REPORT OF THE MONITOR DATED FEBRUARY 16, 2005

BACKGROUND

1. On August 24, 2004, JTI-Macdonald Corp. ("JTI-M" or the "Applicant") filed for and obtained protection from its creditors under the Companies' Creditors Arrangement Act R.S.C. 1985. c. C-36, as amended (the "CCAA") pursuant to the Order of the Honourable Mr. Justice Farley dated August 24, 2004 (the "Initial Order"). Pursuant to the Initial Order, Ernst & Young Inc. ("EYI") was appointed as Monitor (the "Monitor") during this CCAA proceeding.

2. In connection with their litigation against the Applicant, certain of the stakeholders have claimed that certain transactions involving the Applicant and certain of its affiliates on or after the acquisition of the Applicant by the Japan Tobacco group of companies (the "JT Group") were undertaken with intent to defeat, hinder, delay or defraud the creditors of the Applicant. During discussions between the Monitor, the Applicant and its counsel, and counsel to certain of the stakeholders with respect to the development of a roadmap and tentative timetable to deal with claims against JTI-M, it was decided that it would facilitate such discussions if the Monitor were to analyze the Canadian aspects of the transactions undertaken in 1999 and 2000 following the acquisition by Japan Tobacco

Inc. of the world-wide tobacco businesses (except for the U.S. domestic tobacco business) of RJR Nabisco, Inc. and R.J. Reynolds Tobacco Company (collectively, "RJR Nabisco") (the "Integration Transactions") and report the facts of those transactions to this Honourable Court. It was also agreed that the Monitor's analysis would not involve any attempt to verify the underlying intentions of any of the parties involved in the Integration Transactions. In addition, the Monitor will report to this Honourable Court with respect to the validity and registrations of certain security granted by JTI-M to its affiliates.

3. Capitalized terms not defined in the Report are as defined in the Initial Order. All references to dollars are in Canadian currency unless otherwise noted.

TERMS OF REFERENCE

4. In discussions between the Monitor and counsel to the Attorney General of Canada and the Minister of Revenue of Quebec with respect to the scope of the Monitor's analysis of the Integration Transactions, it was agreed that the Monitor's analysis would be restricted to reporting the facts of the transactions that occurred and the primary documentation underlying those transactions. Accordingly, in analyzing the Integration Transactions the Monitor has relied on unaudited company-prepared financial information, company records and discussions with management of the Applicant and certain of its affiliates (collectively "Management") The Monitor has not performed an audit or other verification of such information.

5. In summarizing the Integration Transactions, the Monitor has reported the comments from Management relating to the rationale for those transactions. Where Management indicates that certain transactions resulted in a reduction of corporate income and capital taxes, the Monitor has engaged its affiliate Ernst & Young LLP ("EYLLP") to comment on whether those transactions are consistent with typical tax planning practice. However, neither the Monitor nor its counsel, ThorntonGroutFinnigan LLP ("TGF"), has conducted any formal examinations of Management or employees or made any attempt to search for documentary evidence that might corroborate or contradict Management's comments.

PRIOR INVOLVEMENT OF ERNST & YOUNG

6. During 1999 and 2000, EYLLP and Ernst & Young LLP ("EY UK"), a limited liability partnership registered in England and Wales that is an affiliate of Ernst & Young LLP and a member firm of Ernst & Young International, were engaged by Japan Tobacco Inc. ("Japan Tobacco") and certain of its affiliates to provide tax consulting services. The Monitor has been advised by EY UK that services provided by EY UK involved analyzing the global tax structure of the JT Group and making recommendations to Japan Tobacco on post-acquisition tax structuring in a number of countries, including Canada. EYLLP's services were subcontracted by EY UK after Japan Tobacco had made the decision to transfer the Non-Core Subsidiaries (as defined below) to a non-Canadian affiliate of Japan Tobacco (as discussed in greater detail in paragraphs 29 to 32 and 37 below) for the sole purposes of recommending a structure for the transfer so it could occur without triggering an additional income tax liability and preparing the ruling request submitted to the Canada Revenue Agency ("CRA") (as described in paragraphs 34 and 37 below) to confirm the validity of that proposed tax structure.

7. To ensure the independence of the Monitor's analysis of the Integration Transactions, the EYLLP personnel selected to assist the Monitor in its analysis are individuals who had no involvement with the limited tax planning services described above, and the Monitor and EYLLP have established an internal firewall to prevent communication between those personnel and the EYLLP personnel who were involved with the previous tax planning services. In addition, EY UK has had no involvement with the Monitor's mandate in this proceeding, including the preparation of this Report.

8. This Report does not, and is not intended to, take any position on the ultimate tax effectiveness of the transactions undertaken with involvement from EY UK and EYLLP. The Monitor (with the assistance of EYLLP) does, however, comment on the extent to which certain of the transactions undertaken by the companies are consistent with typical corporate tax optimization strategies.

MONITOR'S ANALYSIS OF INTEGRATION TRANSACTIONS

Comments on Presentation

9. Due to the complexity of the Integration Transactions and the number of legal entities involved and in order to facilitate the review of this Report by this Honourable Court and by the stakeholders, the Monitor has presented this Report in two separate documents: the main body of the Report, in which the Monitor has provided general descriptions of the major components of the Integration Transactions and Management's stated rationale for those transactions, and a separate book of appendices containing (a) as Appendix 1, the current corporate chart of the Applicant, indicating the current ownership and debt structure of the Applicant and its Canadian affiliates (collectively, including predecessor corporations, the "JT Canada Group"), (b) as Appendix 2, a glossary of the Monitor's abbreviations for the relevant corporations and financial instruments involved in the Integration Transactions, and (c) as Appendices 3-10, detailed descriptions of the individual transactions, including graphical representations and descriptions of the underlying documentation, in approximate chronological order.

Background to Japan Tobacco Purchase and Pre-Purchase/Purchase Transactions (Appendix 3)

10. On March 9, 1999, RJR Nabisco Holdings Corp. announced that RJR Nabisco had entered into a definitive agreement to sell the international tobacco business (that is, the tobacco business operating outside the United States and including U.S. duty free business) of its subsidiary R.J.R. Tobacco International Holdings B.V. and other entities and businesses (collectively "RJRTI") to Japan Tobacco for total proceeds of approximately $8 billion U.S. According to the 1998 Form 10K of RJR Nabisco Holdings Corp., RJRTI's international tobacco business manufactured tobacco products in 23 owned and joint-venture locations outside the United States, including Canada, Andorra, China, the Czech Republic, Finland, Germany, Hong Kong, Indonesia, Kazakhstan, Malaysia, Mexico, Puerto Rico, Poland, Portugal, Romania, Russia, Spain, Switzerland, Tanzania, Tunisia, Turkey, Ukraine and Vietnam. Management has advised the Monitor that RJRTI and its affiliates carried on business in more than 100 countries.

11. Management of the Applicant and of the JT Group have indicated that the sale of RJRTI's international tobacco business was effected through a competitive bid process involving most of the world's major tobacco manufacturers and that neither Japan Tobacco nor most other industry participants perceived Japan Tobacco as the front-runner in that process. Management indicates that, as a result, at the time Japan Tobacco's bid was accepted Japan Tobacco had not undertaken detailed planning with respect to the desired capital structure of the acquisition in the approximately one hundred countries in which RJR Nabisco's international tobacco operations carried on business. Management also indicates that once Japan Tobacco's bid had been accepted it was under considerable time pressure to close the transaction (this complex international transaction closed May 11, 1999, approximately 60 days after the date the master purchase agreement was executed) and was therefore again unable to plan and implement the optimal capital and operating structure prior to closing. Instead, the purchase was effected using a capital structure that allowed, in Japan Tobacco's view, maximum flexibility for subsequent recapitalization.

12. Management has advised that the basic elements of the corporate structure established for the acquisition of RJRTI's Canadian operations were effected by RJR Nabisco and its subsidiaries prior to closing and Management advises that it understands that a primary purpose of that structure was to optimize the tax benefit to RJR Nabisco. In particular, RJR-Macdonald Inc., the primary Canadian operating subsidiary of RJRTI, was continued from the Canada Business Corporations Act into Nova Scotia and transformed into an unlimited liability company ("ULC") under the Nova Scotia Companies Act, becoming RJR-Macdonald Corp. ("RJR-M"). Management indicates that under U.S. tax legislation a subsidiary that is a ULC can be treated as a branch for U.S. income tax purposes rather than a separate legal entity, allowing its parent to claim foreign tax credits for the Canadian tax previously paid by the ULC. Accordingly, Management indicates that this step was effected to allow RJR Nabisco to offset U.S. taxes payable on the gain for U.S. income tax purposes on the sale of its international tobacco operations with foreign tax credits with respect to the Canadian income tax previously paid by RJR-M. The acquisition agreement between Japan Tobacco and RJR Nabisco required Japan Tobacco to maintain this structure for at least two years after the acquisition.

13. Management has indicated that, although the acquisition of RJR Nabisco's international tobacco operations by Japan Tobacco was governed by a master agreement of purchase and sale between Japan Tobacco and RJR Nabisco, they each caused their respective subsidiaries to enter into individual agreements of purchase and sale with respect to the shares of RJR Nabisco's subsidiaries which generally owned the international operations and assets of businesses carried on in specific countries or regions. The value attributed by RJR Nabisco and Japan Tobacco to RJR-M and its subsidiaries was established based on an independent appraisal obtained by RJR Nabisco from Deloitte & Touche LLP ("D&T") that estimated the combined value of RJR-M and its subsidiaries at U.S. $2.24 billion at March 9, 1999.

14. In order to effect the acquisition of RJR-M, Japan Tobacco's indirect subsidiary JT International Holding B.V. ("JTIH-BV") created two new subsidiaries: (a) JT Canada LLC Inc. ("JTLLC"), and (b) JT Nova Scotia Corporation ("JT Nova Scotia"). JTLLC is a limited liability company incorporated under Nova Scotia law in April 1999 with nominal capital and further capitalized on May 11, 1999 by issuing common shares and redeemable preference shares to JTIH-BV for consideration of a mutual agreement to hold the benefit of U.S. $2.24 billion in a bank account in trust for JTLLC. JT Nova Scotia is a direct subsidiary of JTLLC that is a ULC under Nova Scotia law. JT Nova Scotia was incorporated on 9 April 1999 with nominal capital and further capitalized on May 11, 1999 by issuing common shares and preference shares to JTLLC for consideration of the assignment of the benefit of the above-mentioned U.S. $2.24 billion in trust. Details of these transactions are provided in Appendix 3a. Management has advised the Monitor that JTLLC and JT Nova Scotia were capitalized in part with redeemable preference shares in order to allow flexibility in adjusting the capital structure of the Canadian operations after the acquisition.

15. Prior to the closing of the acquisition, Japan Tobacco and JT Nova Scotia entered into an agreement under which Japan Tobacco assigned the right to acquire RJR-M to JT Nova Scotia and JT Nova Scotia, as consideration for that assignment, agreed to purchase the shares of RJR-M from RJR Nabisco's indirect subsidiary RJR Tobacco International Holding III B.V. for consideration of U.S. $2.24 billion. JT Nova Scotia acquired the

shares of RJR-M on May 11, 1999, using the U.S. $2.24 billion held in trust. Details of these transactions are provided in Appendix 3b.

Transfer of Trademarks and Implementation of Secured Debt Structure (Appendix 4)

16. As mentioned above, Management has indicated to the Monitor that, due to timing considerations, Japan Tobacco was unable to establish a capital structure for RJRTI's Canadian operations prior to the acquisition that, in addition to other business purposes, would allow Japan Tobacco to optimize its overall international tax burden. In particular, Management indicates that, because Canada has a high corporate tax rate relative to other major industrialized countries, given adequate time before closing Japan Tobacco would have put in place debt financing to fund part of the purchase price of the Canadian operations rather than the all-equity financing used by Japan Tobacco for the acquisition in order to benefit from the tax-deductibility of the interest paid on the debt component.

17. Management has advised the Monitor that subsequent to the acquisition Japan Tobacco also determined that additional adjustments could be made to the corporate structure and asset ownership of the JT Canada Group for business purposes which would have the effect of further reducing the income and capital taxes of the corporate group. Specifically, after the closing of the purchase from RJR Nabisco, Japan Tobacco decided to cause JTI-M to transfer its trademarks to a newly-created subsidiary that carried on business in Quebec, and to recapitalize the Canadian operations to replace the preferred shares issued prior to closing with debt.

(a) Transfer of Trademarks

18. On September 1, 1999 RJR-M incorporated a new subsidiary, JTI-Macdonald TM Corp. ("JTI-TM"), a Nova Scotia ULC. On October 8, 1999 RJR-M transferred its trademarks (the "Trademarks") to JTI-TM in exchange for common shares of JTI-TM. RJR-M and JTI-TM elected to treat the transaction as a rollover under subsection 85(1) of the Income Tax Act ("ITA") resulting in no tax payable by RJR-M on the transfer. JTI-TM, which carries on business only in Quebec, then entered into a licensing agreement with RJR-M whereby RJR-M was granted a non-exclusive worldwide license to use the Trademarks in

exchange for a royalty payable semi-annually. Details of these transactions are provided in Appendix 4a.

19. Japan Tobacco obtained a valuation from D&T that valued the brand equity of RJR-M at $1.2 billion at March 9, 1999. "Brand equity" is indicated by the D&T report to include "the total value of all attributes and qualities implied by [RJR-M's] brand names." The report further clarifies that the attributes and qualities represent the brands' ability to shift demand from competing brands to RJR-M's brands and are supported by RJR-M's distribution channels, marketing intelligence and the performance characteristics of its products. The Monitor notes that, based on this description and the valuation approach adopted by D&T as described in its report, the value of RJR-M's brand equity may be greater than the value that might have been attributed to the trademarks alone. However, without access to the source data used by D&T and the performance of separate valuation procedures, the Monitor can neither confirm this conclusion nor estimate the amount, if any, by which the value of RJR-M's trademarks might have differed from the value of its brand equity.

20. Management has advised the Monitor that the transfer of the trademarks to JTI-TM and the concurrent licensing of those trademarks back to RJR-M had two primary tax implications. First, in calculating their taxable capital, corporations benefit from an allowance for shares of subsidiaries that reduces their taxable capital. The transfer of the trademarks to a subsidiary allowed RJR-M to reduce its annual capital tax liability by approximately $5 million but did not result in a corresponding increase in capital taxes in JTI-TM because, for capital tax purposes, the value of the trademark asset in JTI-TM is the $1 amount of the elected proceeds under the subsection 85(1) rollover. Second, because JTI-TM carries on business only in Quebec, which has a slightly lower combined federal/provincial corporate tax rate than other provinces, the gradual monetization of the value of the trademarks via payment of royalties from RJR-M to JTI-TM achieved a small reduction in the overall effective income tax rate of the Canadian operations. EYLLP has confirmed that, in complex corporate structures, intangible assets are often transferred and licensed in this manner, resulting in reduced taxes payable by the corporate group as a whole.

(b) Recapitalization of Canadian Operations

21. Prior to the recapitalization of the Canadian operations to include a debt component, JTLLC incorporated a new subsidiary, JT Canada LLC II Inc. ("JTLLC II"), a limited liability company under the laws of Nova Scotia. JTLLC then transferred its shares of JT Nova Scotia to JTLLC II in exchange for common shares and for redeemable preference shares of JTLLC II. Management has expressed its opinion to the Monitor that the corporate structure effected via these transactions is a typical holding company structure where a ULC is involved. Details of these transactions are provided in Appendix 4b.

22. Management has indicated to the Monitor that the amount of interest-bearing debt to be included in the revised capital structure of the Canadian operations was determined taking into consideration (a) the thin capitalization rules in the ITA and (b) the expected income and debt service capacity of JTI-M. EYLLP confirms that the thin capitalization rules under the ITA prohibit the deductibility of interest on non-resident related-party debt generally where the ratio of such debt to shareholders' equity of the taxpayer exceeds a specified ratio (at the time of the recapitalization the specified ratio was 3:1). Management has indicated that, based on the expected shareholders' equity of JTLLC, the top company in the Canadian corporate structure and the one that would ultimately be the debtor of the non-resident debt, at the end of 1999 the maximum amount of non-resident related-party debt under the thin capitalization rules was estimated to be approximately $1.3 billion. However, Management selected the lower debt level of $1.2 billion based on the projected profitability of JTI-M.

23. The recapitalization of the Canadian operations occurred on November 23, 1999 by JT International B.V. ("JTI-BV"), a direct subsidiary of JTIH-BV incorporated under the laws of the Netherlands, borrowing $1.2 billion as an overnight loan from ABN AMRO Bank N.V. ("ABN AMRO"), a third-party financial institution, and making a secured advance of $1.2 billion to JTLLC. JTLLC then made a secured advance of $1.2 billion to JTI-TM and JTI-TM made a secured advance of $1.2 billion to JT Nova Scotia. Details of these transactions are provided in Appendix 4c. JT Nova Scotia then returned capital

of $1.2 billion to JTLLC II via a purchase of redeemable preference shares for cancellation, with JTLLC II similarly returning capital of $1.2 billion to JTLLC and JTLLC similarly returning capital of $1.2 billion to JTIH-BV via a purchase of redeemable preference shares for cancellation on November 23, 1999. JTIH-BV then advanced the funds to JTI-BV, details of which advance were not reviewed by the Monitor, and JTI-BV repaid the overnight loan to ABN AMRO. Details of these transactions are provided in Appendix 4d.

24. On January 1, 2000 the $1.2 billion secured loan owed by JTLLC to JTI-BV was transferred by JTI-BV to JT International S.A. ("JTI-SA"), a wholly-owned subsidiary of JTIH-BV. Details of this transaction were not reviewed by the Monitor.

25. The monies owed by JT Nova Scotia to JTI-TM are evidenced by debentures (the "JTI-TM Term Debentures") that are due November 18, 2024, are redeemable at the option of JTI-M as successor to JT Nova Scotia as a result of an amalgamation (discussed below) and convertible into special preference shares of JTI-M at the option of the holder, and are secured by a Deed of Hypothec dated November 23, 1999 held by the Trust Company of Bank of Montreal ("Trustco") as the attorney for JTI-TM. The JTI-TM Term Debentures bear interest at the rate of 7.76% per annum calculated semi-annually. Blended principal and interest payments of $46.7 million are due on November 18 and May 18 of each calendar year until maturity.

26. The monies owed by JTI-TM to JTLLC are evidenced by debentures (the "JTLLC Term Debentures") that are due May 18, 2032, are redeemable at the option of JTI-TM and convertible into special preference shares of JTI-TM at the option of the holder, and are secured by a Deed of Hypothec dated November 23, 1999 held by Trustco as the attorney for JTLLC and a General Security Agreement dated November 23, 1999. The JTLLC Term Debentures bear interest at the rate of 7.635% per annum calculated semi-annually. Blended principal and interest payments of $49.9 million are due on November 18 and May 18 of each calendar year until maturity. Management indicates that the differences between the interest rates and amortization terms of the JTI-TM Term Debentures and the JTLLC Term Debentures are based on arm's-length terms and particularly the concept

that an entity that borrows and re-loans money will re-loan the money at a higher rate than it pays on its own borrowings.

27. EYLLP indicates that international tax planning for an organization with profitable Canadian operations would typically involve a substantial debt component in Canada, because of Canada's comparatively high corporate income tax rate, and that, accordingly, a recapitalization of the Canadian operations to introduce a debt component would not be unusual.

28. The thin capitalization rules under the ITA are based on a maximum debt-to-equity ratio. EYLLP indicates that CRA is typically willing to allow the deduction of interest on related-party debt, provided the taxpayer is within the thin capitalization rules and the interest rate charged on the related-party debt is reasonably consistent with the interest rate that would typically be charged on a similar loan by a third-party lender. Because unsecured debentures would have greater credit risk, an unsecured third-party debt investor would typically charge a higher interest rate than on a secured instrument, meaning that JT Nova Scotia (and, subsequently, the Applicant) could potentially have had the benefit of a larger corporate income tax deduction on the same face value of debt if the JTI-TM Term Debentures were unsecured. Had JTI-M been capitalized in this manner, however, CRA might have taken the position that, considering the amount of debt, the level of leverage and the litigation risk inherent in the tobacco industry, only a secured third-party lender would have been willing to advance these amounts to JTI-M, and that therefore the terms of unsecured related-party debt at a higher interest rate were de facto not arm's-length terms. As a result, JTI-M might have been denied a deduction for a portion of the interest paid on the unsecured debt.

Issuance of Non-Core Note (Appendix 5)

29. At the date of the acquisition by JT Nova Scotia, RJR-M had two significant subsidiaries that were not part of the Canadian tobacco business of RJRTI (collectively, the "Non-Core Subsidiaries"):

(a) R.J. Reynolds International Finance B.V. ("RJR Finco"), a company incorporated in the Netherlands and whose name was subsequently changed to JT International

Finance B.V. on July 26, 1999. According to Management, the primary activity of RJR Finco, prior to the Japan Tobacco acquisition, was investment in debt and holding equity securities of other companies in RJRI's international tobacco business. Management has advised the Monitor that RJR Finco was originally positioned as a subsidiary of RJR-M so that the operating cash flow of RJR-M could be used to provide funding to RJR Finco, which would then advance those funds to other RJRTI subsidiaries, but that the concept ultimately proved unworkable because of adverse Canadian income tax consequences in RJR-M. EYLLP confirms that, in general, for taxation years beginning in 2000, the Canadian tax treatment of "second-tier financing structures," such as the RJR Finco concept, became significantly less favourable and, depending on the facts, could result in a Canadian parent company in such a structure having deemed interest income for Canadian tax purposes on loans made by a non-resident subsidiary finance company to other affiliates; and

(b) R.J. Reynolds Tutun Sanayi A.S. ("RJR Tutun"), a company incorporated in Turkey. Management has advised the Monitor that RJR Tutun was originally positioned as a subsidiary of RJR-M because RJR Tutun was building a new manufacturing facility and the strong cash flow from the Canadian operations was used to finance that construction. Management has advised the Monitor that the construction was completed prior to the acquisition by Japan Tobacco.

30. The valuation of RJR-M and its subsidiaries obtained by RJRI from D&T and referenced above included RJR Finco and RJR Tutun and valued those entities (including their respective subsidiaries) at U.S. $0.87 billion and U.S. $0.17 billion respectively. The audited financial statements of Finco and Tutun for the year ended December 31, 1998 are summarized in the chart below.

($U.S. millions)

	RJR Finco	RJR Tutun
Balance Sheet (Dec 31/98)		
Cash	$ -	$ 18.5
Inventories	-	60.0
Loans to affiliates (Note 1)	358.1	10.8
Equity investments in affiliate (Note 2)	325.0	-
Property, plant & equipment	-	87.3
Other assets	0.2	0.5
TOTAL ASSETS	$683.3	$177.1
Loans from affiliates (Note 3)	$355.9	$ 9.7
Other liabilities	0.8	61.4
Shareholders' Equity	326.6	106.0
TOTAL LIABILITIES AND EQUITY	$683.3	$177.1
Income Statement		
Revenues	$53.5	$132.1
Expenses	34.2	124.6
Net Income	$19.3	$ 7.5

Note 1 – RJR Finco balance consists of loans due from six affiliated companies, most notably a U.S. $331.1 million loan to R.J. Reynolds International B.V., which was renamed following the acquisition by Japan Tobacco to become JTI-BV

Note 2 – RJR Finco balance consists of 99.99% equity interest in R.J. Reynolds Tobacco GmbH

Note 3 – RJR Finco balance consists of loans due to nine affiliated companies, most notably R.J. Reynolds Tobacco GmbH (U.S. $97.7 million) and R.J. Reynolds Overseas Finance Co. N.V. (U.S. $98.2 million)

31. Management has advised the Monitor that Japan Tobacco decided it would be appropriate to transfer the Non-Core Subsidiaries to a non-Canadian subsidiary of Japan Tobacco for the purpose of (a) in the case of RJR Finco, a Dutch company, aligning it as a subsidiary of JTIH-BV, another Dutch company, so that its assets could be deployed without triggering the kinds of adverse income tax consequences described in paragraph 29(a) above, and (b) in the case of RJR Tutun, reducing the complexity of Japan Tobacco's worldwide tax planning by repositioning RJR Tutun closer to its ultimate parent company rather than several subsidiaries deep in the corporate structure. In order to transfer ownership of the Non-Core Subsidiaries to a non-Canadian affiliate without triggering taxable capital gains in RJR-M, Management developed a structured series of

transactions for the transfer and requested and obtained an advance ruling in August 1999 from the CRA confirming that no income or capital gains would be triggered for tax purposes as a result of the transactions contemplated.

32. The first phase of the transfer of the Non-Core Subsidiaries was effected on November 23, 1999 by JT Nova Scotia returning capital to JTLLC II via the purchase of redeemable preference shares for cancellation in exchange for the issuance of two unsecured demand promissory notes (the "Non-Core Notes") in the combined amount of $1.52 billion. Management indicates that the combined amount of the Non-Core Notes represents the estimated fair market value of the Non-Core Subsidiaries at or about 23 November 1999. JTLLC II and its parent JTLLC then returned capital to their respective parent companies via the purchase for cancellation of redeemable preference shares in exchange for the transfer of the Non-Core Notes with the result that the $1.52 billion principal amount of the Non-Core Notes was ultimately owed by JT Nova Scotia to JTIH-BV. Details of these transactions are provided in Appendix 5. The remaining phase of the transfer was effected following the amalgamation of JT Nova Scotia with RJR-M and is discussed separately below.

Amalgamation of JT Nova Scotia with RJR-M (Appendix 6)

33. On November 27, 1999 JT Nova Scotia amalgamated with RJR-M to form the Applicant. Details of the amalgamation are provided in Appendix 6.

34. Management has advised that, on the amalgamation of RJR-M and JT Nova Scotia, RJR-M's investments in its subsidiaries were required, under generally accepted accounting principles, to be revalued to their fair values, as described in the Monitor's Third Report dated November 19, 2004. The amalgamation also allowed an election to be made for Canadian tax purposes that increased the adjusted cost base ("ACB") of the shares of the Non-Core Subsidiaries to their fair value at the time of the acquisition of RJR-M by the JT Group. The ACB increase was free of Canadian tax. This tax treatment was approved as part of the advance tax ruling mentioned in paragraph 39. EYLLP confirms that this is a typical tax planning technique.

35. An effect of the amalgamation was that the interest expense for the JTI-TM Term Debentures was in the primary legal entity where the operating profits from the Canadian tobacco business were generated.

36. As a result of the amalgamation, the Applicant assumed JT Nova Scotia's $1.2 billion liability to JTI-TM for the JTI-TM Term Debentures and JT Nova Scotia's $1.52 billion liability to JTIH-BV under the Non-Core Notes. The amalgamation agreement provided that the rights of creditors of the predecessor corporations were unimpaired and that existing security agreements applied to the Applicant as if the original debts had been incurred and the original security agreements executed by the Applicant. In addition, on December 2, 1999 the Applicant executed an assumption agreement under which it expressly assumed the obligations of JT Nova Scotia under the JTI-TM Term Debentures and the related security agreements.

Transfer of Non-Core Subsidiaries in Satisfaction of Non-Core Note (Appendix 7)

37. On December 2, 1999, the Applicant transferred the shares of the Non-Core Subsidiaries to JTIH-BV in exchange for the extinguishment of the principal balance of the Non-Core Note. At the time the Non-Core Subsidiaries were transferred, their value had increased by approximately $9.2 million from the time the JTI Group acquired RJR-M, with the result that value exceeded ACB by approximately $9.2 million at December 2, 1999. This increase in value did not result in a gain subject to Canadian tax on the transfer of the Non-Core Subsidiaries on December 2, 1999 as the Non-Core Subsidiaries had sufficient exempt surplus (as defined in the ITA) to offset the $9.2 million gain by way of an election under subsection 93(1) of the ITA. EYLLP confirms that this is a typical tax planning technique. Details of these transactions are provided in Appendix 7.

Issuance of Additional Secured Debentures (Appendix 8)

38. Management has advised the Monitor that, by late 2000, it was apparent that the Applicant's financial performance was substantially better than Japan Tobacco had anticipated, due in large part to cigarette price increases initiated by the other Canadian tobacco manufacturers and adopted by JTI-M. The increased profitability resulted in the ability to service additional debt, which would result in a further reduction of the overall

Canadian tax burden of the JT Canada Group. Based on the projected profitability of JTI-M for 2001 and subsequent years, Management estimated the additional debt that could be supported at $410 million. However, a reduction of the thin capitalization limit from 3:1 to 2:1, effective in fiscal years beginning after 2000, had been announced in the 2000 federal budget and Management indicates that JTLLC already had a debt/equity ratio greater than 2:1 at December 31, 2000. Accordingly, it was not feasible for JTLLC to incur additional non-resident related-party debt. Instead, in December 2000 the Applicant and its affiliates undertook a series of transactions, discussed below, to introduce an additional $410 million of interest-bearing debt into the Canadian corporate structure using an alternative structure. Details of these transactions are provided in Appendices 8a through 8c.

39. On December 4, 2000 JTLLC incorporated a new wholly-owned subsidiary, JT International (BVI) Canada Inc. ("JTI-BVI"), in the British Virgin Islands as the first step in the new recapitalization transactions. JTI-BVI purchased from JTLLC, for consideration consisting of common shares of JTI-BVI, a nominal investment in a publicly-traded Ontario limited partnership to further evidence that it had a permanent establishment in Ontario.

40. On December 12, 2000 the Applicant borrowed $410 million as an unsecured overnight loan from ABN AMRO. The Applicant then returned capital of $410 million to JTLLC II via the purchase for cancellation of redeemable preference shares and JTLLC II similarly returned capital of $410 million to JTLLC.

41. JTLLC then advanced $410 million to JTI-M pursuant to secured demand debentures (the "Demand Debentures") and JTI-M used these monies to repay the overnight loan to ABN AMRO on December 13, 2000. The Demand Debentures are secured by a demand debenture dated December 13, 2000 and a Deed of Hypothec dated December 13, 2000 and Deed of Moveable Hypothec and Pledge of Shares dated December 13, 2000. Each of the hypothecs is held by Trustco as the attorney for JTLLC. The demand debentures are subordinated only to the JTI-TM Term Debentures and bear interest at LIBOR plus

0.5% payable semi-annually on June 13 and December 13. Details of the transactions described in paragraphs 38-40 are provided in Appendix 8a.

42. On December 13, 2000 JTLLC, JTI-TM and JTI-BVI entered into an agreement pursuant to which:

    (a) the Demand Debentures were assigned by JTLLC to JTI-TM;

    (b) as consideration for the assignment of the Demand Debentures, JTI-TM issued to JTLLC's subsidiary JTI-BVI a $410 million unsecured subordinated demand "specialty debt" bearing interest at LIBOR plus 0.375% payable semi-annually on June 13 and December 13; and

    (c) JTI-BVI issued a $410 million unsecured non-interest-bearing demand promissory note to JTLLC.

    Details of the agreement are provided in Appendix 8b.

43. A specialty debt is a debt issued under seal and has the unique characteristic that it is considered to be located where the physical document is located or, if the debt is pledged as security, in the location of the secured party. The specialty debt issued by JTI-TM to JTI-BVI is unsecured and the document was originally located in the British Virgin Islands. Management has advised the Monitor that, as a result, the interest earned by JTI-BVI on the debt was essentially subject only to Canadian federal income tax net of the 10% abatement available for taxable income earned in the year in a province.

44. EYLLP has advised the Monitor that the use of a foreign-incorporated entity such as JTI-BVI is normal for the type of tax structuring that was implemented.

45. On December 14, 2000, JTLLC surrendered to JTI-BVI for cancellation the $410 million promissory note owed by JTI-BVI in exchange for additional common shares of JTI-BVI and contributed surplus.

46. Management has advised the Monitor that the $410 million specialty debt held by JTI-BVI was physically located in the British Virgin Islands until January 2003, at which

time it was returned to Canada. The effect of returning the specialty debt to Canada was to increase the overall level of Canadian corporate income tax paid by JTI-BVI on the interest income earned thereon.

47. With respect to the security granted for the Demand Debentures, EYLLP notes that, consistent with its comments in paragraph 28, had the Demand Debentures been unsecured the interest charged could have been higher allowing the Applicant the benefit of either (a) a larger interest deduction on the same face value of debt, or (b) the same absolute interest expense on a smaller debenture face value.

Partial Repayment of $1.2 Billion Secured Loan by JTLLC (Appendix 9)

48. As noted above and as confirmed by EYLLP, for taxation years beginning after 2000 the maximum debt/equity ratio permissible for purposes of the thin capitalization rules under the ITA was reduced from 3:1 to 2:1. Management advises that as at December 31, 2000, JTLLC had total share capital and retained earnings of $594.8 million and owed interest-bearing debt of $1.2 billion to JTI-SA, a ratio of 2.02:1, meaning that it was necessary to reduce its interest-bearing debt owed to JTI-SA during 2001. In addition, Management indicates that a review of the Canadian operations had identified permanent surplus cash of $100 million in JTLLC and its subsidiaries and that Japan Tobacco wished to repatriate this cash for deployment in other operations.

49. The reduction in the balance owed to JTI-SA was effected on March 30, 2001 using a $51.0 million secured demand loan from JTI-M to JTLLC which, in turn, used the proceeds to repay a portion of the principal balance owed to JTI-SA. The secured demand loan bears interest at the lesser of 7.50% and LIBOR plus 0.5%, payable semi-annually on March 30 and September 30. In addition, on November 22, 2001 JTLLC returned capital of $49.0 million to JTIH-BV via a purchase for cancellation of redeemable preference shares using cash on hand in JTLLC. The partial repayment of the balance owed to JTI-SA, although partially offset by the reduction in share capital, was sufficient to reduce JTLLC's debt/equity ratio for purposes of the ITA thin capitalization rules below 2:1 for 2001. Details of these transactions are provided in Appendix 9.

Payment of Dividends and Related Intercompany Loans (Appendix 10)

50. During 2000 through 2003 certain dividends were paid between the Applicant and its affiliates. Management has indicated to the Monitor that the JT Canada Group generally declared and paid annual dividends up through the corporate structure to JTLLC equal to the surplus cash of the Canadian entities within corporate law limits. Management indicates that the intent of this policy was to optimize retained earnings in JTLLC, where the thin capitalization test is applied, and to provide JTLLC with flexibility to reinvest surplus cash in the Canadian operations or repatriate it. The Monitor notes that during 2000 through 2003 a substantial portion of the dividends paid up to JTLLC was reinvested in the Canadian operations via non-interest-bearing demand loans, as described in greater detail below.

51. On December 18, 2000 JTI-M made a $14.0 million unsecured non-interest-bearing demand loan to JTI-TM, which used the funds to pay a $14.0 million dividend to JTI-M. JTI-M then paid a $60.0 million dividend to JTLLC II which paid a $60.0 million dividend to JTLLC. JTLLC then made an unsecured $14.0 million non-interest-bearing demand loan to JTI-TM which used the loan proceeds to repay the demand loan owed to JTI-M. Details of these transactions are provided in Appendix 10a.

52. On December 19, 2001, JTLLC made a $17.5 million non-interest-bearing unsecured loan to JTI-TM. JTI-TM used part of the proceeds of that loan to pay a $15.5 million dividend to JTI-M. JTI-M then paid a $27.725 million dividend to JTLLC II which paid a $27.725 million dividend to JTLLC. After receipt of the dividend, JTLLC made a $30.0 million unsecured non-interest-bearing demand loan to JTI-M. Details of these transactions are provided in Appendix 10b.

53. On December 18, 2002, JTI-M received dividends of $1.1 million and $15.0 million, respectively, from its subsidiaries Export "A" Inc. and JTI-TM. Export "A" Inc. is currently inactive but it provided sponsorship and promotion services to RJR-M and JTI-M from 1989 until 2001 for an annual fee plus recovery of expenses. JTI-M then paid a $19.6 million dividend to JTLLC II which paid a $19.6 million dividend to JTLLC. In addition, JTI-BVI paid an $8.75 million dividend to JTLLC. After receipt of the

dividend, JTLLC made a $28.35 million unsecured non-interest-bearing demand loan to JTI-M. Details of these transactions are provided in Appendix 10c.

54. On December 15, 2003, JTLLC received a $9.6 million dividend from JTI-BVI. After receipt of the dividend, JTLLC made an $11.1 million unsecured non-interest-bearing demand loan to JTI-M. Details of these transactions are provided in Appendix 10d.

VALIDITY OF SECURITY REGISTRATIONS

55. The Monitor retained the services of Burchell MacDougall in Nova Scotia and has obtained an opinion dated February 7, 2005 with respect to the security governed by the laws of Nova Scotia, a copy of which opinion is annexed hereto as Appendix 11 (the "Nova Scotia Opinion"). TGF retained Mendelsohn in Quebec to provide an opinion with respect to the security governed by the laws of the Province of Quebec. The opinion of Mendelsohn is dated January 27, 2005, a copy of which is annexed hereto as Appendix 12 (the "Quebec Opinion").

56. As evidenced by the Nova Scotia Opinion and subject to the qualifications and assumptions therein, the following security constitutes valid and binding obligations of the debtor companies referenced therein and are enforceable in accordance with their respective terms:

(a) General Security Agreement dated November 23, 1999 granted by JTI-TM in favour of JTLLC;

(b) Demand Debenture No. 11 in the principal amount of $1,200,000,000.00 dated November 23, 1999 granted by JT Nova Scotia to JTI-TM;

(c) Demand Debenture No. 12 dated December 2, 1999 in the principal amount of $1,200,000,000.00 granted by JTI-M to JTI-TM; and

(d) Demand Debenture dated December 13, 2000 in the principal amount of $500,000,000.00 granted by JTI-M to JTLLC.

57. As evidenced by the Quebec Opinion and subject to the qualifications and assumptions therein, the following security documents constitute valid security on the assets which form the object thereof located in the Province of Quebec:

(a) Moveable Hypothec and Pledge of Shares dated November 23, 1999 granted by JTLLC to JTI-BV;

(b) Moveable Hypothec (Universality) dated February 12, 2001 granted by JTLLC to JTI-SA;

(c) Moveable Hypothec (Universality) dated March 30, 2001 granted by JTLLC to JTI-M;

(d) Moveable Hypothec and Pledge of Shares dated March 30, 2001 granted by JTLLC to JTI-M;

(e) Deed of Hypothec dated November 23, 1999 granted by JT Nova Scotia to Trustco;

(f) Supplemental Deed of Hypothec dated December 2, 1999 granted by JTI-M to Trustco;

(g) Deed of Movable Hypothec and Pledge of Shares dated December 12, 2000 granted by JTI-M to Trustco;

(h) Deed of Hypothec dated December 13, 2000 granted by JTI-M to Trustco;

(i) Deed of Movable Hypothec and Pledge of Shares dated December 13, 2000 granted by JTI-M to Trustco; and

(j) Deed of Hypothec dated November 23, 1999 granted by JTI-TM to Trustco.

58. Based on and subject to the foregoing, and the assumptions and qualifications contained therein TGF has rendered an opinion to the Monitor, a copy of which is annexed hereto as Appendix 13, that the security agreements referenced in the opinion create valid security interests in the right, title and interest of JTI-M in favour of the secured parties

named therein and such security interests have been perfected to the extent capable of perfection by registration in the Province of Ontario under the *Personal Property Security Act* (Ontario).

All of which is respectfully submitted by:

ERNST & YOUNG INC.
In its capacity as Court Appointed
Monitor of JTI-Macdonald Corp.

Per: Murray A. McDonald
President

Court File No. 04 CL 5530

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 JTI–MACDONALD CORP.

FOURTH REPORT OF THE MONITOR DATED FEBRUARY 16, 2005

LIST OF APPENDICES

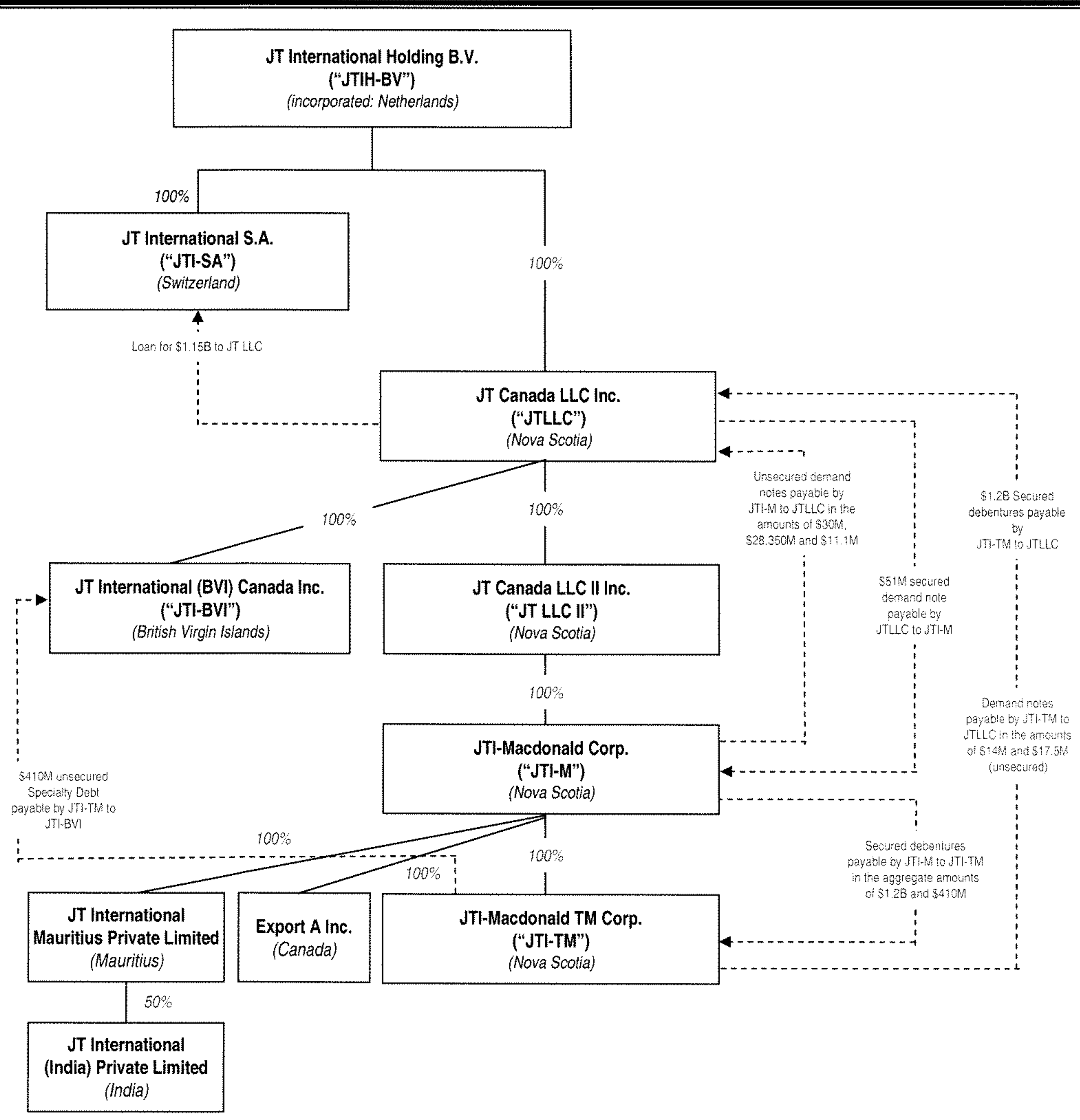
Appendix	Description
1	Corporate structure as at August 24, 2004
2	Glossary of significant abbreviations
3	
3a	Transactions prior to Japan Tobacco acquisition [May 11, 1999]
3b	Acquisition of RJR-Macdonald Corp. and subsidiaries [May 11, 1999]
4	
4a	Transfer of trademarks [September 1, 1999 to October 8, 1999]
4b	Incorporation of JTLLC II [September 1, 1999 to October 8, 1999]
4c	Recapitalization with $1.2 billion secured debt (slide #1 of 3) [November 23, 1999]
4d	Recapitalization with $1.2 billion secured debt (slide #2 of 3) [November 23, 1999 to November 24, 1999]
4e	Recapitalization with $1.2 billion secured debt (slide #3 of 3) [January 1, 2000]

Appendix	Description
5	Transfer of Non-Core Subsidiaries (Phase 1) [October 8, 1999 to November 23, 1999]
6	Amalgamation of JT Nova Scotia and RJR-M [November 27, 1999]
7	Transfer of Non-Core Subsidiaries (Phase 2) [December 2, 1999]
8	
8a	Issuance of $410 million secured debenture (slide #1 of 3) [December 4, 2000 to December 13, 2000]
8b	Issuance of $410 million secured debenture (slide #2 of 3) [December 13, 2000]
8c	Issuance of $410 million secured debenture (slide #3 of 3) [December 14, 2000]
9	Partial repayment of $1.2 billion secured debenture [March 30, 2001 to November 22, 2001]
10	
10a	Payment of December 2000 dividends [December 18, 2000]
10b	Payment of December 2001 dividends [December 19, 2001]
10c	Payment of December 2002 dividends [December 18, 2002]
10d	Payment of December 2003 dividends [December 15, 2003]
11	Opinion of Burchell MacDougall dated February 7, 2005 with respect to the security governed by the laws of Nova Scotia
12	Opinion of Mendelsohn dated January 27, 2005 with respect to the security governed by the laws of Quebec
13	Opinion of ThorntonGroutFinnigan dated February 15, 2005 with respect to the security governed by the laws of Ontario

JT Canada Group Corporate Structure

Corporate Structure as of August 24, 2004

Appendix 1



Court File No. 04 CL 5530

JTI–MACDONALD CORP.

APPENDIX 2 TO THE FOURTH REPORT OF THE MONITOR DATED FEBRUARY 16, 2005

GLOSSARY OF SIGNIFICANT ABBREVIATIONS

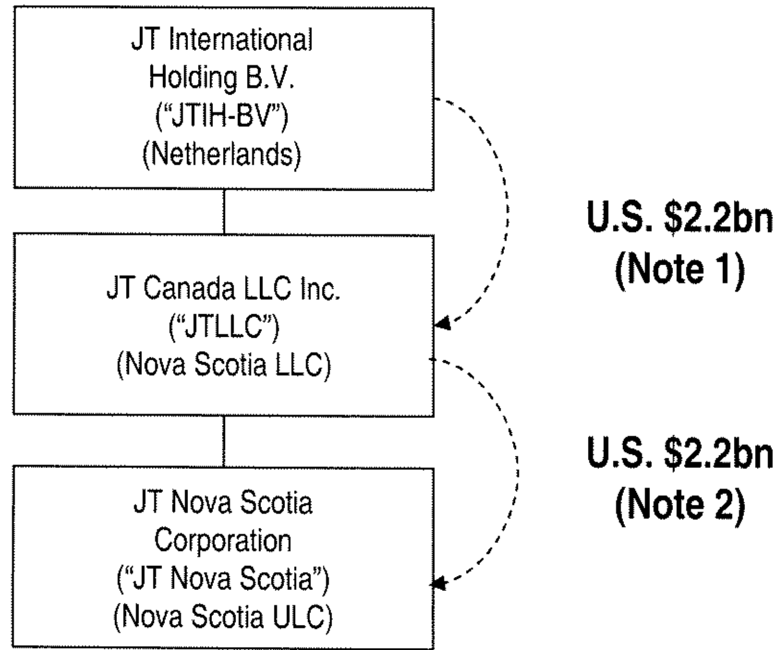
ABN AMRO	ABN AMRO Bank N.V., a third-party financial institution
CRA	Canada Revenue Agency
D&T	Deloitte & Touche LLP
Demand Debentures	The $410 million secured demand debentures payable by JTI-M to JTI-TM
ITA	*Income Tax Act*
Japan Tobacco	Japan Tobacco Inc., ultimate parent of JTI-M
JT Canada Group	JTI-M and its Canadian affiliates
JT Group	The Japan Tobacco group of companies
JT Nova Scotia	JT Nova Scotia Corporation, a predecessor corporation of JTI-M
JTI-BV	JT International B.V., a wholly-owned subsidiary of JTIH-BV
JTI-BVI	JT International (BVI) Canada Inc., direct subsidiary of JTLLC
JTIH-BV	JT International Holding B.V., parent company of JTLLC
JTI-M	JTI-Macdonald Corp.

JTI-SA	JT International S.A., a wholly-owned subsidiary of JTIH-BV
JTI-TM	JTI-Macdonald TM Corp., direct subsidiary of JTI-M
JTI-TM Term Debentures	The $1.2 billion secured debentures payable by JTI-M to JTI-TM
JTLLC	JT Canada LLC Inc., parent company of JTLLC II
JTLLC II	JT Canada LLC II Inc., parent company of JTI-M
JTLLC Term Debentures	The $1.2 billion secured debentures payable by JTI-TM to JTLLC
Non-Core Note	The $1.5 billion unsecured demand promissory note issued by JT Nova Scotia to JTLLC II as consideration for the redemption of preference shares
Non-Core Subsidiaries	RJR Finco and RJR Tutun collectively
RJRTI	R.J.R. Tobacco International Holdings B.V.
RJR Finco	RJR International Finance B.V., a wholly-owned subsidiary of RJR-M
RJR Nabisco	RJR Nabisco, Inc. and R.J. Reynolds Tobacco Company collectively
RJR Tutun	R.J. Reynolds Tutun Sanayi A.S., a wholly-owned subsidiary of RJR-M
RJRI	R.J. Reynolds International, former owner of the international tobacco business of RJR Nabisco
RJR-M	RJR-Macdonald Corp., a predecessor corporation of JTI-M

JTI–Macdonald Corp.
Monitor's Fourth Report

Transactions Prior to Japan Tobacco Acquisition

Appendix 3a
May 11, 1999



Appendix 3a

Note 1

JT Canada LLC Inc. was incorporated on April 9, 1999 as a limited liability company under the laws of Nova Scotia by issuing one common share for $1 and was further capitalized on May 11, 1999 as follows:

- Issued 999,999 common shares with paid-up capital (PUC) of $1,004,353 to its parent company JT International Holding B.V.

- Issued 3,238,814,802 preferred shares with PUC of $3,252,914,120 to JT International Holding B.V.

Consideration for the issuance of the shares was a direction and mutual agreement between JT International Holding B.V. and Japan Tobacco Inc. for Japan Tobacco Inc. to hold the benefit of U.S. $2,238,678,000 in a bank account in trust for the benefit of JT Canada LLC Inc.

Note 2

JT Nova Scotia Corporation was incorporated on April 9, 1999 as an unlimited liability corporation under the laws of Nova Scotia by issuing one common share for $1 and was further capitalized on May 11, 1999 as follows:

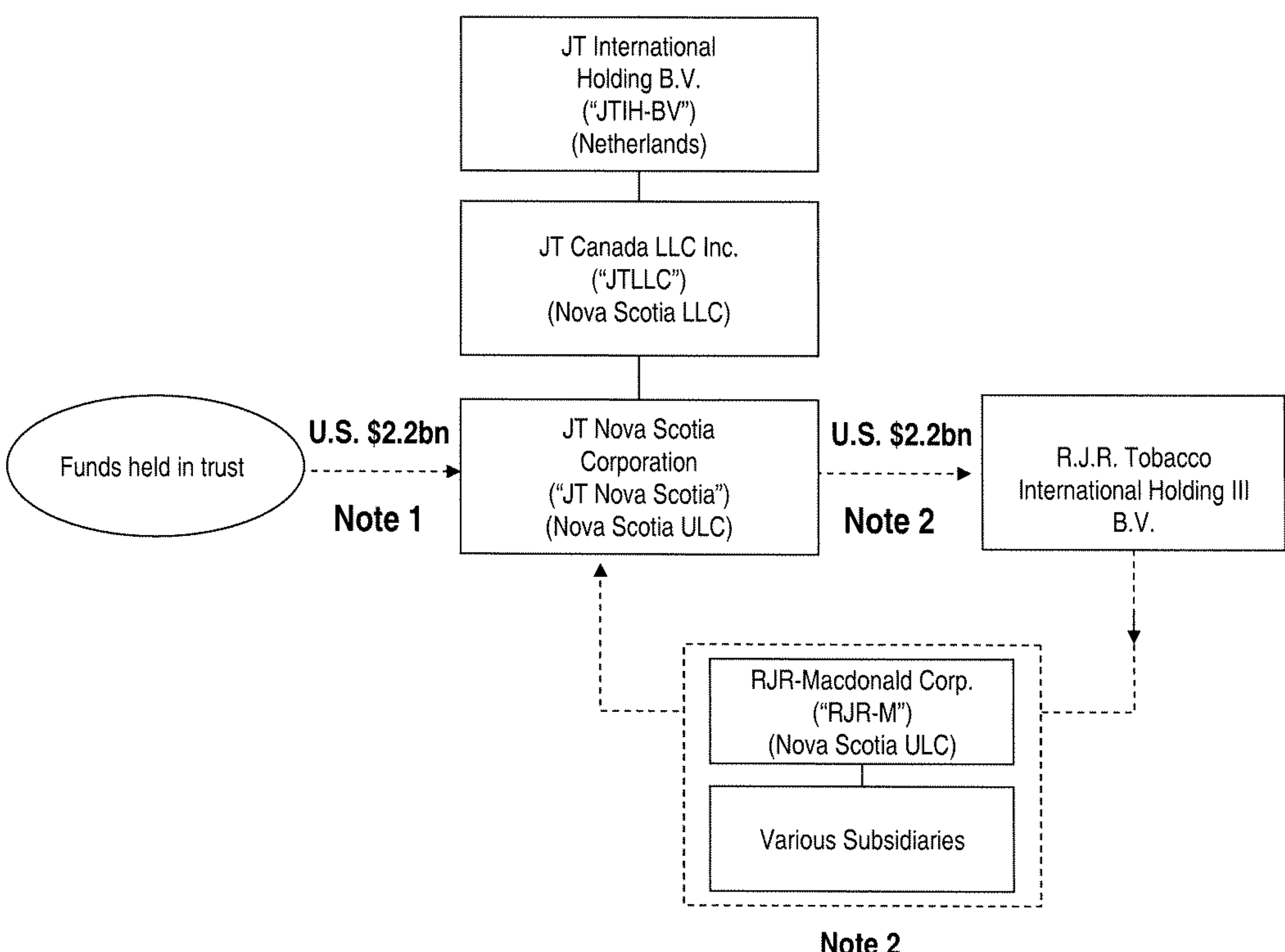
- Issued 999,999 common shares with paid-up capital (PUC) of $1,004,353 to its parent company JT Canada LLC Inc.

- Issued 3,238,814,802 preferred shares with PUC of $3,252,914,120 to JT Canada LLC Inc.

Consideration for the issuance of the shares was the assignment by JT Canada LLC Inc. to JT Nova Scotia Corporation of the benefit of U.S. $2,238,678,000 held by Japan Tobacco Inc. in a bank account in trust for the benefit of JT Canada LLC Inc.

JTI–Macdonald Corp.
Monitor's Fourth Report
Acquisition of RJR-Macdonald Corp. and subsidiaries

Appendix 3b
May 11,1999



Appendix 3b

Note 1

On May 11, 1999, Japan Tobacco Inc. assigned the right to acquire 100% of the shares of RJR-Macdonald Corp. to JT Nova Scotia Corporation in exchange for the agreement by JT Nova Scotia Corporation to pay U.S. $2,238,678,000 to RJR Tobacco International Holding III B.V. for those shares.

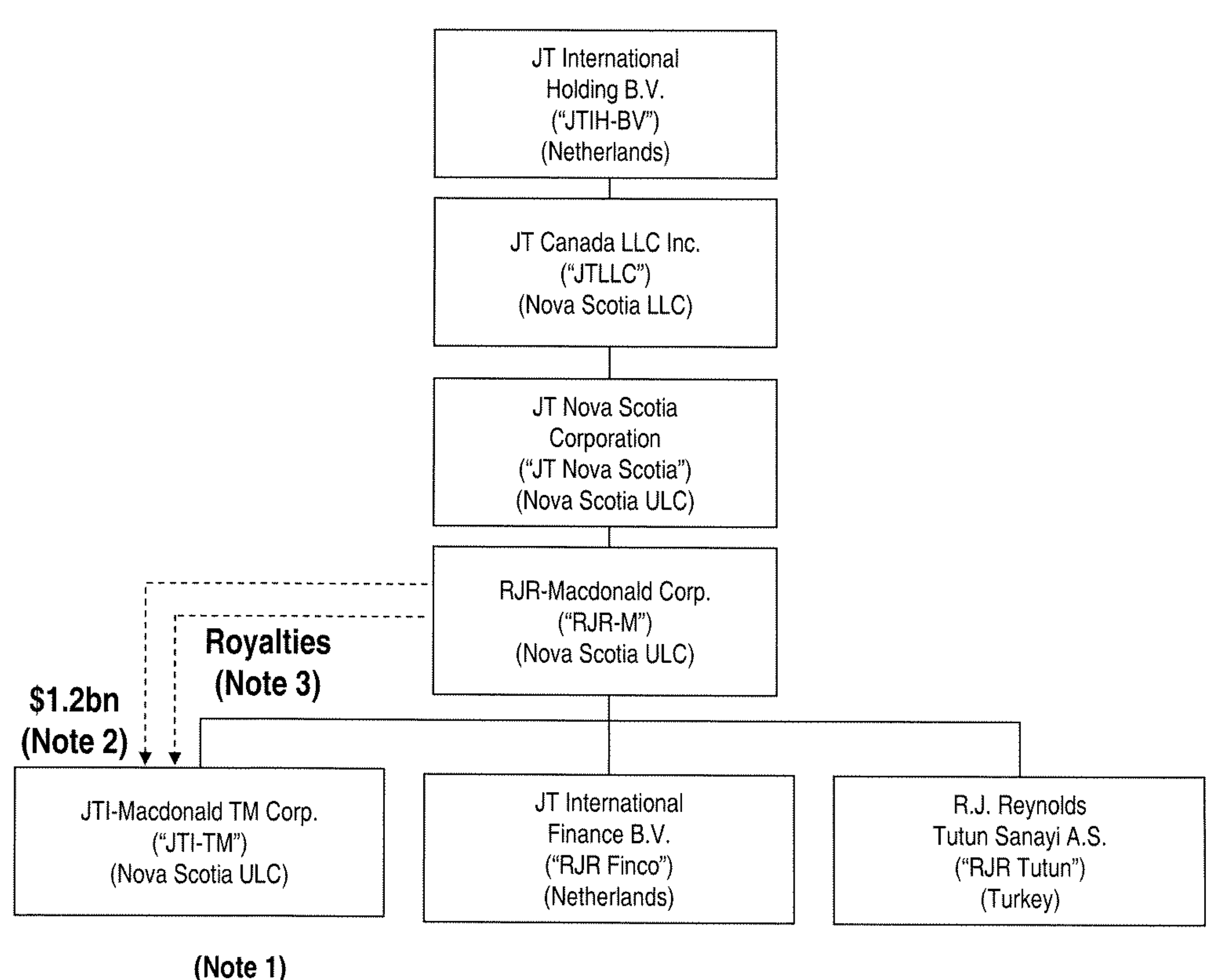
Note 2

On May 11, 1999, JT Nova Scotia Corporation authorized the release of U.S. $2,238,678,000, held by Japan Tobacco Inc. in a bank account in trust for the benefit of JT Canada LLC Inc. and assigned to JT Nova Scotia Corporation as noted in Appendix 3a, to RJR Tobacco International Holding III B.V. in exchange for 100% of the shares of RJR-Macdonald Corp.

JTI–Macdonald Corp.
Monitor's Fourth Report

Transfer of Trademarks

Appendix 4a
September 1, 1999 to October 8, 1999



Appendix 4a

Note 1

On September 1, 1999, RJR-Macdonald Corp. incorporated new subsidiary JTI-Macdonald TM Corp. with initial capitalization of one common share with nominal par value.

Note 2

On October 8, 1999, RJR-Macdonald Corp. assigned all of its trademarks to JTI-Macdonald TM Corp. in exchange for 1,000,000 common shares of JTI-Macdonald TM Corp. with an aggregate par value of $1 and a value of $1.2 billion, pursuant to section 85 of the *Income Tax Act*.

Note 3

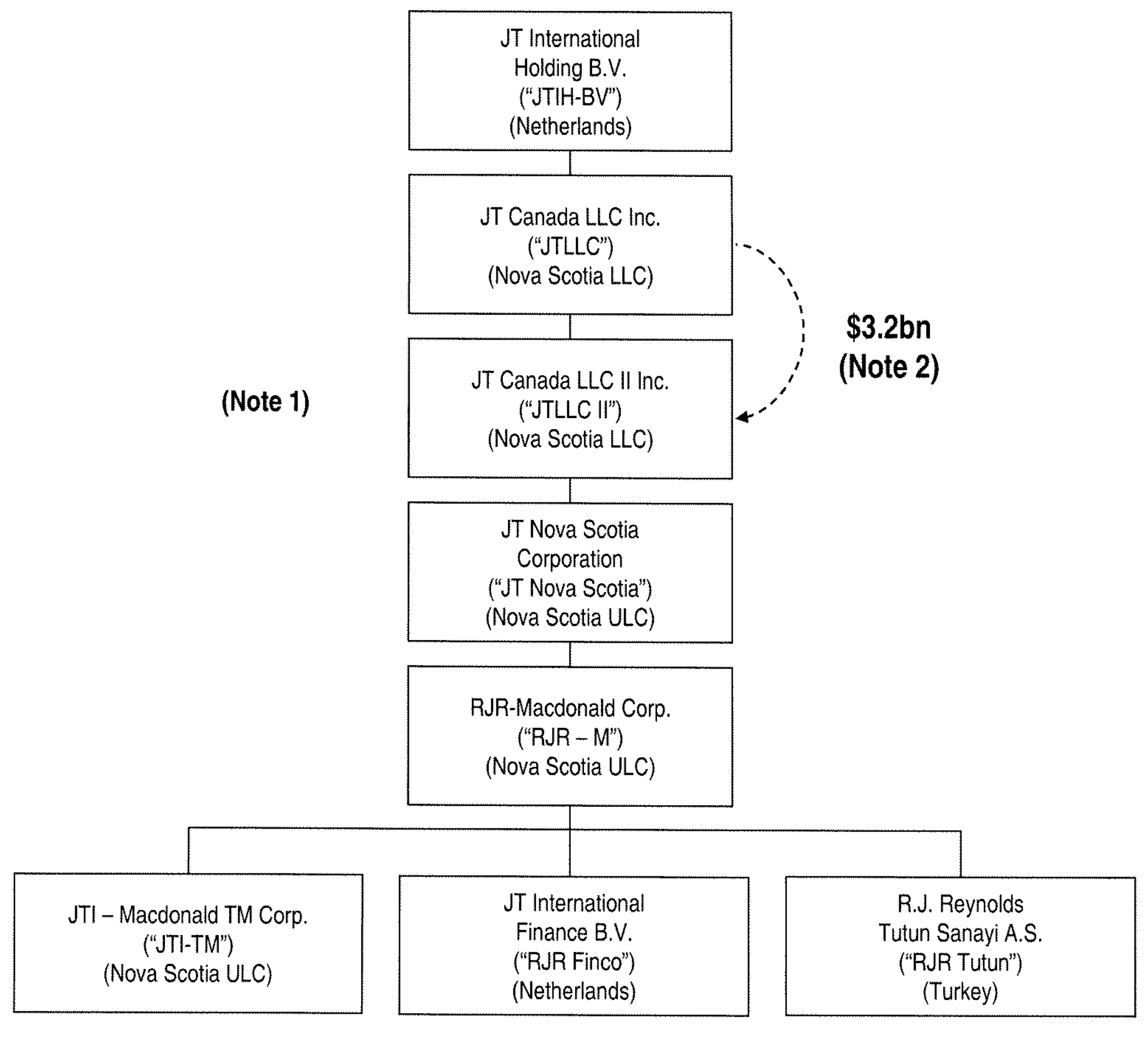
On October 8, 1999, RJR-Macdonald Corp. and JTI-Macdonald TM Corp. entered into a Trademark Licence Agreement pursuant to which RJR-Macdonald Corp. was granted a non-exclusive worldwide license to use the Trademarks in exchange for a royalty, payable twice annually, calculated with respect to net sales revenue from the products in question.

JTI–Macdonald Corp.
Monitor's Fourth Report

Appendix 4b

Incorporation of JTLLC II

September 1, 1999 to October 8, 1999



Appendix 4b

Note 1

On September 1, 1999, JT Canada LLC Inc. incorporated a new subsidiary, JT Canada LLC II Inc., with initial capitalization of one common share with nominal share capital.

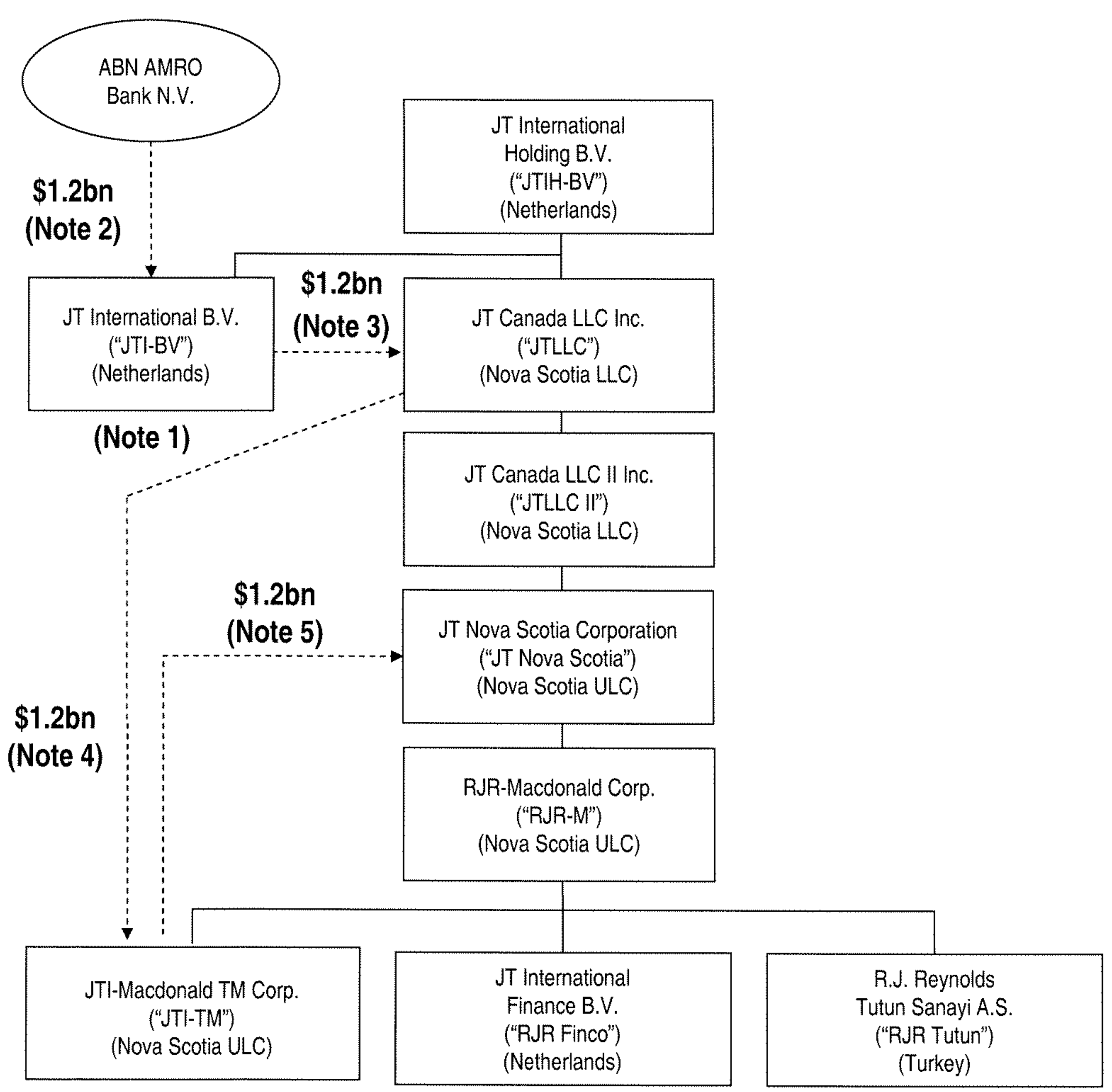
Note 2

On October 8, 1999, JT Canada LLC Inc. transferred its shares in JT Nova Scotia Corporation to JT Canada LLC II Inc. for consideration of 1,000,000 common shares and 3,238,814,802 redeemable preference shares of JT Canada LLC II Inc. valued at an aggregate amount of $3,263,228,141.

JTI–Macdonald Corp.
Monitor's Fourth Report

Appendix 4c

Recapitalization with $1.2bn secured debt (slide #1 of 3) **November 23, 1999**



Appendix 4c

Note 1

JT International B.V., a subsidiary of JT International Holding B.V., was formerly named R.J. Reynolds International B.V. and was renamed after it was acquired as part of Japan Tobacco Inc's purchase of the international tobacco operations of R.J.R. Tobacco International Holdings B.V. and related entities and businesses.

Note 2

On November 23, 1999, JT International B.V. borrowed $1.2 billion from ABN AMRO Bank N.V. Credit protection provided to ABN AMRO Bank N.V. consisted of a comfort letter from Japan Tobacco Inc., an acknowledgment of joint and several liability from JT International Holding B.V., and a pledge of $1.2 billion owned by JT International Holding B.V. and held on deposit with ABN AMRO Bank N.V.

Note 3

On November 23, 1999, JT International B.V. advanced $1.2 billion to JT Canada LLC Inc. secured by a Moveable Hypothec and Pledge of Shares dated November 23, 1999.

Note 4

On November 23, 1999, JT Canada LLC Inc. advanced $1.2 billion to JTI-Macdonald TM Corp. in exchange for $1.2 billion in 7.635% secured debentures due May 18, 2032. The debentures are convertible into special preference shares of JTI-Macdonald TM Corp. at the option of the holder, and are secured by a Deed of Hypothec dated November 23, 1999 and a general security agreement dated November 23, 1999.

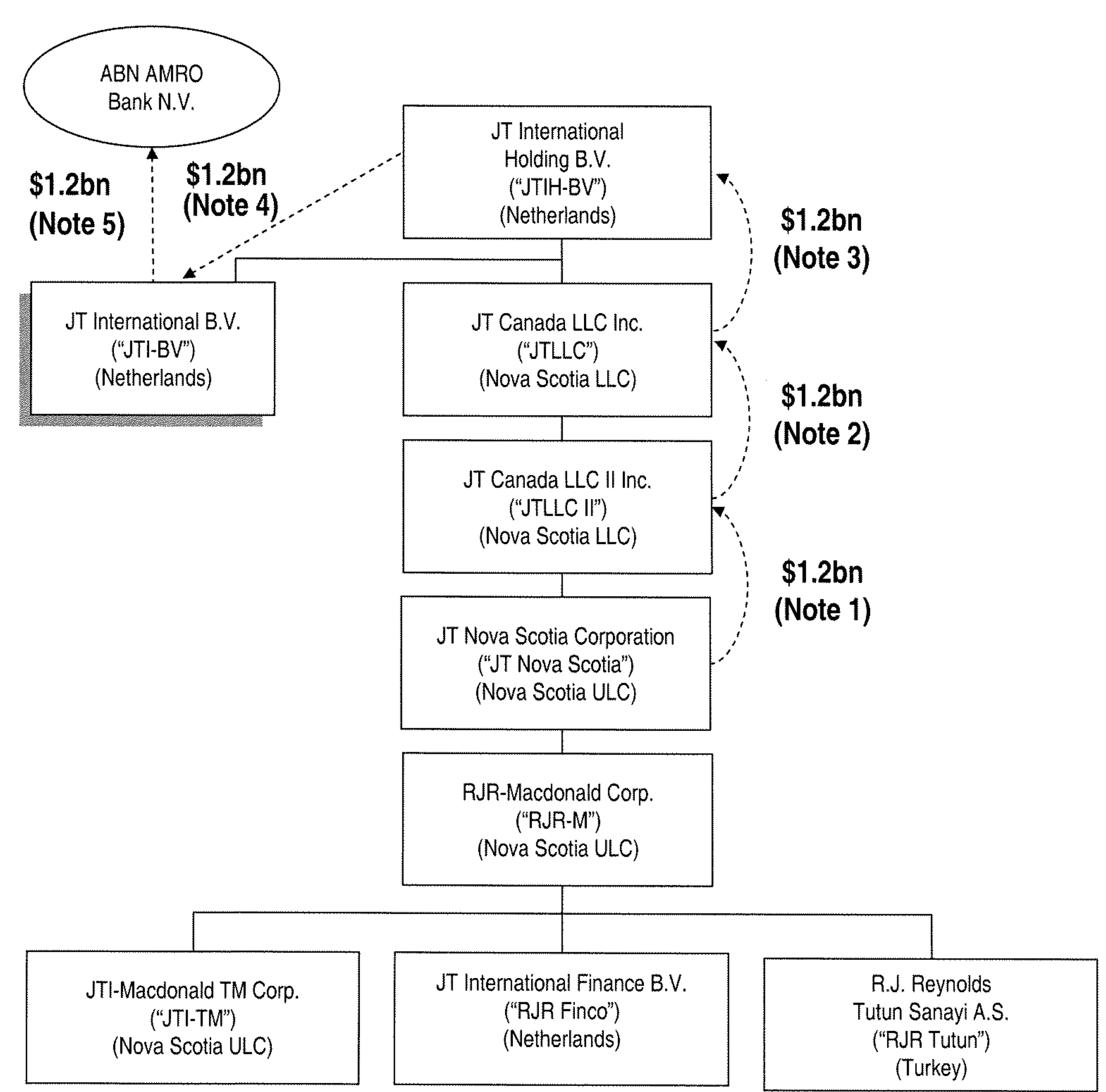
Note 5

On November 23, 1999, JTI-Macdonald TM Corp. advanced $1.2 billion to JT Nova Scotia Corporation in exchange for $1.2 billion in 7.76% secured debentures due November 18, 2024. The debentures are convertible into special preference shares of JTI-Macdonald Corp. (as successor corporation to JT Nova Scotia Corporation as a result of the amalgamation of RJR-Macdonald Corp. and JT Nova Scotia Corporation) at the option of the holder, and are secured by a Deed of Hypothec dated November 23, 1999.

JTI–Macdonald Corp.
Monitor's Fourth Report

Recapitalization with $1.2bn secured debt (slide #2 of 3)

Appendix 4d
November 23-24, 1999



Appendix 4d

Note 1

On November 23, 1999, JT Nova Scotia Corporation returned capital of $1.2 billion to JT Canada LLC II Inc. by purchasing 1,194,798,762 redeemable preference shares at par value for cancellation. Consideration for the purchase was cash of $1.2 billion. Capitalization of JT Nova Scotia Corporation after the purchase was as set out in the following table:

	Common shares	Preferred shares
Original Balance	1,000,000	3,238,814,802
October 8, 1999 purchase for cancellation (see Appendix 5)		-1,512,338,472
Balance before purchase on November 23, 1999		1,726,476,330
November 23, 1999 purchase for cancellation	-	-1,194,798,762
Balance after purchase	1,000,000	531,677,568

Note 2

On November 23, 1999, JT Canada LLC II Inc. returned capital of $1.2 billion to JT Canada LLC Inc. by purchasing 1,194,798,762 redeemable preference shares at par value for cancellation. Consideration for the purchase was cash of $1.2 billion. Capitalization of JT Canada LLC II Inc. after the purchase was as set out in the following table:

	Common shares	Preferred shares
Original Balance	1,000,001	3,238,814,802
October 8, 1999 purchase for cancellation (see Appendix 5)		-1,512,338,472
Balance before purchase on November 23, 1999		1,726,476,330
November 23, 1999 purchase for cancellation	-	-1,194,798,762
Balance after purchase	1,000,001	531,677,568

Note 3

On November 23, 1999, JT Canada LLC Inc. returned capital of $1.2 billion to JT International Holding B.V. by purchasing 1,194,798,762 redeemable preference shares at par value for cancellation. Consideration for the purchase was cash of $1.2 billion. Capitalization of JT Canada LLC Inc. after the purchase was as set out in the following table:

	Common shares	Preferred shares
Original Balance	1,000,000	3,238,814,802
Purchase for cancellation	-	-1,194,798,762
Balance after purchase	1,000,000	2,044,016,040

Note 4

On November 24, 1999, JT International Holding B.V. made a $1.2 billion loan to JT International B.V. Details of the loan have not been reviewed by the Monitor.

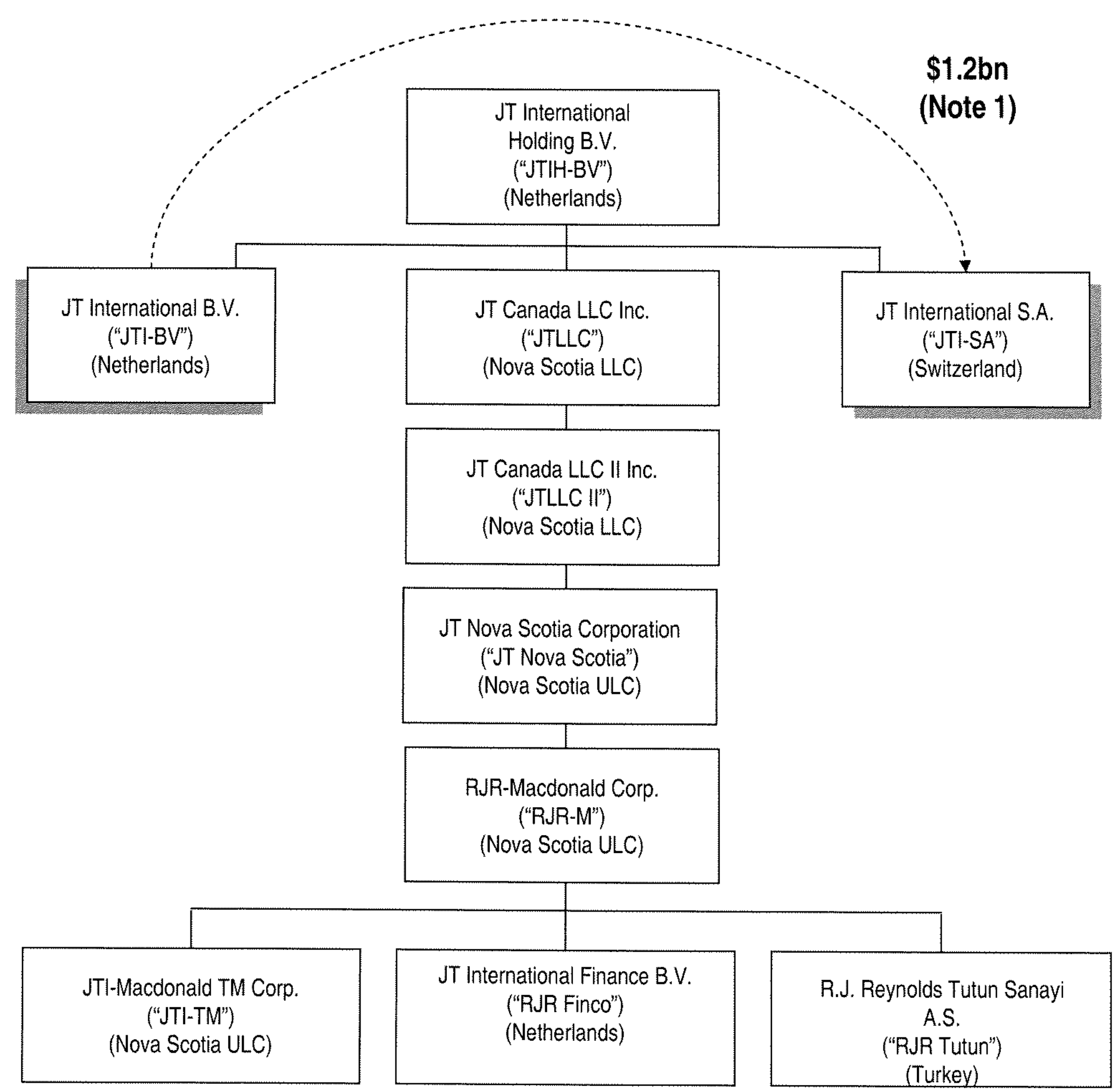
Note 5

On November 24, 1999, JT International B.V. repaid in full the $1.2 billion daylight loan from ABN AMRO Bank N.V.

JTI–Macdonald Corp.
Monitor's Fourth Report

Recapitalization with $1.2bn secured debt (slide #3 of 3)

Appendix 4e
January 1, 2000



Appendix 4e

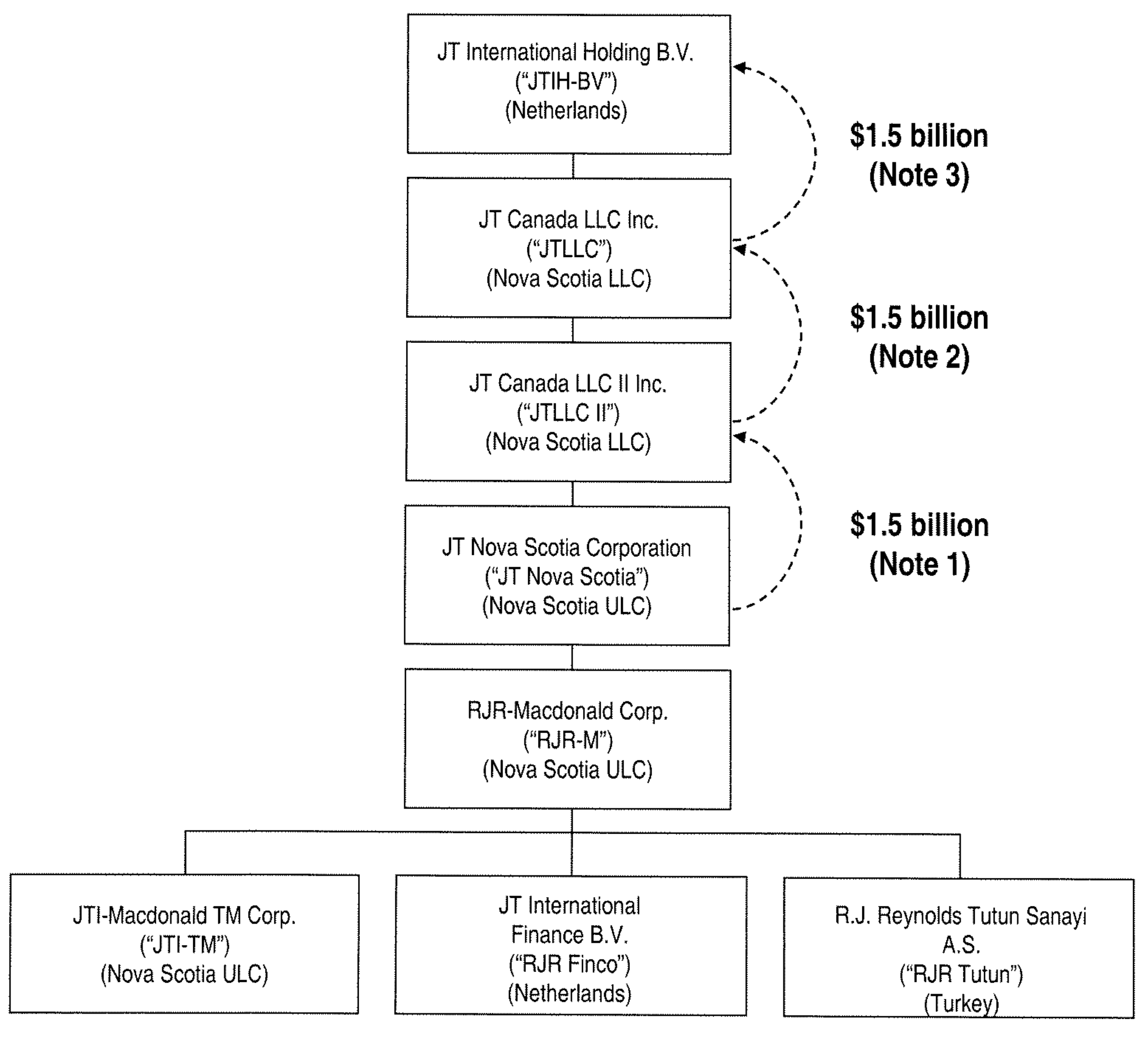
Note 1

On January 1, 2000, the $1.2 billion secured loan owed by JT Canada LLC Inc. to JT International B.V. was assigned by JT International B.V. to JT International S.A. Details of the consideration for the transfer have not been reviewed by the Monitor.

JTI–Macdonald Corp.
Monitor's Fourth Report

Transfer of Non-Core Subsidiaries (Phase I)

Appendix 5
October 8, 1999 to November 23, 1999



Appendix 5

Note 1

On October 8, 1999, JT Nova Scotia Corporation returned capital of $1.5 billion to JT Canada LLC II Inc. by purchasing 1,512,338,472 redeemable preference shares at par value for cancellation. Consideration for the purchase was two unsecured demand promissory notes with face values of $1,278,859,068 and $240,062,967, respectively. Capitalization of JT Nova Scotia Corporation after the purchase was as set out in the following table:

	Common shares	Preferred shares
Original Balance	1,000,000	3,238,814,802
Purchase for cancellation	-	-1,512,338,472
Balance after purchase	1,000,000	1,726,476,330

Note 2

On October 8, 1999, JT Canada LLC II Inc. returned capital of $1.5 billion to JT Canada LLC Inc. by purchasing 1,512,338,472 redeemable preference shares at par value for cancellation. Consideration for the purchase was an assignment of two unsecured demand promissory notes owed by JT Nova Scotia Corporation with face values of $1,278,859,068 and $240,062,967, respectively. Capitalization of JT Canada LLC II Inc. after the purchase was as set out in the following table:

	Common shares	Preferred shares
Original Balance	1,000,001	3,238,814,802
Purchase for cancellation	-	-1,512,338,472
Balance after purchase	1,000,001	1,726,476,330

Note 3

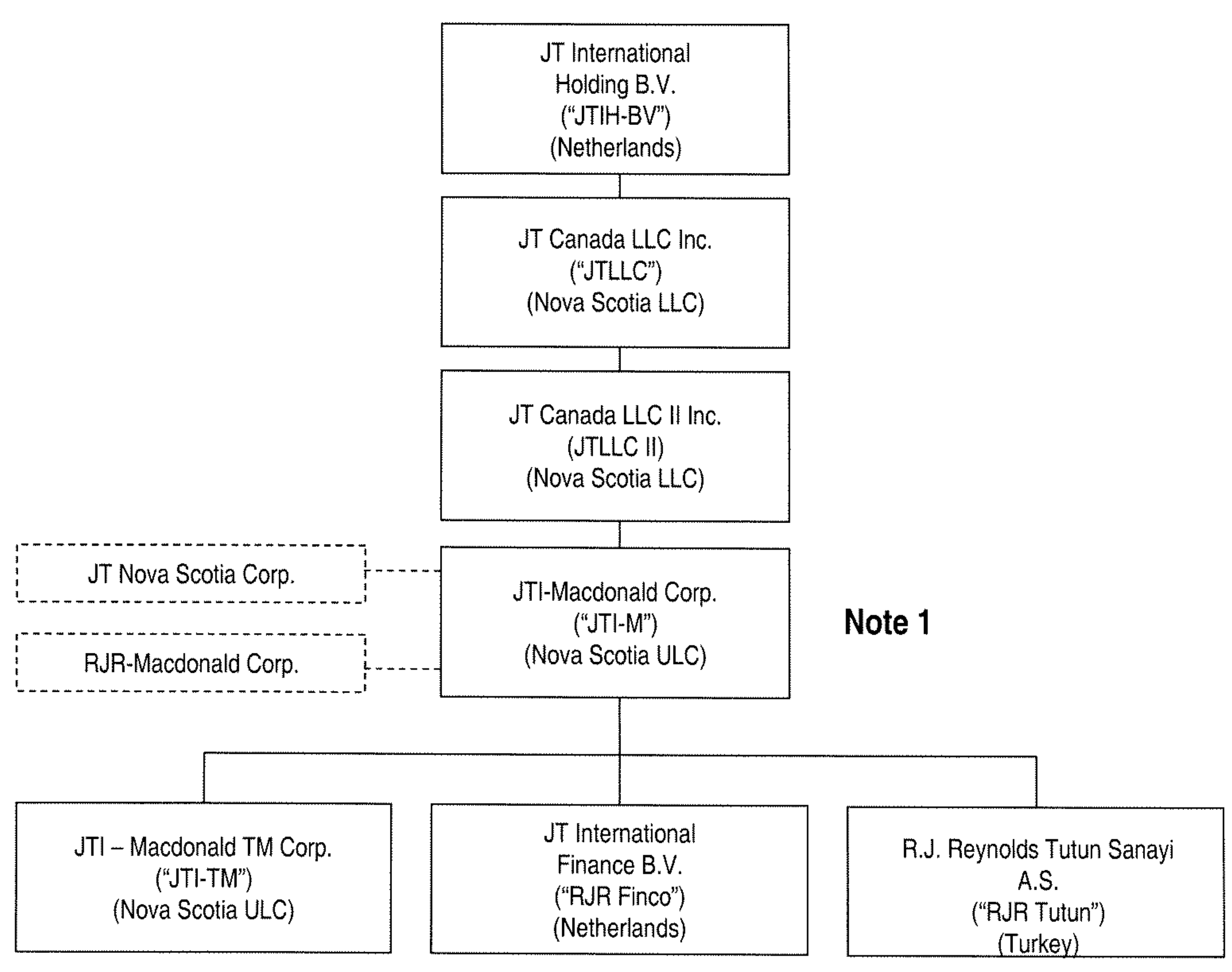
On November 23, 1999, JT Canada LLC Inc. returned capital of $1.5 billion to JT International Holding B.V. by purchasing 1,512,338,472 redeemable preference shares at par value for cancellation. Consideration for the purchase was an assignment of two unsecured demand promissory notes owed by JT Nova Scotia Corporation with face values of $1,278,859,068 and $240,062,967, respectively.

Capitalization of JT Canada LLC Inc. after the purchase was as set out in the following table:

	Common shares	Preferred shares
Balance before purchase	1,000,000	2,044,016,040
Purchase for cancellation	-	-1,512,338,472
Balance after purchase	1,000,000	531,677,568

JTI–Macdonald Corp.
Monitor's Fourth Report
Amalgamation of JT Nova Scotia and RJR-M

Appendix 6
November 27, 1999



Appendix 6

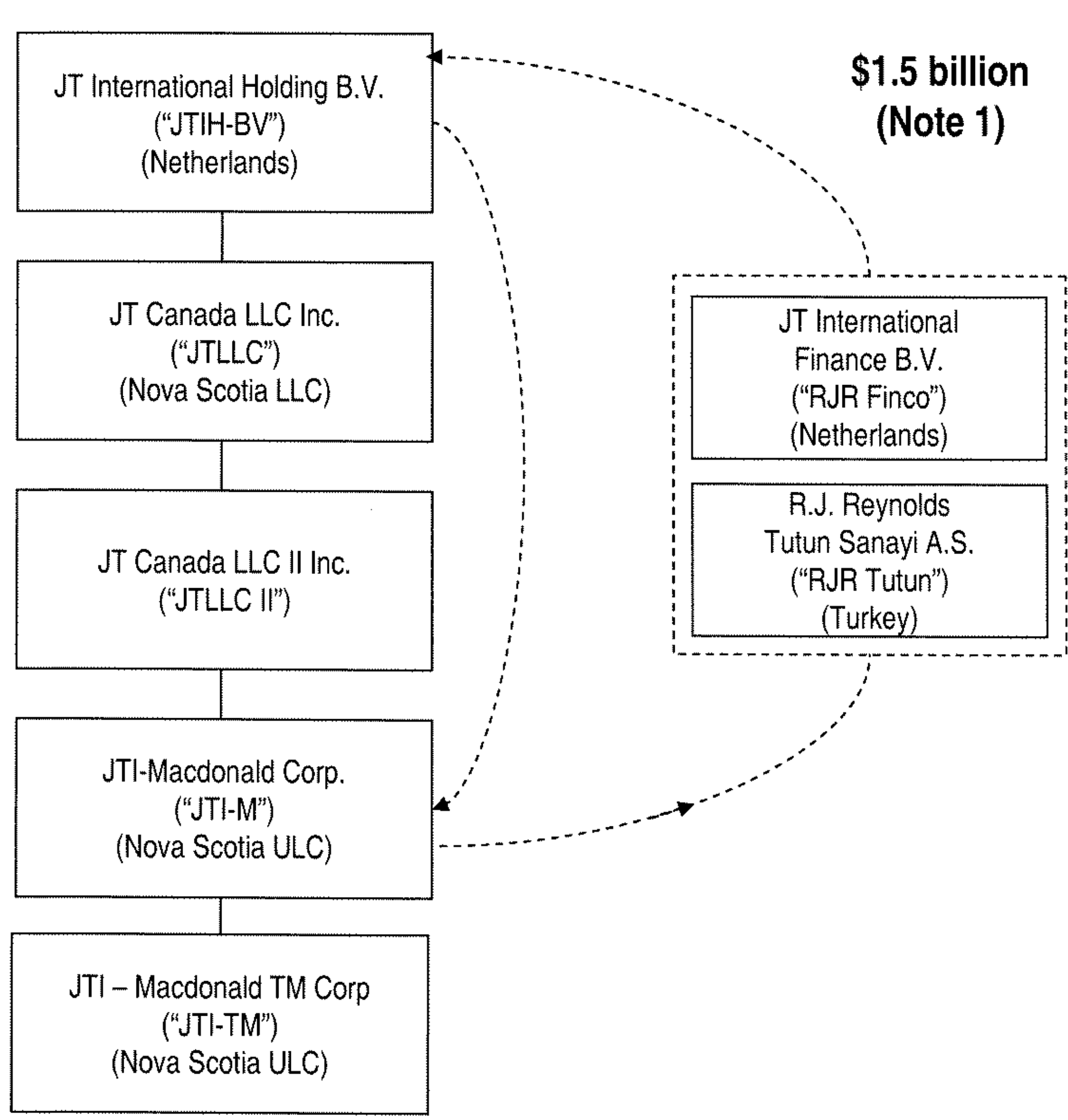
Note 1

Effective as of November 27, 1999, JT Nova Scotia Corporation amalgamated with RJR-Macdonald Corp. under the laws of Nova Scotia to form JTI-Macdonald Corp. The amalgamation agreement specifies that the rights of pre-amalgamation creditors are unimpaired, and that the claims of those creditors attach to JTI-Macdonald Corp. as if those debts had been incurred directly by JTI-Macdonald Corp. In addition, on December 2, 1999 the Applicant executed an assumption agreement under which it expressly assumed the obligations of JT Nova Scotia Corporation under the JTI-Macdonald TM Corp. Demand Debentures and the related security agreements.

JTI–Macdonald Corp.
Monitor's Fourth Report

Transfer of Non-Core Subsidiaries (Phase 2)

Appendix 7
December 2, 1999



Appendix 7

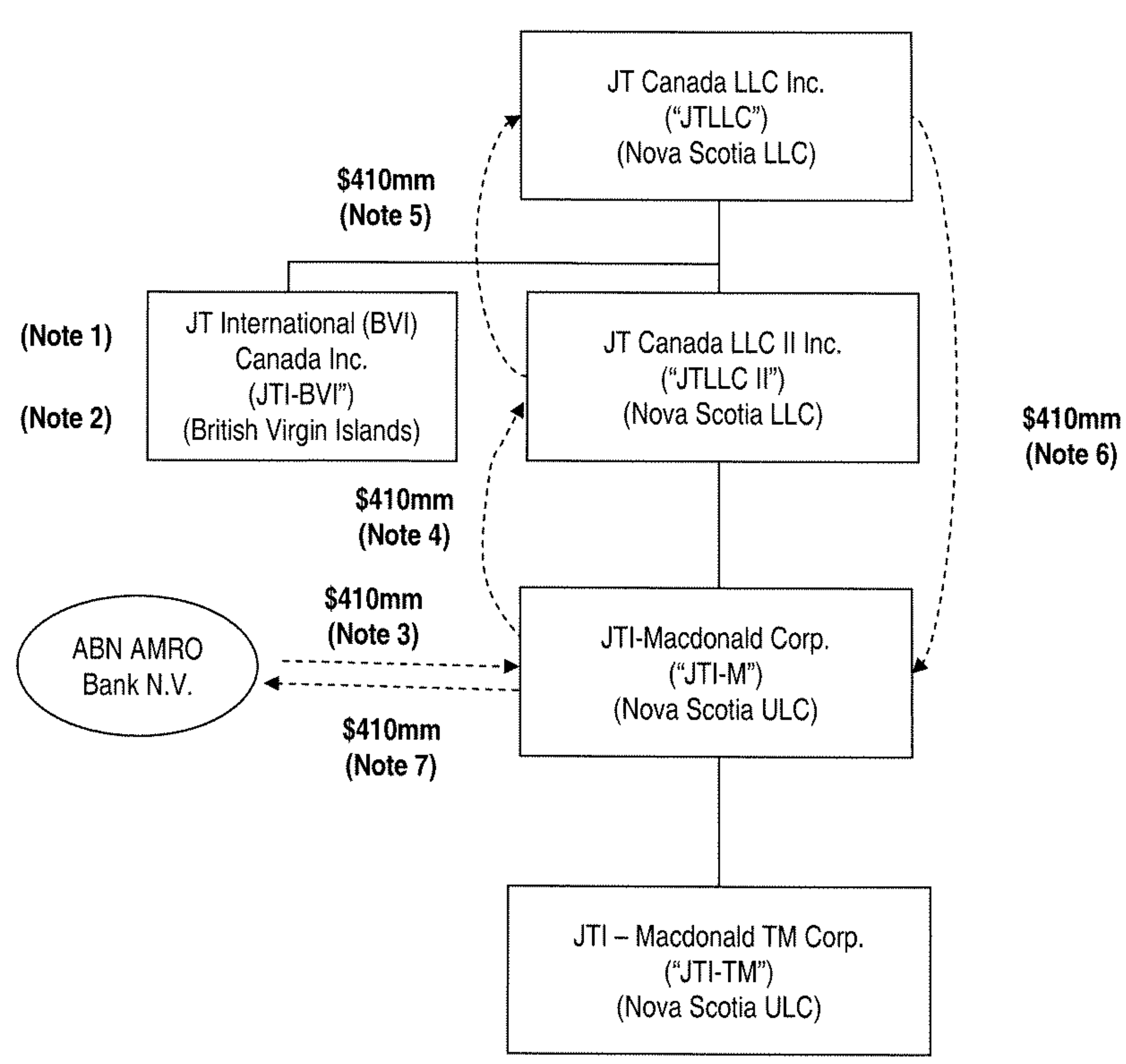
Note 1

On December 2, 1999, JTI-Macdonald Corp. sold its shares in JT International Finance B.V. and R.J. Reynolds Tutun Sanayi A.S. to JT International Holding B.V. in exchange for consideration of $1,518,922,035, which consideration was conveyed via the assignment to JTI-Macdonald Corp. of the two unsecured demand promissory notes owed by JTI-Macdonald Corp. with face values of $1,278,859,068 and $240,062,967, respectively, and an acknowledgment of the extinguishment of those notes after the transfer.

JTI–Macdonald Corp.
Monitor's Fourth Report

Issuance of $410mm secured debenture (slide #1 of 3)

Appendix 8a
December 4-13, 2000



Appendix 8a

Note 1

On December 4, 2000, JT Canada LLC Inc. incorporated JT International (BVI) Canada Inc. under the laws of the British Virgin Islands with authorized capital of 1.8 million common shares with par value of $1.00 per share.

Note 2

On December 12, 2000, JT Canada LLC Inc. purchased 4,800 partnership units of Multi-Manager Limited Partnership, an Ontario publicly-traded limited partnership, for cash consideration of $27,317.51 and transferred these units to JT International (BVI) Canada Inc. in exchange for 97 common shares of JT International (BVI) Canada Inc. The excess of the value of the partnership units over the par value of the common shares issued was accounted for by JT International (BVI) Canada Inc. as contributed surplus.

Note 3

On December 12, 2000, JTI-Macdonald Corp. borrowed $410 million as an unsecured overnight loan from ABN AMRO Bank N.V. The loan bore interest at the rate of ABN AMRO Bank N.V.'s overnight borrowing rate plus 2.2% per annum. Credit protection provided to ABN AMRO Bank N.V. consisted of a comfort letter from Japan Tobacco Inc., an acknowledgment of joint and several liability from JT Canada LLC Inc., and a pledge of $410 million owned by JT Canada LLC Inc. and held on deposit with ABN AMRO Bank N.V.

Note 4

On December 12, 2000, JTI-Macdonald Corp. returned capital of approximately $410 million to JT Canada LLC II Inc. by purchasing 408,222,912 redeemable preference shares at par value for cancellation. Consideration for the purchase was cash of approximately $410 million. Capitalization of JTI-Macdonald Corp. after the purchase was as set out in the following table:

	Common shares	Preferred shares
Balance before purchase	1,000,000	531,677,568
Purchase for cancellation	-	-408,222,912
Balance after purchase	1,000,000	123,454,656

Note 5

On December 12, 2000, JT Canada LLC II Inc. returned capital of approximately $410 million to JT Canada LLC Inc. by purchasing 408,222,912 redeemable preference shares at par value for cancellation. Consideration for the purchase was cash of approximately $410 million. Capitalization of JT Canada LLC II Inc. after the purchase was as set out in the following table:

	Common shares	Preferred shares
Balance before purchase	1,000,001	531,677,568
Purchase for cancellation	-	-408,222,912
Balance after purchase	1,000,001	123,454,656

Note 6

On December 13, 2000, JT Canada LLC Inc. advanced $410 million to JTI-Macdonald Corp. in exchange for $410 million in secured demand debentures. The debentures are secured by a Deed of Hypothec dated December 13, 2000 and a Deed of Moveable Hypothec and Pledge of Shares dated December 13, 2000 that is subordinated only to the JTI-Macdonald TM Corp. Term Debentures, and bear interest at LIBOR plus 0.5% payable semi-annually on June 13 and December 13.

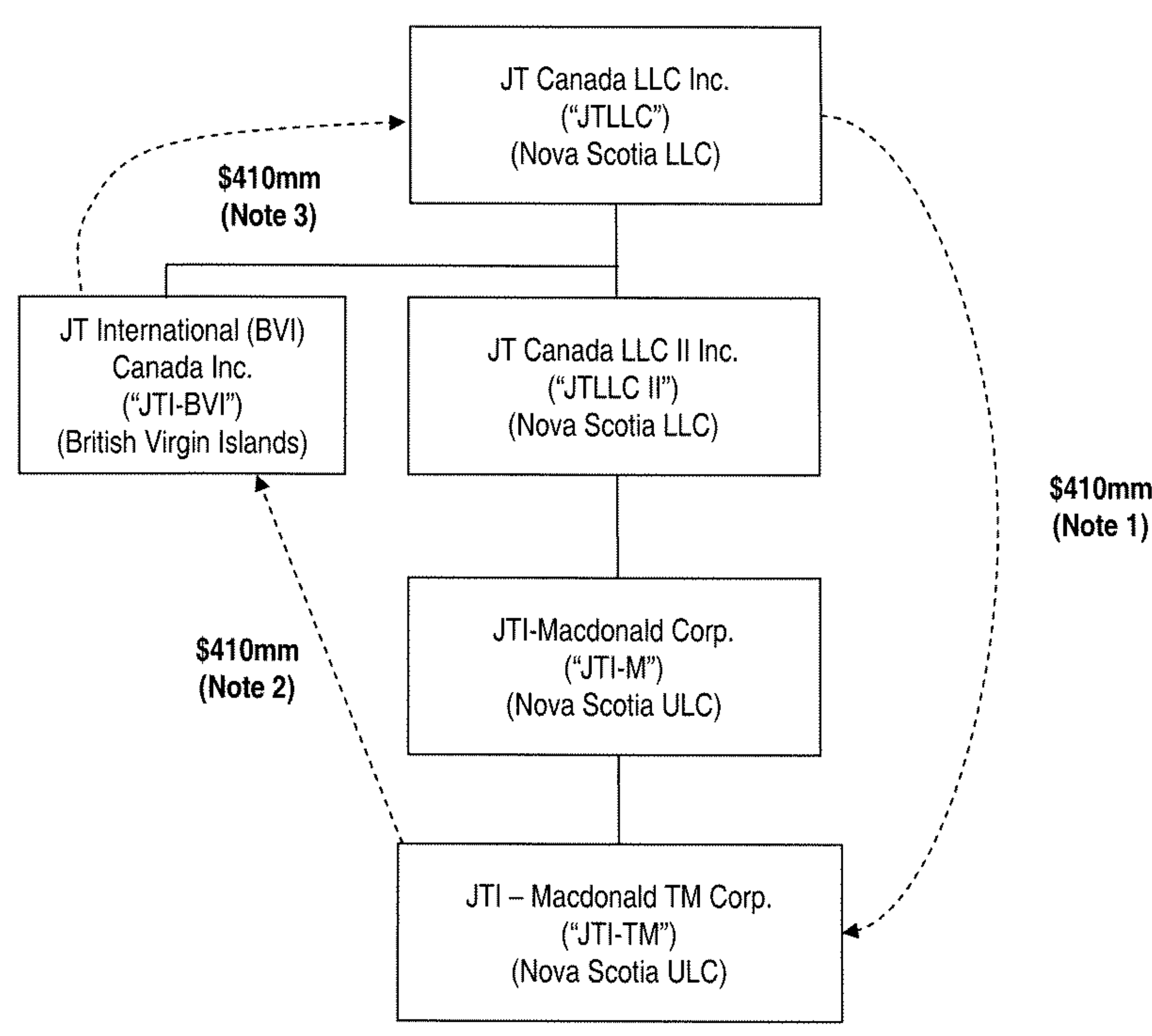
Note 7

On December 13, 2000, JTI-Macdonald Corp. repaid in full the $410 million daylight loan from ABN AMRO Bank N.V. plus one day's interest of $89,974.50.

JTI–Macdonald Corp.
Monitor's Fourth Report

Issuance of $410mm secured debenture (slide #2 of 3)

Appendix 8b
December 13, 2000



Appendix 8b

On December 13, 2000, JT Canada LLC Inc., JT International (BVI) Canada Inc. and JTI-Macdonald TM Corp. entered into an agreement under which:

- Note 1

  JT Canada LLC Inc. assigned to JTI-Macdonald TM Corp. the $410 million in secured demand debentures owed by JTI-Macdonald Corp.;

- Note 2

  As consideration for the assignment of the $410 million in secured demand debentures, JTI-Macdonald TM Corp. issued $410 million in deeds of specialty debt to JT International (BVI) Canada Inc. The specialty debts are demand obligations of JTI-Macdonald TM Corp. that are subordinated to all present and future indebtedness of JTI-Macdonald TM Corp. and bear interest at LIBOR plus 0.375% payable semi-annually on June 13 and December 13; and

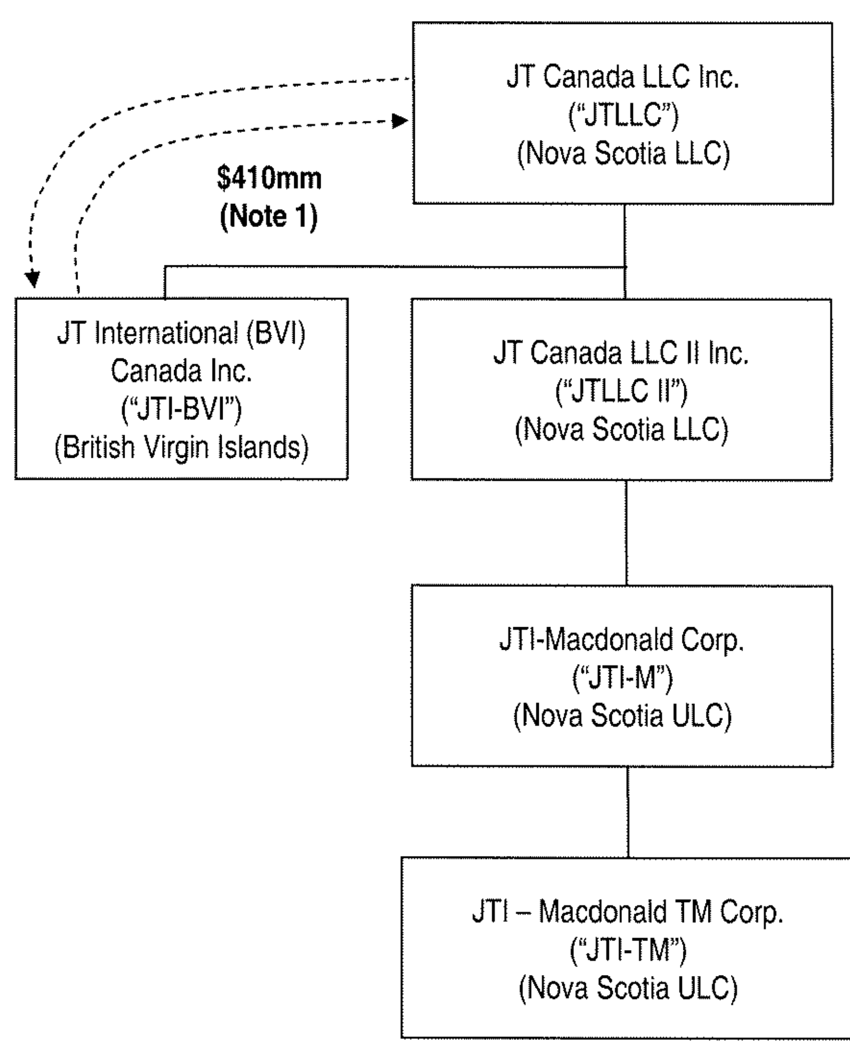
- Note 3

  JT International (BVI) Canada Inc. issued a $410 million unsecured non-interest-bearing demand promissory note to JT Canada LLC Inc.

JTI–Macdonald Corp.
Monitor's Fourth Report

Issuance of $410mm secured debenture (slide #3 of 3)

Appendix 8c
December 14, 2000



Appendix 8c

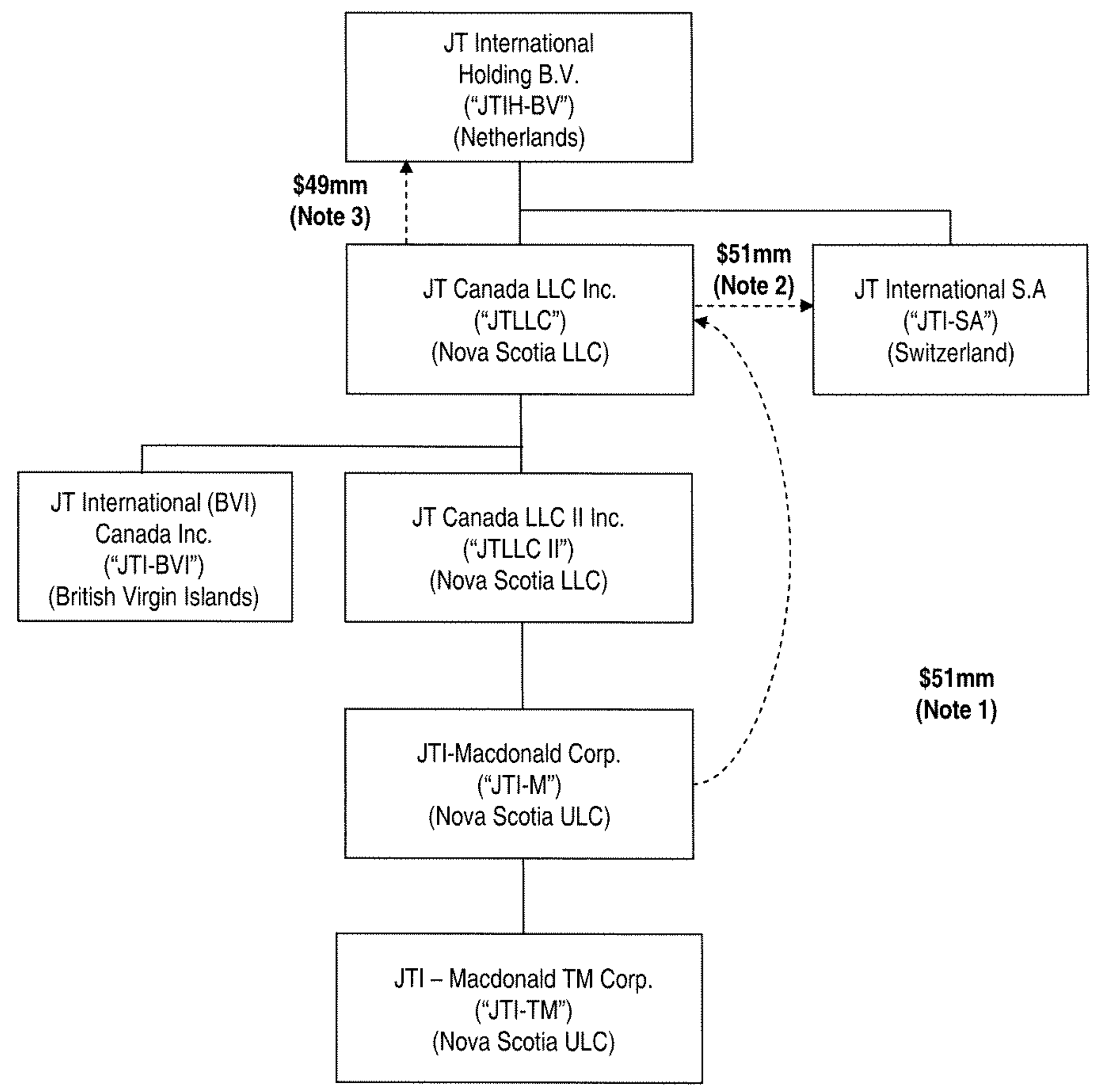
Note 1

On December 14, 2000, JT Canada LLC Inc. surrendered to JT International (BVI) Canada Inc. the $410 million unsecured non-interest-bearing demand promissory note owed by JT International (BVI) Canada Inc., in exchange for 1.64 million common shares of JT International (BVI) Canada Inc. The excess of the $410 million face value of the note over the par value of the common shares issued was accounted for by JT International (BVI) Canada Inc. as contributed surplus.

JTI–Macdonald Corp.
Monitor's Fourth Report

Appendix 9

Partial repayment of $1.2 billion secured debenture **March 30, 2001 to Nov. 22, 2001**



Appendix 9

Note 1

On March 30, 2001, JTI-Macdonald Corp. made a $51.0 million demand loan to JT Canada LLC Inc. The loan bears interest at the lesser of 7.50% and LIBOR plus 0.5%, payable semi-annually on March 30 and September 30, and is secured by a Deed of Moveable Hypothec dated March 30, 2001 and a Deed of Moveable Hypothec and Pledge of Shares dated March 30, 2001.

Note 2

On March 30, 2001, JT Canada LLC Inc. used the proceeds from the $51.0 million demand loan from JTI-Macdonald Corp. to make a $51.0 million partial repayment of the $1.2 billion term loan owed to JT International S.A.

Note 3

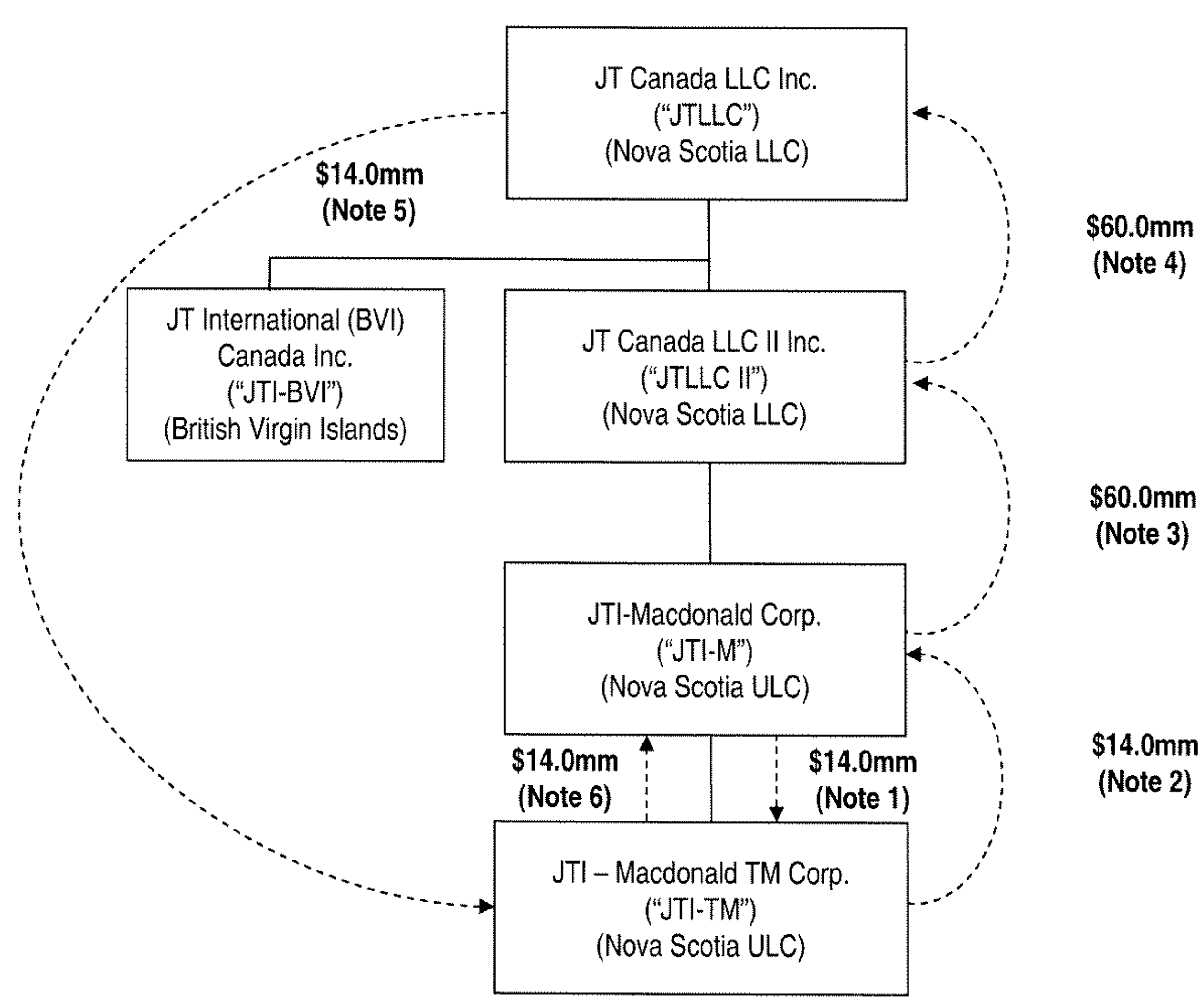
On November 22, 2001, JT Canada LLC Inc. returned capital of approximately $49.0 million to JT International Holding B.V. by purchasing 48,787,616 redeemable preference shares at par value for cancellation. Consideration for the purchase was cash of $49.0 million. Capitalization of JT Canada LLC Inc. after the purchase was as set out in the following table:

	Common shares	Preferred shares
Balance before purchase	1,000,000	531,677,568
Purchase for cancellation	-	-48,787,616
Balance after purchase	1,000,000	482,889,952

JTI–Macdonald Corp.
Monitor's Fourth Report

Payment of December 2000 dividends

Appendix 10a
December 18, 2000



Appendix 10a

Note 1

On December 18, 2000, JTI-Macdonald Corp. made a $14.0 million unsecured non-interest-bearing demand loan to JTI-Macdonald TM Corp.

Note 2

On December 18, 2000, JTI-Macdonald TM Corp. paid a $14.0 million dividend to JTI-Macdonald Corp.

Note 3

On December 18, 2000, JTI-Macdonald Corp. paid a $60.0 million dividend to JT Canada LLC II Inc.

Note 4

On December 18, 2000, JT Canada LLC II Inc. paid a $60.0 million dividend to JT Canada LLC Inc.

Note 5

On December 18, 2000, JT Canada LLC Inc. made a $14.0 million unsecured non-interest-bearing demand loan to JTI-Macdonald TM Corp.

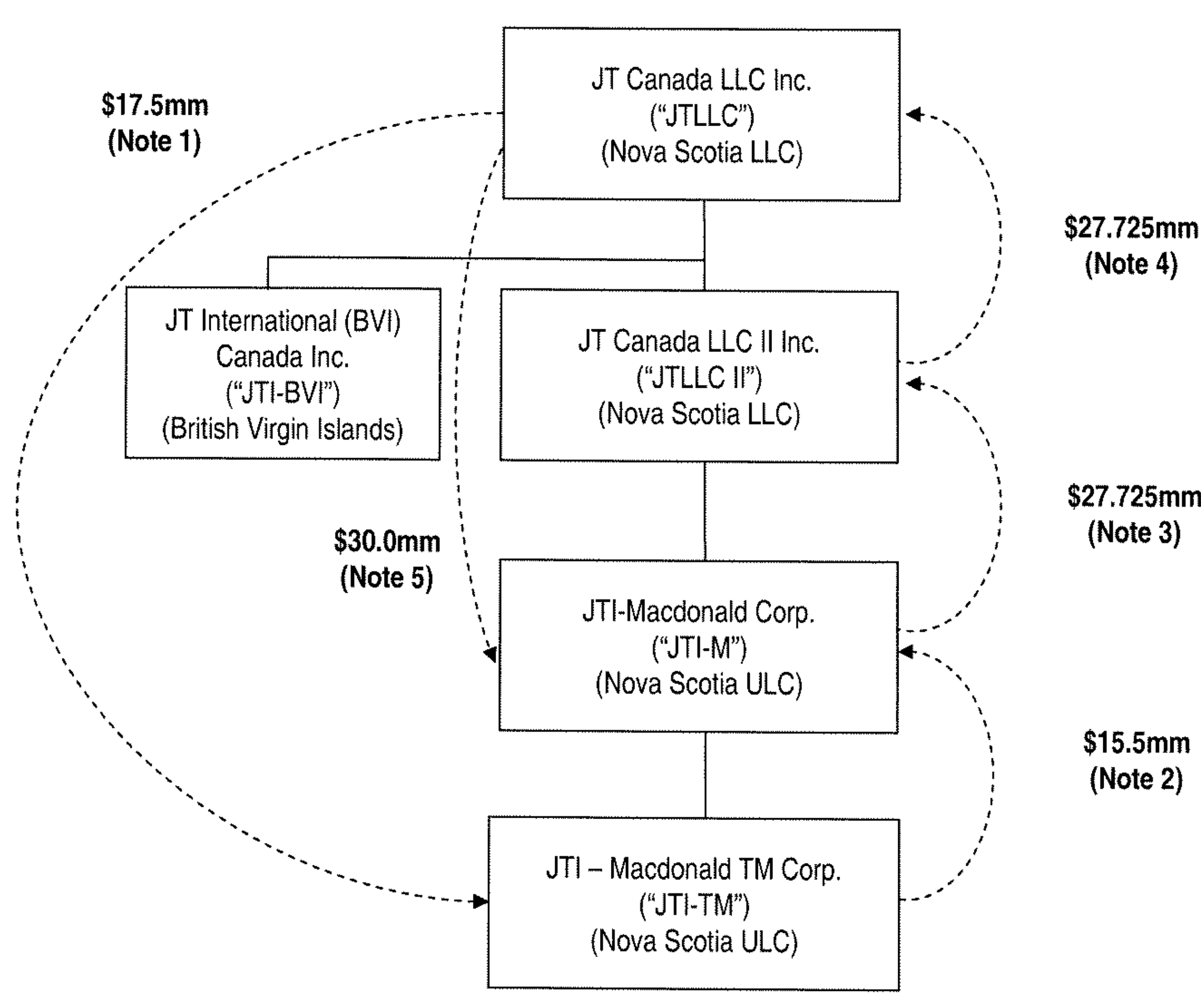
Note 6

On December 18, 2000, JTI-Macdonald TM Corp. repaid the $14.0 million unsecured non-interest-bearing demand loan owed to JTI-Macdonald Corp.

JTI–Macdonald Corp.
Monitor's Fourth Report

Payment of December 2001 dividends

Appendix 10b
December 19, 2001



Appendix 10b

Note 1

On December 19, 2001, JT Canada LLC Inc. made a $17.5 million unsecured non-interest-bearing demand loan to JTI-Macdonald TM Corp.

Note 2

On December 19, 2001, JTI-Macdonald TM Corp. paid a $15.5 million dividend to JTI-Macdonald Corp.

Note 3

On December 19, 2001, JTI-Macdonald Corp. paid a $27.725 million dividend to JT Canada LLC II Inc.

Note 4

On December 19, 2001, JT Canada LLC II Inc. paid a $27.725 million dividend to JT Canada LLC Inc.

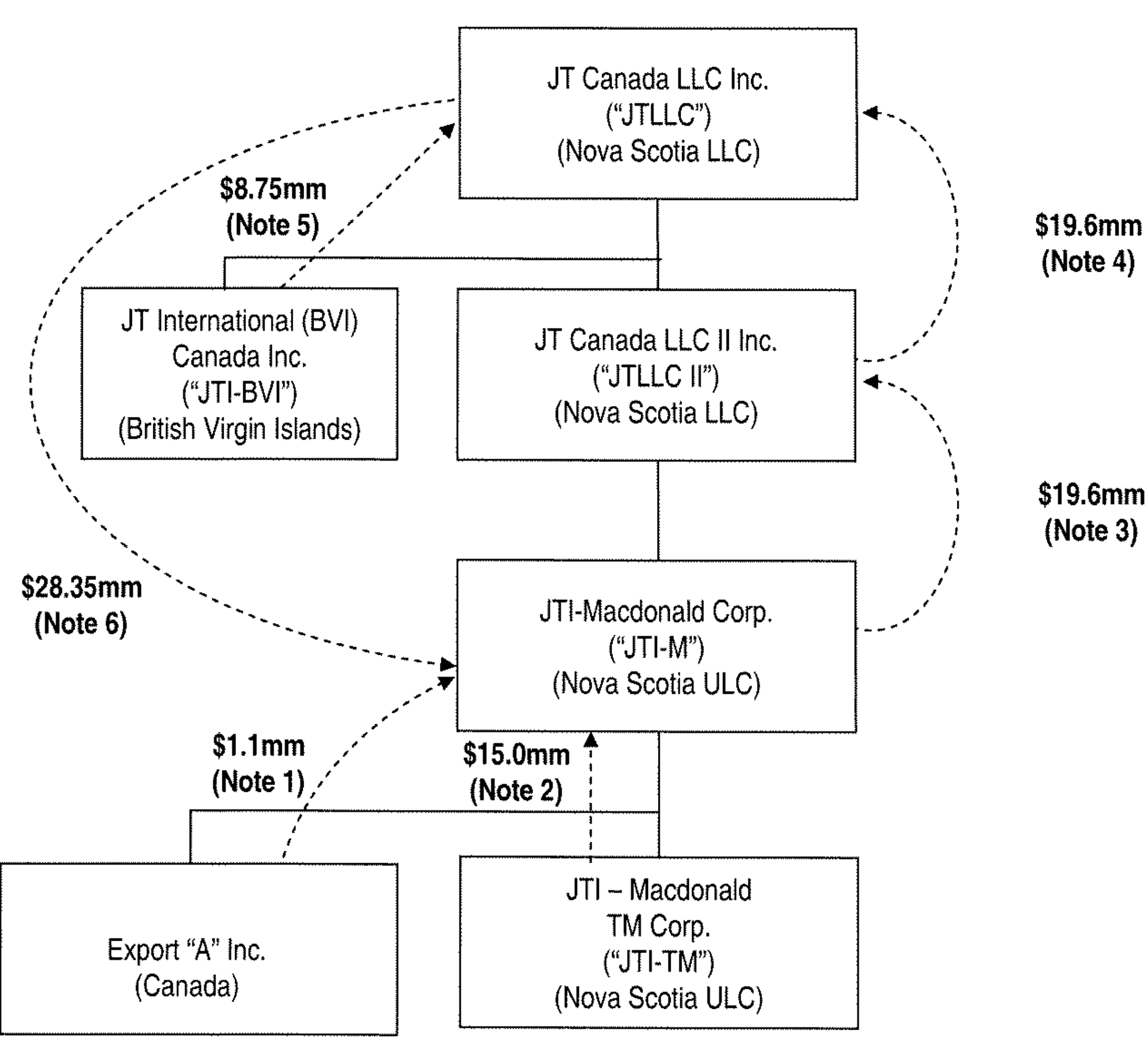
Note 5

On December 19, 2001, JT Canada LLC Inc. made a $30.0 million unsecured non-interest-bearing demand loan to JTI-Macdonald Corp.

JTI–Macdonald Corp.
Monitor's Fourth Report

Payment of December 2002 dividends

Appendix 10c
December 18, 2002



Appendix 10c

Note 1

On December 18, 2002, Export "A" Inc. paid a $1.1 million dividend to JTI-Macdonald Corp.

Note 2

On December 18, 2002, JTI-Macdonald TM Corp. paid a $15.0 million dividend to JTI-Macdonald Corp.

Note 3

On December 18, 2002, JTI-Macdonald Corp. paid a $19.6 million dividend to JT Canada LLC II Inc.

Note 4

On December 18, 2002, JT Canada LLC II Inc. paid a $19.6 million dividend to JT Canada LLC Inc.

Note 5

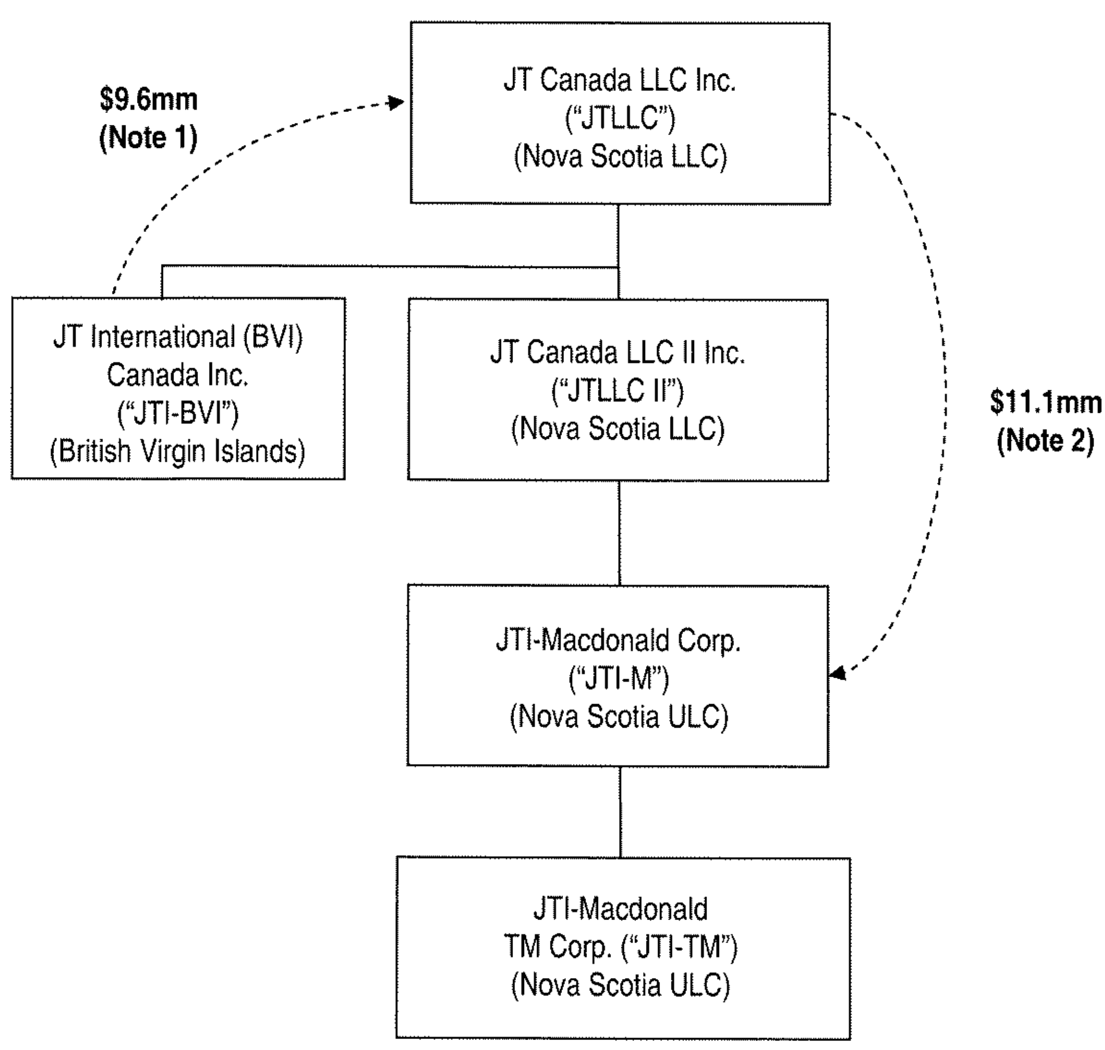
On December 18, 2002, JT International (BVI) Canada Inc. paid an $8.75 million dividend to JT Canada LLC Inc.

Note 6

On December 18, 2002, JT Canada LLC Inc. made a $28.35 million unsecured non-interest-bearing demand loan to JTI-Macdonald Corp.

JTI–Macdonald Corp.
Monitor's Fourth Report
Payment of December 2003 dividends

Appendix 10d
December 15, 2003



Appendix 10d

Note 1

On December 15, 2003, JT International (BVI) Canada Inc. paid a $9.6 million dividend to JT Canada LLC Inc.

Note 2

On December 15, 2003, JT Canada LLC Inc. made an $11.1 million unsecured non-interest-bearing demand loan to JTI-Macdonald Corp.

BY FAX 416-943-3300

February 7, 2005

P.O. Box 1128
710 Prince Street
Truro, Nova Scotia
Canada B2N 5H1

Telephone: 902 895 1561
Facsimile: 902 895 7709
Toll Free: 1 800 565 1200 (NS)

www.burchellmacdougall.com

Brian W. Stilwell
bstilwell@burchellmacdougall.com
Voicemail Ex. 548

Ernst & Young Inc.
Monitor of JTI-Macdonald Corp.
(The "Monitor")

Attention: Mike Dean

Dear Sirs :

RE: Certain Security among JT Canada LLC Inc. ("JT LLC"), JTI Macdonald Corp. ("JTIMC") and JTI Macdonald TM Corp. ("TM Holdco"), (individually a "company" and collectively, the "Companies" with JTIMC and TM Holdco being referred to individually as a "Debtor Company" and collectively as the "Debtor Companies")

You have asked us to provide our opinion as to the validity, enforceability and perfection of certain security granted by the Debtor Companies, pursuant to security documents more particularly described in Schedule "A" attached hereto (collectively, the "Nova Scotia Security Documents"). The undertaking, business, properties, assets and rights of the Debtor Companies as described in the Security Documents are sometimes collectively referred to as the "Charged Property".

We did not act for any of the companies in connection with the negotiation, execution and delivery of the Nova Scotia Security Documents. We have been retained by Ernst & Young Inc. in connection with the current proceedings under the *Companies' Creditors Arrangement Act* (the "CCAA") with respect to JTIMC. We have been advised that both the Attorney General for Canada and the Ministere du Revenu du Quebec have sought in separate proceedings to, in effect, challenge the validity and enforceability of the Nova Scotia Security Documents. This opinion is not an analysis of, or opinion as to the merits of, any such challenge.

The opinions expressed herein are limited to the laws of the Province of Nova Scotia and the laws of Canada applicable therein.

1. Materials Reviewed and Assumptions

We have examined originals or copies, certified or otherwise identified to our satisfaction, of such public records, and have considered such questions of law as we have deemed relevant and necessary as the basis for the opinions hereinafter expressed. In such examination, we have assumed the genuineness of all signatures on, and the authenticity and completeness of, all documents submitted to us as original documents and the conformity to the original documents of all documents submitted to us as true, certified, telecopied or photostatic copies thereof. We have not reviewed all of the Companies' corporate records and minute books. We have assumed that:

(i) each of the Companies is an existing corporation duly incorporated and subsisting under the laws of its jurisdiction of incorporation and each of the Debtor companies is duly incorporated and subsisting as an unlimited company, governed by the *Companies Act* of Nova Scotia;

(ii) each of the Debtor Companies has the corporate capacity and corporate authority to own its property and assets, to carry on its business as currently carried on by it and to execute, deliver and perform its obligations under the Nova Scotia Security Documents to which it is a party;

(iii) each of the Debtor Companies has duly authorized, executed and delivered the Nova Scotia Security Documents to which it is a party;

(iv) the execution and delivery by each Debtor Company of the Nova Scotia Security Documents to which it is a party and the performance of its obligations thereunder is not a contravention of or in conflict with its articles or by-laws or any resolutions of its directors or shareholders or with any applicable law of the jurisdiction of its incorporation or of Canada;

(v) where shares are pledged as security, that the secured party has taken delivery and maintained continued possession of the share certificates representing the pledged shares;

(vi) none of the Charged Property constitutes a fixture for the purposes of the *Personal Property Security Act* (Nova Scotia) (the "Nova Scotia PPSA"); and

(vii) neither of the Debtor Companies owns real property in the Province of Nova Scotia and therefore registrations in respect of any charge on real property referred to in any of the Nova Scotia Security Documents are not required.

We have also assumed that the:

(a) Convertible debenture subscription agreement between JT Nova Scotia Corp. ("JT NS Corp.") and TM Holdco for debentures in the aggregate total amount of $1,200,000,000 dated November 23, 1999 ("Nov. 23 Subscription Agreement");

(b) Debentures nos. 1-10 issued by TM Holdco to JT LLC in the amount of $1,200,000,000 each dated November 23, 1999 ("Nov. 23 Debentures");

(c) Assumption Agreement dated December 2, 1999 by JTIMC (resulting from the amalgamation of JT NS Corp. and RJR-MacDonald Corp. on November 27, 1999 under the *Companies Act* (Nova Scotia) whereby JTIMC agrees to assume the obligations of JT NS Corp. under the Nov. 23 Subscription Agreement and the Nov. 23 Debentures;

(d) Amending agreement between JTIMC and TM Holdco amending the Nov. 23 Subscription Agreement dated December 12, 2000;

(e) Demand debenture subscription agreement between JTIMC and JT LLC for debentures in the aggregate total amount $410,000,000 dated December 13, 2000;

(f) Demand debentures nos. 1-10 issued by JTIMC to JT LLC in the amount of $410,000,000 dated December 13, 2000;

are valid and enforceable and constitute binding obligations in accordance with their terms under the laws by which they are expressed to be governed.

We have conducted searches for filings or registrations pursuant to the *Personal Property Security Act* (Nova Scotia) as at November 19th, 2004.

2. Opinions

Based and relying upon the foregoing and subject to the qualifications hereinafter set forth, we are of the opinion that:

1) Each Nova Scotia Security Document executed and delivered by a Debtor Company creates in favour of the secured party named therein under the laws of the Province of Nova Scotia, a valid security interest in the Charged Property of the applicable Debtor Company to which the Nova Scotia PPSA applies; and

2) Each Nova Scotia Security Document has been registered, filed or recorded in all public offices where the registration, filing or recording thereof is required under the laws of the Province of Nova Scotia to perfect the security interest constituted in the Charged Property to which the Nova Scotia PPSA applies; and

3) Each Nova Scotia Security Document creates valid and binding obligations of the Debtor Company that is a party thereto which is enforceable against the Debtor Company in accordance wit the respective terms thereof.

4. Registrations Under the Nova Scotia PPSA

The financing statements registered in respect of the Nova Scotia Security Documents (the "**Financing Statements**") must be renewed before the expiry of the applicable registration period in respect of the Financing Statements by registration of a financing change statement in the prescribed form in order for the security interests perfected by the registration of the Financing Statements to continue to be perfected.

The security interests perfected by the registration of the Financing Statements may become unperfected in certain circumstances such as:

(a) if the secured party learns that the Debtor Company has transferred its interest in the collateral; or

(b) if the secured party learns that the Debtor Company has changed its name.

In order to maintain perfection, the secured party must file a financing change statement within 15 days of learning of such a transfer of interest or change of name, or within 15 days of a transfer of a debtor's interest in the collateral with the prior consent of the secured party.

4. Qualifications

The opinions expressed herein are subject to the following qualifications:

(a) the enforceability of any of the Nova Scotia Security Documents and the rights and remedies set out therein or any judgment arising out of or in connection therewith may be limited by bankruptcy, insolvency, winding-up, reorganization, arrangement, moratorium, the Nova Scotia PPSA or other laws affecting creditors rights generally;

(b) the enforceability of any of the Nova Scotia Security Documents and the rights and remedies set out therein may be limited by general principles of equity, and no opinion is given as to any equitable remedy that may be granted, imposed or rendered (including specific performance and injunction);

(c) a receiver or receiver and manager appointed pursuant to the provisions of the Nova Scotia Security Documents may, for certain purposes, be treated by a court as being the agent of the secured party, notwithstanding any agreement to the contrary;

(d) we express no opinion as to the effectiveness of any security interest created by any Nova Scotia Security Documents in any collateral to which the Nova Scotia PPSA does not apply;

(e) no opinion is expressed as to the title of any Debtor Company to any real or personal property, or as to the priority or ranking of any charge, security interest or assignment created by any of the Nova Scotia Security Documents;

(f) we offer no opinion as to whether a security interest may be created in receivables, licenses, permits, privileges, franchises, leases or agreements to the extent that the terms of the foregoing property or any applicable law prohibits its assignment or requires a consent, approval or other authorization or registration which has not been made or given;

(g) our Nova Scotia PPSA search results indicate that other parties may have security interests in personal property of one or more of the Companies which have been registered prior to or subsequent to the Companies' interests under the Nova Scotia Security Documents and which may evidence purchase-money type security interests. It is possible that any one or more of these security interests would have priority over the Companies' interests under the Nova Scotia Security Documents. We have not been requested to render an opinion as to the relative priorities of these interests and we offer no opinion as to priority regarding any such security interests;

(h) our opinion is based solely on the documents constituting the Nova Scotia Security Documents and such opinions may therefore be subject to other rights and interests that may exist at law, by statute or by agreement;

(i) no opinion is expressed as to any charge or security interest or assignment created by any of the Nova Scotia Security Documents with respect to any property of any Debtor company or any proceeds of such property that is not identifiable or traceable, or which by its terms cannot be subject to such charge, security interest or assignment without the consent of a third party which has not been obtained;

(j) no opinion is expressed as to the enforceability of any provision of any of the Nova Scotia Security Documents providing for severability;

(k) no opinion is expressed with respect to the validity, binding nature or enforceability of any provision of the Nova Scotia Security Documents which suggests that modifications, amendments or waivers that are not in writing will not be effective;

(l) no opinion is expressed with respect to any provision of the Nova Scotia Security Documents which purports to relieve a person from a liability or duty otherwise owed or to require compliance regardless of law;

(m) the costs of and incidental to all proceedings taken in a court or before a judge are in the discretion of the court or judge and the court or judge has power to determine by whom and to what extent such costs shall be paid;

(n) pursuant to the *Currency Act* (Canada), a court in Canada will render judgment only in lawful money of Canada;

(o) a court in the Province of Nova Scotia may decline to enforce rights of indemnity and contribution under the Nova Scotia Security Documents to the extent that they are found to be contrary to public policy;

(p) no opinion is given with respect to creation or perfection of a security interest pursuant to, the *Canada Shipping Act* (Canada), the *Copyright Act* (Canada), the *Industrial Design Act* (Canada), the *Integrated Circuit Topography Act* (Canada), the *Patent Act* (Canada), the *Plant Breeders' Rights Act* (Canada), the *Railway Act*(Canada), and the *Trade-Marks Act* (Canada) or the consequences of compliance or non-compliance with such statutes;

(q) no opinion is given with respect to the provisions of the Nova Scotia *Companies Act* applicable to unlimited liability companies such as the Debtor Companies nor with respect to any pledge of shares in the capital stock of either of the Debtor companies or any security interest in any such shares;

(r) to the extent that the security interest or interests created under the Nova Scotia Security Documents:

(a) attaches to an intangible;

(b) attaches to goods which are of a type that are normally used in more than one jurisdiction, if such goods are classified as equipment or inventory which are leased or held for lease to others; or

(c) includes a non-possessory security interest in a security, chattel paper, a negotiable document of title, an instrument or money;

the validity, perfection and effect of perfection or non-perfection of the security interest is governed by the laws of the jurisdiction in which the place of business of the applicable Debtor Company is located or, in the event it has more than one place of business, at its chief executive office at the time at which the security interest attaches. No opinion is given with respect to whether Nova Scotia is the appropriate place of registration for the various security interests in view of the fact that we understand that the chief executive office of the Debtor Companies is located in Ontario or Quebec;

(s) we have not made any investigations for registrations against or perfection or any security interest in real property collateral which may be charged by the Security Documents (real property collateral would include and extend to mineral, oil and gas properties and interests therein; unextracted minerals, oil and gas and other hydrocarbons; and uncut lumber) and we express no opinion with respect to such real property security interest; and

(t) if any collateral charged by the Nova Scotia Security Documents is comprised of items of "serial number goods" (as that term is defined in the Nova Scotia PPSA), then registration of a financing statement or amendment thereof providing an adequate serial number description of those goods is necessary to protect the security therein as against certain other lenders and buyers. We have not made inquiries as to whether any such serial number registrations are necessary or advisable.

This opinion is intended solely for the use of the parties to which it is addressed and may not be relied upon by any other person or for any other purpose or quoted or referred to in any other document without our prior written consent.

We trust the foregoing is satisfactory. Should you have any questions or comments, please do not hesitate to contact us.

Yours very truly,

BURCHELL MACDOUGALL

SCHEDULE "A"

SECURITY DOCUMENTS

1. General Security Agreement dated November 23, 1999 granted by TM Holdco in favour of JT LLC.

2. Demand Debenture No. 11 in the principal amount of $1,200,000,000.00 dated November 23, 1999 granted by JT NS Corp. to TM Holdco, which Demand Debenture became an obligation of JTIMC on amalgamation on November 27, 1999 or was replaced by Demand Debenture No. 12 dated December 2, 1999 (see below).

3. Demand Debenture No. 12 dated December 2, 1999 in the principal amount of $1,200,000,000.00 granted by JTIMC to TM Holdco as security for the same obligations as referred to in Demand Debenture No. 11 above.

4. Demand Debenture dated December 13, 2000 in the amount of $500,000,000.00 granted by JTIMC to JT LLC as assigned by Assignment of Debenture dated December 13, 2000 by JT LLC to TM Holdco.

Our file 64,137(0)-1000

January 27, 2005

THORNTON GROUT FINNIGAN
Royal Trust Tower
Toronto-Dominion Centre
77 King Street West
Suite 2200
P.O. Box 329
Toronto, Ontario
M5K 1K7

Attention: Mrs. Leanne M. Hoyles

Dear Sirs:

RE: JTI-MACDONALD CORP. – SECURITY REVIEW

You have asked for our opinion on the validity and enforceability of certain Québec security (specifically described and defined in Schedule A attached hereto) ("**SECURITY DOCUMENTS**") granted by the following entities:

1. JTI-MacDonald Corp. ("**JTIMC**") and its predecessor JT Nova Scotia Corporation ("**JTNS**");
2. JTI-MacDonald TM Corp. ("**JTITM**"); and
3. JTI Canada LLC Inc. ("**JTLLC**").

(all the aforementioned parties are sometimes hereinafter collectively referred to as, the "**GRANTORS**" or individually as the "**GRANTOR**").

1. DOCUMENTS REVIEWED

For the purposes of this opinion, we have examined copies of the SECURITY DOCUMENTS which you have provided to us.

AVOCATS | ATTORNEYS — SOCIÉTÉ EN NOM COLLECTIF | GENERAL PARTNERSHIP
1000 SHERBROOKE O. | W. #2700 MONTRÉAL (QUÉBEC) CANADA H3A 3G4
TÉLÉPHONE 514.987.5000 FAX 514.987.1213 WWW.MENDELSOHN.CA

2. SEARCHES

In preparing our report, we conducted the Movable (Personal) Property Searches and certain Immovable (Real) Property Searches, as more fully described hereunder.

A. Movable (Personal) Property Searches

We have conducted the following searches ("**MOVABLE PROPERTY SEARCHES**") with respect to filings or registrations with respect to the names indicated in Schedule B (comprised of Schedules A-1, A-2 and A-3) ("**SEARCH SCHEDULES**") attached hereto:

2.1 a search with respect to registrations in the Register of Personal and Movable Real Rights (Québec) ("**RPMRR**") with respect to movable (personal) property.

The searches were conducted against the English names, the French names, any combined English/French name and certain predecessor names, as applicable. The results of such searches are also set out in the SEARCH SCHEDULES.

The foregoing searches did not disclose, as of the respective dates indicated in the SEARCH SCHEDULES, any filings or registrations with respect to the names searched other than those indicated in the SEARCH SCHEDULES.

We draw to your attention that there could exist various other rights in favour of third parties which would not be disclosed by the searches such as, for example, the following:

2.2 statutory claims and the rights of third parties whose claims have priority by law and which are not required to be published (registered);

2.3 various rights of a creditor, which rights are preserved by such creditor on the property by observing certain formalities within prescribed delays;

2.4 the following rights of a seller with respect to property sold under certain circumstances to any of the entities whose name has been searched:

(a) certain rights of resolution or revendication of an unpaid seller;

(b) the hypothecary rights of a seller with respect to a hypothec granted by any of the entities whose name has been searched upon the acquisition of property and registered within prescribed delays;

2.5 the rights of third parties resulting from reservations of ownership, sales with a right of redemption, leases with a term of more than one (1) year and leasing contracts (*crédit-baux*) which may be set up against third parties, including hypothecary (secured)

creditors provided such rights are registered within fifteen (15) days from the entering into of agreements containing said rights;

2.6 the hypothecary rights of a creditor of any of the entities whose name has been searched affecting the following movable property:

(a) movable property hypothecated (pledged) with delivery (i.e. with physical dispossession); and

(b) accounts receivable (claims) or movable property represented by a bill of lading or other negotiable instrument, provided that the hypothec affecting such property is published (by registration or delivery) within ten (10) days following the time the creditor gives value.

Also, we draw to your attention that the RPMRR is a computer database which suffers from sporadic glitches and manual transcription errors of the registrar which can give rise to uncertainties. Although rare, there have been instances where a proper search of the RPMRR has failed to disclose all entries.

B. Immovable (Real) Property Searches

The description of the property charged under the DECEMBER 1999 SUPPLEMENTAL DEED (as defined in Schedule A) refers to approximately one hundred thirty-two (132) unrenovated (unconsolidated) lots; since a renovation (consolidation) of the lots had by then taken place, the description of the property charged under the DECEMBER 2000 DEED (as defined in Schedule A) refers to eight (8) renovated (consolidated) lots which appear to cover the same property located at 2455 Ontario Street, Montreal, Quebec, H2K 1W3 ("**PROPERTY**").

For the purposes of determining whether the DECEMBER 1999 SUPPLEMENTAL DEED was registered, we have obtained copies of the Index of Immovables with respect to registrations at the Land Register (Québec) ("**INDEX OF IMMOVABLES**") against some of the unrenovated lots on a random basis given the quantity of lots to be searched. We obtained copies of the INDEX OF IMMOVABLES against all renovated lots.

Please note that we have not examined title to the PROPERTY nor have verified the description of same nor reviewed the content of any other encumbrances. Furthermore, we have not reviewed any surveys or plans of the PROPERTY.

3. ASSUMPTIONS

For the purposes of the opinions herein expressed, we have assumed the following:

3.1 The genuineness of all signatures, the authenticity of all documents submitted to us as originals and the conformity to original documents of all documents submitted to us as certified, facsimile, photostatic or notarial copies.

3.2 The original copies of all documents were in fact signed by the relevant parties;

3.3 The accuracy, completeness and currency of the RPMRR, the INDEX OF IMMOVABLES, the Register of Enterprises ("**COMPANY REGISTER**") and other public records maintained by public offices where we searched or inquired or have caused searches or inquiries to be made upon such information and advice provided to us by appropriate governmental, regulatory, or other like authorities with respect to those matters referred to therein;

3.4 That the address in the SECURITY DOCUMENTS accurately reflects the head office or a place of business of each of the parties.

3.5 That the domicile (registered office) of GRANTORS is located outside the Province of Québec.

3.6 That all relevant individuals had full legal capacity at all relevant times.

3.7 That on the date each of the SECURITY DOCUMENTS was executed and delivered:

(a) each party to the SECURITY DOCUMENTS validly exists and has the power, authority and qualification to enter into, execute, deliver and perform the SECURITY DOCUMENTS to which it is a party;

(b) each of the SECURITY DOCUMENTS has been duly authorized, executed and delivered by the parties thereto on the dates set out therein;

(c) the authorization, execution, delivery and performance of the SECURITY DOCUMENTS by any party thereto did not contravene or conflict with (i) any provision of such party's constating documents or by-laws; (ii) any existing applicable laws or regulations; or (iii) any of the terms, provision or conditions of any agreement, indenture, instrument or other document to which any party is bound or by which it or any of its assets is or may be bound or subject.

3.8 That for the purposes of any opinion herein relating to the creation, validity or perfection of the SECURITY DOCUMENTS on any property, (i) the laws of the Province of Québec apply to such property and the SECURITY DOCUMENTS; (ii) the applicable GRANTOR has rights with respect to such property and has title to such PROPERTY; (iii) the description of the assets as set forth in the respective SECURITY DOCUMENTS

is correct and sufficient to enable such assets to be identified; (iv) the legal description of the PROPERTY in the SECURITY DOCUMENTS containing same is complete and accurate and in accordance with the *Civil Code of Québec* ("**CIVIL CODE**").

3.9 That the DECEMBER 1999 SUPPLEMENTAL DEED was registered against all 132 unrenovated (unconsolidated) lots.

3.10 That the shares being pledged ("**PLEDGED SHARES**") in the NOVEMBER 1999 MOVABLE HYPOTHEC, DECEMBER 2000 MOVABLE HYPOTHEC, DECEMBER 2000 MOVABLE HYPOTHEC, FEBRUARY 2001 MOVABLE HYPOTHEC, MARCH 2001 MOVABLE HYPOTHEC and MARCH 2001 PLEDGE OF SHARES were delivered to the respective holders and have continuously been held by such holders in the Province of Québec.

3.11 That there are no restrictions on the transfer of the PLEDGED SHARES or that all required consents have been obtained in order to authorize the pledge of the PLEDGED SHARES.

3.12 That BMO had been duly appointed as the person holding the power of attorney (*fondé de pouvoir*) pursuant to Article 2692 of the CIVIL CODE of the creditors and such appointment remains in full force and effect on the date hereof.

3.13 That the debentures secured under the relevant SECURITY DOCUMENT were properly issued in accordance with their respective subscription agreements.

3.14 That the "obligations" purported to be secured under the SECURITY DOCUMENTS were created at the time that the SECURITY DOCUMENTS were entered into.

We have not undertaken any independent investigation to verify the accuracy of such assumptions.

4. OPINION

Based and relying solely upon our examination of the SECURITY DOCUMENTS, the MOVABLE PROPERTY SEARCHES and the searches at the INDEX OF IMMOVABLES and subject to the aforementioned assumptions and the qualifications hereinafter expressed, we are of the opinion that the SECURITY DOCUMENTS, to the extent set forth below, constitute valid security on the assets which form the object thereof located in the Province of Québec, limited to the amounts stipulated therein:

4.1 The NOVEMBER 1999 MOVABLE HYPOTHEC secures the repayment of the indebtedness and the performance of JTLLC's obligations under the NOVEMBER 1999

MOVABLE HYPOTHEC, the loan agreement dated November 23, 1999 between JTLLC and JT International B.V. ("**LOAN AGREEMENT**") and the "loan documents" (as such term is defined therein).

4.2 The NOVEMBER 1999 JTITM DEED secures the payment of the "Debentures" (as such term is defined therein) and the performance of JTITM's obligations under the NOVEMBER 1999 JTITM DEED. We would draw to your attention the following discrepancies:

(a) The list of trademarks scheduled to the NOVEMBER 1999 JTITM DEED was at times unclear and as such, we are unable to confirm that the description contained in the RPMRR registration is accurate; and

(b) In the NOVEMBER 1999 JTITM DEED, the registration made at the RPMRR fails to mention Article 2692 of the CIVIL CODE as is provided for on the RPMRR RH form which is filed in order to effect registration. This article refers to security granted to a *fondé de pouvoir* (person holding the power of attorney) for the creditors as is the case in the NOVEMBER 1999 JTITM DEED.

While we are unable to predict with any certainty whether the foregoing discrepancy would be maintained by a court of competent jurisdiction as a valid reason for rejecting the validity of the registration or enforceability of the NOVEMBER 1999 JTITM DEED, our view is that the more logical position is that this discrepancy would not invalidate the NOVEMBER 1999 JTITM DEED because:

(i) the NOVEMBER 1999 JTITM DEED on its face would appear to be valid;

(ii) enough elements in the publication of the NOVEMBER 1999 JTITM DEED exist to put third parties in good faith on the appropriate notice of their existence such that it is unlikely that any existing or potential creditors of the relevant GRANTOR would be prejudiced.

4.3 The NOVEMBER 1999 JTNS DEED and the DECEMBER 1999 SUPPLEMENTAL DEED secure the payment of the "Debentures" (as such term is defined therein) and the performance of JTNS's and JTIMC's (as successor to JTNS) obligations under the NOVEMBER 1999 JTNS DEED and DECEMBER 1999 SUPPLEMENTAL DEED. We would draw to your attention the following:

(a) the NOVEMBER 1999 JTNS DEED was registered twice under registration numbers 99-0201938-0003 and 99-0201938-0001 to indicate a movable hypothec

without disposition and a movable hypothec with disposition (i.e. pledge) presumably to account for the fact that the GRANTOR disposed itself of assets covered by the hypothec (shares). The NOVEMBER 1999 JTNS DEED makes no reference to the hypothecation with disposition with respect to certain of the assets disposed (i.e. pledged), but disposition is a question of fact with no need for registration. If no disposition actually occurred the result would be a hypothec without disposition which is covered by registration number 99-0201938-0001.

(b) JTNS amalgamated on November 27, 1999 with RJR-MacDonald Corp. to form JTIMC and no registration of a name change has been effected at the RPMRR. Although it is customary to file a notice of name change, it is not a requirement of the CIVIL CODE and should not affect the opposability of the security to third parties.

4.4 The DECEMBER 2000 MOVABLE HYPOTHEC secures the payment of the "Debentures" (as such term is defined therein) and the performance of JTIMC's obligations under the DECEMBER 2000 MOVABLE HYPOTHEC.

4.5 The DECEMBER 2000 DEED secures the payment of the "Debentures" (as such term is defined therein) and the performance of JTIMC's obligations under the DECEMBER 2000 DEED.

4.6 The DECEMBER 2000 MOVABLE HYPOTHEC secures the payment of the "Debentures" (as such term is defined therein) and the performance of JTIMC's obligations under the DECEMBER 2000 MOVABLE HYPOTHEC.

4.7 The FEBRUARY 2001 MOVABLE HYPOTHEC secures the repayment of the indebtedness and the performance of JTLLC's obligations under the FEBRUARY 2001 MOVABLE HYPOTHEC as well as under the LOAN AGREEMENT (which was assigned to JT International S.A. on January 1, 2000).

4.8 The MARCH 2001 MOVABLE HYPOTHEC secures the repayment of the indebtedness and the performance of JTLLC's obligations under the MARCH 2001 MOVABLE HYPOTHEC, the "Grantor Promissory Note" and the "Loan Documents" (as such terms are defined therein).

4.9 The MARCH 2001 PLEDGE OF SHARES secures the repayment of the indebtedness and the performance of the JTLLC's obligations under the MARCH 2001 PLEDGE OF SHARES, the "Grantor Promissory Note" and the "Loan Documents" (as such terms are defined therein). Please note that we were not provided with "Schedule A" containing the description of the shares being pledged and as such we are unable to confirm that the description contained in the RPMRR is accurate.

4.10 The NOVEMBER 1999 JTITM DEED, NOVEMBER 1999 JTNS DEED and the DECEMBER 2000 DEED contain an assignment of claims subject to the *Financial Administration Act* (Canada). Under Article 1642 of the CIVIL CODE, an assignment of the universality of claims, present or future, may only be set up against debtors and third person by the registration of the assignment in the RPMRR and by providing them with a copy or a pertinent extract of the deed of assignment or any other evidence of the assignment. No registration in the RPMRR has been effected with respect to these assignments and we are unable to determine whether any notice was provided to the debtor or third person. Accordingly, we cannot opine on the opposability of the assignment against the debtor or the third person.

4.11 Based on the MOVABLE PROPERTY SEARCHES and searches in the INDEX OF IMMOVABLES, we would like to point out that BMO appears to have assigned its rights under the relevant SECURITY DOCUMENTS to BNY Trust Company of Canada.

5. QUALIFICATIONS

The foregoing opinions are subject to the following qualifications:

5.1 We are attorneys qualified to practice law and to render opinions only as to the laws of the Province of Québec and the laws of Canada applicable therein, and accordingly, we express no opinion as to the laws of any other jurisdiction.

5.2 We express no opinion as to whether the SECURITY DOCUMENTS could be attacked according to the provisions of any applicable bankruptcy, insolvency or creditors' rights legislation or under the CIVIL CODE as reviewable transactions.

5.3 Orders of specific performance and injunctive relief are remedies which may be ordered by a court in its discretion, and, accordingly, they may not be available as remedies to enforce the terms and provisions of the SECURITY DOCUMENTS.

5.4 The SECURITY DOCUMENTS may contain certain provisions (particularly concerning remedies after default) which go beyond and/or expand the strict reading of certain provisions of the CIVIL CODE. It is difficult to assess whether the courts will enforce such provisions. However, even if certain provisions of the SECURITY DOCUMENTS were found to be unenforceable, this would not prevent the holder from benefiting from the hypothecary remedies available to hypothecary creditors provided for under the CIVIL CODE.

5.5 Every creditor must exercise its rights in good faith. No right may be exercised in an excessive and unreasonable manner.

5.6 We express no opinion with respect to the enforceability of any provisions of the SECURITY DOCUMENTS which purport to enable the holder to recover any costs of enforcement or fees. Without limiting the foregoing, it should be noted that the CIVIL CODE provides that a hypothec may secure the capital and the interest accrued thereon, as well as the legitimate costs incurred for recovering or conserving the property charged by the hypothec. We draw to your attention that, under Article 2667 of the CIVIL CODE, notwithstanding any provision of the SECURITY DOCUMENTS to the contrary, no hypothec provided for therein secures the payment of extra-judicial professional fees payable by the holder for services in order to recover the capital and interest secured thereby or to conserve the property charged thereunder.

5.7 Pursuant to Articles 2959 and 2960 of the CIVIL CODE:

(a) Interest owing to the creditor for the current year and the three preceding years will have the same rank as the principal obligation secured under the SECURITY DOCUMENTS; and

(b) Any surplus of interest owing to the creditor will rank from the time of registration of a notice, at the applicable register, setting forth the amounts claimed.

5.8 We would draw to your attention that certain SECURITY DOCUMENTS were not registered at the RPMRR under certain of the trade names of the GRANTORS. Although it is practice to register security documents under trade names, it is our view that the omission to register under the trade names does not prevent the security to be opposable to third parties.

5.9 No opinion is expressed herein with respect to the enforceability in relation to third parties of the SECURITY DOCUMENTS on the following property:

(a) property of the GRANTOR disposed of out of the ordinary course of its business since the time of the execution of the SECURITY DOCUMENTS unless the creditors of such SECURITY DOCUMENTS arranged, in order to preserve the security created by the SECURITY DOCUMENTS on such property, for the publication at the RPMRR of a notice of preservation of hypothec and the transmission of a copy thereof to the purchaser within fifteen (15) days after the creditors of such SECURITY DOCUMENTS were advised of or consented to the transfer of the property;

(b) property ordinarily used in more than one jurisdiction;

(c) incorporeal movable property (unless established by title in bearer form and situated in the Province of Quebec);

(d) property and assets of the GRANTOR not situated in the Province of Québec.

5.10 To the extent that the GRANTOR is a creditor of a debt of Her Majesty the Queen in right of Canada, the charges created under the SECURITY DOCUMENTS with respect to such debt may not be enforceable by virtue of the provisions of the *Financial Administration Act* (Canada), subject to the express exceptions provided therein. Additionally, to the extent that the GRANTOR is a creditor of a debt of Her Majesty the Queen in right of the Province of Québec with respect to a fiscal law, the charges created under the SECURITY DOCUMENTS with respect to such debt may not be enforceable by virtue *of An Act Respecting the Ministère du Revenu* (Québec).

5.11 The rights created by the SECURITY DOCUMENTS in respect of claims (accounts receivable and rents) will have no effect against the debtors of such claims until such time as each such debtor has either acknowledged the rights of the creditor under the relevant SECURITY DOCUMENTS or received a copy or pertinent extract of such SECURITY DOCUMENTS or any other evidence of such SECURITY DOCUMENTS which may be set up against the GRANTOR. In the event that any claim subject to the SECURITY DOCUMENTS is itself secured by a registered hypothec, it is necessary to remit a copy of the certified statement of registration of the SECURITY DOCUMENTS to the debtor of such claim.

5.12 The charges constituted by the SECURITY DOCUMENTS are accessory to the obligations secured thereby and are enforceable only to the extent that the obligations secured thereby are enforceable.

5.13 No opinion is expressed herein with respect to:

(a) the ownership of, title to, interest in or existence of, any property, right, or interest owned or held or purported to be owned or held by GRANTOR and/or purporting to be charged pursuant to the SECURITY DOCUMENTS;

(b) the existence or absence (except as revealed by the searches referred to in Schedule B) of any liens, privileges, prior claims, claims, encumbrances, mortgages, registrations, security interests, or other charges in respect of any property or any right or interest in the property and assets charged under the SECURITY DOCUMENTS, or the priority or ranking of the creditors' rights thereunder with respect thereto (except as revealed by such searches referred to in Schedule B);

(c) the validity, perfection, enforcement or creation of any hypothecs created under the SECURITY DOCUMENTS in any property to which the CIVIL CODE does not apply;

(d) any provisions of the SECURITY DOCUMENTS which purport to waive the rights of any party under any legislation;

(e) any provisions of the SECURITY DOCUMENTS which purport to allow for the compensation or set-off of unmatured or unliquidated claims;

(f) any provisions of the SECURITY DOCUMENTS which purport to create a security interest;

(g) any provisions of the SECURITY DOCUMENTS which purport to create an irrevocable power of attorney, agency or mandate;

(h) any provisions of the SECURITY DOCUMENTS which purport to create a trust;

(i) any provisions of the SECURITY DOCUMENTS which refer to any legislation other than the laws of the Province of Québec and the laws of Canada applicable therein.

5.14 If any provision of the SECURITY DOCUMENTS is held to be null, without effect or deemed unwritten, this would not render such SECURITY DOCUMENTS invalid in other respects unless it is apparent that such SECURITY DOCUMENTS may be considered only as an indivisible whole.

5.15 The hypothecation of a right resulting from a contract of insurance of persons is without affect against the insurer, the beneficiary and third persons until the insurer receives notices thereof. In the event that any of the assets subject to the SECURITY DOCUMENTS consist of life insurance policies, the creditors should ensure (to the extent that they have not already done so) that such notice has been given.

5.16 The right of a hypothecary creditor to receive the indemnities resulting from a contract of property insurance on the damaged property is subject to a notice of the hypothec to the insurer. Accordingly, the creditors should ensure (to the extent that they have not already done so) that such notice has been given.

5.17 The enforceability of the SECURITY DOCUMENTS is subject to equitable principles and remedies as construed and applied by the Courts of the Province of Québec including, without limitation, the following:

(a) limitations upon the rights of the creditor to receive immediate payment of amounts stated to be payable on demand;

(b) limitations upon the rights of the creditor to enforce any provisions of the SECURITY DOCUMENTS based upon a purely technical or immaterial default;

(c) the obligation of any party to pay penalties may be reduced or extinguished in the discretion of the courts;

(d) the discretion that a court may reserve to itself to decline to hear an action if it is contrary to public policy for it to do so or if it is not the proper forum to hear such action;

(e) reasonable time which must be given to the borrower to make payment of any amount demanded in respect of any obligation payable on demand or without notice, and the restrictions on a creditor's right to enforce the SECURITY DOCUMENTS during such period of time;

(f) the discretion that a court may reserve to itself to decline to be bound by the provisions of the SECURITY DOCUMENTS to the effect that certain calculations, certificates or determinations of fact will be conclusive and binding; and

(g) any requirement that Interest (as defined in the *Criminal Code* (Canada)) be paid at a rate in excess of 60% per annum may contravene Section 347 of said Code and may not be enforceable.

5.18 Limitations on the liability of the creditor and any provisions of the SECURITY DOCUMENTS constituting or deeming the actions of the creditor to be actions of an attorney or agent of or otherwise on behalf of the borrower may be limited by a court and may not be enforceable.

5.19 The enforceability of the provisions of the SECURITY DOCUMENTS exculpating a party from a liability or duty otherwise owed by it to another or reducing such liability or duty may be limited under applicable law.

5.20 Rights of indemnification may be limited under applicable law.

5.21 The requirements of Articles 1641, 1642 and 3003 of the CIVIL CODE must be complied with in the event of an assignment by the creditor, of any of its rights under the SECURITY DOCUMENTS. Article 1641 provides, *inter alia*, that an assignment may be set up against the debtor and third party as soon as the debtor has acquiesced in it or

received a copy or pertinent extract of the deed of assignment or any other evidence of the assignment which may be set up against the assignor. Article 1642 provides that the assignment of a universality of claims, present and future, may be set up against debtors and third persons by registration of the assignment in the RPMRR, provided, however, that the other formalities whereby the assignment may be set up against the debtors who have not acquiesced in it have been accomplished. Article 3003 provides that where a hypothec is acquired by subrogation or assignment, publication of the subrogation or assignment is made in the appropriate register and a certified statement of registration therein shall be furnished to the grantor of such hypothec. If these formalities are not observed, the subrogation or assignment may not be set up against a subsequent assignee who has observed them.

5.22 We have not examined the title of JTIMC to the PROPERTY, nor have we verified the description of the PROPERTY. Accordingly, we are not in a position to express any opinion with respect to the title of JTIMC to the PROPERTY or the effectiveness or ranking of the charges created under the SECURITY DOCUMENTS with respect to the PROPERTY.

5.23 Article 3065 of the CIVIL CODE provides that the creditor is bound to register the acquittance of a debt if he receives a sufficient amount to pay the registration fee and the costs of sending the application to the registry office; he may not claim any other amount, notwithstanding any stipulation to the contrary. In this respect, to the extent that any provision of the SECURITY DOCUMENTS is contrary to Article 3065, no opinion is expressed herein with respect to the enforceability of such provision.

5.24 In the event at any time after the creation of the security ("**SECURITY**") created by the SECURITY DOCUMENTS, the PLEDGED SHARES cease to be held by the holder in the Province of Québec, the publication of the SECURITY and its effects may be subject to the laws of the jurisdiction in which the PLEDGED SHARES are located at the time.

5.25 The secured parties may, in the future, need to file registrations to ensure the continuous perfection of the hypothecs created under the SECURITY DOCUMENTS as follows:

(a) the registrations of the hypothecs registered at the RPMRR will expire ten (10) years after registration unless renewed by the filing in the RMPRR of a notice of renewal prior to such date and every ten (10) years thereafter.

(b) If any of the charged property subject to any hypothecs registered at the RMPRR consists of motor vehicles, it is necessary for the creditors to arrange for the filing at the RMPRR of registration documents making specific reference to the serial number of such motor vehicles, in order to render the rights of the creditors to such vehicles opposable to third parties.

(c) If any movable property subject to any hypothecs registered at the RMPRR is transformed, mixed or combined with the movable property of a third party so as to form a new movable property, it is necessary for the creditors to arrange for the registration at the RPMRR of a notice of renewal of any movable hypothecs against such resulting new property.

(d) If any shares or other securities affected by any hypothecs registered at the RMPRR are purchased, redeemed, converted, cancelled or otherwise transformed, it is necessary for the creditors to arrange for the registration at the RMPRR of a notice of renewal of the movable hypothec against the shares or other securities received or issued.

(e) The registrations of any hypothecs relating to the PROPERTY will expire thirty (30) years after registration unless renewed by the filing of a notice of renewal prior to such date and every thirty (30) years thereafter.

The opinions herein set forth are given as of the date hereof and we express no opinion with regard to the validity, binding nature or enforceability of any of the SECURITY DOCUMENTS consequent upon the amendment to, or coming into force of any law of the Province of Québec or federal law of Canada applicable therein or any corporate reorganization, after the date hereof. We undertake no, and hereby expressly disclaim any, obligation to advise you of any change in any matters set forth herein.

We trust the foregoing is satisfactory. If you have any questions or comments with respect to this report, please do not hesitate to contact us at your convenience.

Yours very truly,

Mendelsohn s.r.l. -

SCHEDULE "A"

GRANTOR: **JT CANADA LLC INC.**

1. Movable Hypothec and Pledge of Shares ("**NOVEMBER 1999 MOVABLE HYPOTHEC**") dated November 23, 1999 by JT Canada LLC Inc. ("**JTLLC**") in favour of JT International B.V. ("**JTBV**") charging the shares of JT Canada LLC II Inc. and registered at the Register of Personal and Movable Real Rights ("**RPMRR**") under numbers 99-0201894-0002 and 99-0201894-0003;

2. Movable Hypothec (Universality) ("**FEBRUARY 2001 MOVABLE HYPOTHEC**") dated February 12, 2001 by JTLLC in favour of JT International S.A.(said successor-in-right to JTBV) charging the movable property of JTLLC (including shares in JT International (BVI) Canada Inc.) and registered at the RPMRR under numbers 01-0042865-0001 and 01-0042865-0004;

3. Movable Hypothec (Universality) ("**MARCH 2001 MOVABLE HYPOTHEC**") dated March 30, 2001 by JTLLC in favour of JTI-MacDonald Corp ("**JTIMC**") charging the movable (other than shares of JT Canada LLC II Inc.) property of JTLLC and registered at the RPMRR under number 01-0114407-0002; and

4. Movable Hypothec and Pledge of Shares ("**MARCH 2001 PLEDGE OF SHARES**") dated March 30, 2001 by JTLLC in favour of JTIMC charging the shares of JT Canada LLC II Inc. registered at the RPMRR under number 01-0114407-0003.

GRANTOR: **JTI-MACDONALD CORP**. (and predecessor JT Nova Scotia Corporation)

5. Deed of Hypothec dated November 23, 1999 ("**NOVEMBER 1999 JTNS DEED**") by JT Nova Scotia Corporation ("**JTNS**") in favour of The Trust Company of the Bank of Montreal ("**BMO**") charging all of the movable (including the shares held in RJR-MacDonald Corp) and immovable property of JTNS and registered at the RPMRR under numbers 99-0201938-0001 and 99-0201938-0003;

6. Supplemental Deed of Hypothec ("**DECEMBER 1999 SUPPLEMENTAL DEED**") dated December 2, 1999 by JTIMC in favour of BMO confirming the NOVEMBER 1999 JTNS DEED and charging all of the movable (except for the shares held in JTI-MacDonald TM Corp. ("**JTITM**")) and immovable property of JTIMC and registered at the Land Registry division of Montreal under registration number 5138944;

7. Deed of Movable Hypothec and Pledge of Shares ("**DECEMBER 2000 MOVABLE HYPOTHEC**") dated December 12, 2000 by JTIMC in favour of BMO charging the shares held by JTIMC in JTITM and registered at the RPMRR under registration numbers 00-0381720-0001 and 00-0381720-0002;

8. Deed of Hypothec ("**DECEMBER 2000 DEED**") dated December 13, 2000 by JTIMC in favour of BMO charging all the movable (other than the shares of JTITM) and immovable property of JTIMC and registered at the RPMRR under number 00-0382879-0001 and at the Land Registry Division of Montreal under registration number 5221600;

9. Deed of Movable Hypothec and Pledge of Shares ("**DECEMBER 2000 MOVABLE HYPOTHEC**") dated December 13, 2000 by JTIMC in favour of BMO charging the shares held by JTIMC in JTITM and registered at the RPMRR under numbers 00-0382879-0003 and 00-0382879-0005;

GRANTOR: **JTI-MACDONALD TM CORP.**

10. Deed of Hypothec dated November 23, 1999 ("**NOVEMBER 1999 JTITM DEED**") by JTITM in favour of BMO charging all of the movable and immovable property of JTITM and registered at the RPMRR under number 99-0201909-0001;

(collectively referred to as "**SECURITY DOCUMENTS**")

Robert Thornton
Direct: (416) 304-0560 E-mail: rthornton@tgf.ca
File No: 519-019

February 15, 2005

Ernst & Young Inc.
P.O. Box 251, Ernst & Young Tower
Toronto-Dominion Centre, 222 Bay Street
Toronto ON M5K 1J7

Attention: Murray McDonald

Dear Sirs:

**Re: In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended and in the Matter of JTI-Macdonald Corp.
Court File No. CL 5530**

In your capacity as Court-appointed Monitor of JTI-Macdonald Corp. (the "Company"), you have requested our opinion with respect to the priority of certain security agreements, more particularly described in Schedule "A" attached hereto (the "Security Agreements"), in the Province of Ontario.

We did not participate in the preparation of or in the registration of the Security Agreements. Our involvement with the Security Agreements arises solely in our capacity as independent Ontario counsel to the Monitor. To render our opinions, we have reviewed photocopies of the executed Security Agreements and the searches described below. The opinions expressed herein are also based upon and subject to whatever qualifications may be hereinafter expressed including, but not limited to, those expressed in Schedule "B" annexed hereto (the "Assumptions and Qualifications").

We note that legal proceedings have been commenced by the Attorney General for Canada and the Ministère du Revenue du Québec in respect of the validity and enforceability of the Security Agreements. We do not express any opinion with respect to the merits of those actions nor upon the effect which the facts alleged in those proceedings would have upon the Security Agreements if true. This opinion is expressly qualified in this regard.

Ontario Law

The opinions expressed herein relate only to the laws of the Province of Ontario and no opinions are expressed herein with respect to the laws of any other jurisdiction. Without limiting the generality of the foregoing, we express no opinion with respect to the laws of any other jurisdiction to the extent that those laws may govern the validity, perfection, effect of perfection or non-perfection, enforcement or priority of the security interests created by the Security

Agreements as a result of the application of Ontario conflict of laws rules, including, without limitation, Sections 5 through 8 inclusive of the Ontario *Personal Property Security Act* (the "PPSA"). In addition, we express no opinion whether, pursuant to those conflict of laws rules, Ontario law would govern the validity, perfection, effect of perfection or non-perfection or enforcement or priority of the security interests created by the Security Agreements.

With respect to the laws of the Province of Nova Scotia, we have obtained and relied on an opinion from Burchell MacDougall, a copy of which is attached hereto as Schedule "C". With respect to the laws of the Province of Quebec, we have obtained and relied on an opinion from Mendelsohn, a copy of which is attached hereto as Schedule "D".

Searches and Registrations

We have conducted or caused to be conducted a search of the Personal Property Security Registration System (the "Search") against the Company, current as of August 23, 2004, with the Ministry of Consumer and Business Services. Other than as set out in the attached Schedule "E", we have not searched or caused to be searched any other names of the Company, including those which it may have had or under which it does carry on, or may have carried on, business. We understand that such additional searches are not required for your present purposes. The only registrations, filings or recordings against the Company disclosed by the Search are set forth in the attached Schedule "E".

JTI-Macdonald TM Corp. ("JTI-TM") registered three financing statements under the PPSA against the proper name of the Company. The first registration was registered on November 22, 1999 over all classes of collateral except "consumer goods" and is due to expire on November 22, 2025. There are no registrations in priority to this registration. The second registration in favour of JTI-TM was registered on November 29, 1999 over all classes of collateral except "consumer goods" and is due to expire on November 29, 2025. The third registration in favour of JTI-TM was registered on December 11, 2000 over all classes of collateral except "consumer goods" and is due to expire on December 11, 2025. This registration was initially registered in favour of JT Canada LLC Inc. but was subsequently assigned to JTI-TM on January 3, 2001.

The Trust Company of Bank of Montreal ("Trustco") registered two financing statements under the PPSA against the proper name of the Company. The first registration was registered on December 11, 2000 over "accounts" and "other" and is due to expire on December 11, 2025. The collateral description states that this registration secures, among other things, convertible debentures in the amount of $410,000,000.00. The second registration was also registered on December 11, 2000 over "accounts" and "other" and is due to expire on December 11, 2025. The collateral description states that this registration secures, among other things, convertible debentures in the amount of $1,200,000,000.00.

Our opinion herein with respect to the priority of the security interests created by the Security Agreements is based solely upon a review of the Search summarized in Schedule "E" hereto and is subject to the assumptions and qualifications stated herein.

<u>**OPINION**</u>

Based on and subject to the foregoing and the Assumptions and Qualifications set out in Schedule "B" hereto, we are of the opinion that each of the Security Agreements creates a valid security interest in the right, title and interest of the Company in and to the Collateral (as defined in the Security Agreements), securing payment and performance of the Secured Obligations (as defined in the Security Agreements) in favour of the secured party named therein and such security interests have been perfected to the extent capable of perfection by registration in the Province of Ontario under the PPSA.

We trust you find the above satisfactory for your purposes. If you require any further advice or assistance, please do not hesitate to contact the undersigned.

Yours very truly,

ThorntonGroutFinnigan LLP

Robert I. Thornton

SCHEDULE "A"

1. Demand Debenture No. 11 in the principal amount of $1,200,000,000.00 dated November 23, 1999 granted by JT Nova Scotia to JTI-TM.

2. Demand Debenture No. 12 dated December 2, 1999 in the principal amount of $1,200,000,000.00 granted by JTI-M to JTI-TM.

3. Deed of Movable Hypothec and Pledge of Shares dated December 12, 2000 granted by JTI-M to Trustco.

4. Deed of Movable Hypothec and Pledge of Shares dated December 13, 2000 granted by JTI-M to Trustco.

5. Demand Debenture dated December 13, 2000 in the principal amount of $500,000,000.00 granted by JTI-M to JTLLC which was subsequently assigned to JTI-TM.

SCHEDULE "B"

The opinions contained in this letter are subject to the following assumptions and qualifications:

ASSUMPTIONS

1. Each of the Security Agreements constitutes a legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms under the laws which are expressly stated as governing such Security Agreements.

2. The genuiness of all signatures and the authenticity of all documents submitted to us as originals, and the conformity to original documents of all documents submitted to us as certified, notarized or photostatic copies.

3. The Company was validly subsisting at the time the Security Agreements were executed by the Company and continue to be active as of the date of this opinion.

4. The Company has the corporate power and capacity to own its property and assets and to carry on its business as it is now being carried on by it.

5. The registrations, filings or recordings referred to in Schedule "E" hereto relate to the Security Agreements and continue to be effective and unchanged as of the date of this opinion.

6. That the Company has rights in the collateral described in the security granted by the Company, that value has been given to the Company and that no agreement exists between JTI-TM or Trustco and the Company whereby the time for attachment of the security interest has been postponed.

7. The accuracy, completeness and currency of all public records wherein we conducted searches, as set out herein.

QUALIFICATIONS

1. The enforceability of any security is subject to all applicable bankruptcy and insolvency laws and laws of general application affecting the enforcement of creditors' rights generally, and the enforcement of such rights and the availability of equitable remedies are subject to the inherent discretion of the court.

2. We are qualified to practice law only in the Province of Ontario. The opinions expressed herein are limited to the laws of the Province of Ontario and the laws of Canada application herein.

3. Our opinion with respect to the registered priority of the personal property security

granted by the Company is based solely upon a review of a certified PPSA search for the Company provided to us by the Ministry. We express no opinion with respect to any unregistered or unperfected claims of third parties whether now existing or arising in the future, which may, in the absence of any registration or perfection, rank in priority to the security interests of any secured party.

4. As Ontario does not have a system for recording ownership of personal property, no opinion is given with respect to title to any of the personal property pledged by the Company.

5. In accordance with our usual practice, we have conducted no searches and made no registrations in respect of any trademarks, trade-names, patents, copyrights or other intellectual property rights of the Company.

6. Government licenses, permits, quotas or rights may be incapable of assignment, or may require the approval of or notice to the relevant governmental authority prior to becoming effective.

7. Powers of attorney, although expressed to be irrevocable, may in some circumstances be revoked, including without limitation, pursuant to the *Substitute Decisions Act* (Ontario).

8. A perfected security interest may become unperfected prior to its stated expiry date in certain circumstances, such as where a debtor transfers its collateral out of the ordinary course of business or changes its name and the secured party fails to register an amendment to its PPSA registration within a prescribed period of time after learning of same.

9. While the order of registration is not absolutely indicative of priority, the general rules of priority under the PPSA provide that the first party to perfect its security interest has priority over parties who perfect their security interest at a later date. There are exceptions to this rule, such as inventory and equipment that is purchased through the use of a purchase money security interest ("PMSI") security arrangement, whereby a security interest is granted in the purchased goods to secure payment of the purchase price. A PMSI registration can have priority over a pre-existing PPSA registration in the event that the requirements for a PMSI are met by a PMSI lender. Collateral may also be subject to unregistered government super priority claims. We are not able to advise you as to the merits of such PMSI or government claims until a respective party raises such claims.

10. The enforceability and priority of the Security Agreements, the security interests created thereby and the rights and remedies set out therein or any judgment arising out of or in connection therewith may be limited by any applicable bankruptcy, insolvency, winding-up, reorganization, arrangement, moratorium or other laws affecting creditors' rights generally, from time to time in effect, and will be subject to the *Limitations Act, 2002* (Ontario), and we express no opinion as to whether a court may find a provision of any of the Security Agreements to be unenforceable as an attempt to vary or exclude a limitation period under such statute.

8. The enforceability and priority of the Security Agreements, the security interests created thereby, and the rights and remedies set out therein may be limited by general principles of equity and the obligation to act in a reasonable manner, and no opinion is given as to any specific remedy that may be granted, imposed or rendered (including equitable remedies such as those of specific performance and injunction).

9. Our opinion does not apply to security interests created by a previous owner, if any, of the Collateral and perfected by the filing of a Financing Statement under its name.

10. We give no opinion as to:

    (a) the merits of the legal proceedings constituted to date to challenge the validity and enforceability of the Security Agreements, including the proceedings commenced by the Attorney General for Canada and the Ministère du Revenue du Québec (the "Challenge Proceedings");

    (b) the effect which the facts alleged in the Challenge Proceedings would have upon the enforceability and validity of the Security Agreements if true; and

    (c) the applicability or effect upon the Security Agreements of any law of general application under which the Security Agreements could be challenged arising from any intention of any party to the Security Agreements to hinder, delay, defeat or defraud creditors;

    and this opinion is expressly qualified in this regard.

SCHEDULE "C"

BY FAX 416-943-3300

February 7, 2005

P.O. Box 1128
710 Prince Street
Truro, Nova Scotia
Canada B2N 5H1

Telephone: 902 895 1561
Facsimile: 902 895 7709
Toll Free: 1 800 565 1200 (NS)

www.burchellmacdougall.com

Brian W. Stilwell
bstilwell@burchellmacdougall.com
Voicemail Ex. 548

Ernst & Young Inc.
Monitor of JTI-Macdonald Corp.
(The "Monitor")

Attention: Mike Dean

Dear Sirs :

RE: Certain Security among JT Canada LLC Inc. ("JT LLC"), JTI Macdonald Corp. ("JTIMC") and JTI Macdonald TM Corp. ("TM Holdco"), (individually a "company" and collectively, the "Companies" with JTIMC and TM Holdco being referred to individually as a "Debtor Company" and collectively as the "Debtor Companies")

You have asked us to provide our opinion as to the validity, enforceability and perfection of certain security granted by the Debtor Companies, pursuant to security documents more particularly described in Schedule "A" attached hereto (collectively, the "Nova Scotia Security Documents"). The undertaking, business, properties, assets and rights of the Debtor Companies as described in the Security Documents are sometimes collectively referred to as the "Charged Property".

We did not act for any of the companies in connection with the negotiation, execution and delivery of the Nova Scotia Security Documents. We have been retained by Ernst & Young Inc. in connection with the current proceedings under the *Companies' Creditors Arrangement Act* (the "CCAA") with respect to JTIMC. We have been advised that both the Attorney General for Canada and the Ministere du Revenu du Quebec have sought in separate proceedings to, in effect, challenge the validity and enforceability of the Nova Scotia Security Documents. This opinion is not an analysis of, or opinion as to the merits of, any such challenge.

The opinions expressed herein are limited to the laws of the Province of Nova Scotia and the laws of Canada applicable therein.

1. Materials Reviewed and Assumptions

We have examined originals or copies, certified or otherwise identified to our satisfaction, of such public records, and have considered such questions of law as we have deemed relevant and necessary as the basis for the opinions hereinafter expressed. In such examination, we have assumed the genuineness of all signatures on, and the authenticity and completeness of, all documents submitted to us as original documents and the conformity to the original documents of all documents submitted to us as true, certified, telecopied or photostatic copies thereof. We have not reviewed all of the Companies' corporate records and minute books. We have assumed that:

(i) each of the Companies is an existing corporation duly incorporated and subsisting under the laws of its jurisdiction of incorporation and each of the Debtor companies is duly incorporated and subsisting as an unlimited company, governed by the *Companies Act* of Nova Scotia;

(ii) each of the Debtor Companies has the corporate capacity and corporate authority to own its property and assets, to carry on its business as currently carried on by it and to execute, deliver and perform its obligations under the Nova Scotia Security Documents to which it is a party;

(iii) each of the Debtor Companies has duly authorized, executed and delivered the Nova Scotia Security Documents to which it is a party;

(iv) the execution and delivery by each Debtor Company of the Nova Scotia Security Documents to which it is a party and the performance of its obligations thereunder is not a contravention of or in conflict with its articles or by-laws or any resolutions of its directors or shareholders or with any applicable law of the jurisdiction of its incorporation or of Canada;

(v) where shares are pledged as security, that the secured party has taken delivery and maintained continued possession of the share certificates representing the pledged shares;

(vi) none of the Charged Property constitutes a fixture for the purposes of the *Personal Property Security Act* (Nova Scotia) (the "Nova Scotia PPSA"); and

(vii) neither of the Debtor Companies owns real property in the Province of Nova Scotia and therefore registrations in respect of any charge on real property referred to in any of the Nova Scotia Security Documents are not required.

We have also assumed that the:

(a) Convertible debenture subscription agreement between JT Nova Scotia Corp. ("JT NS Corp.") and TM Holdco for debentures in the aggregate total amount of $1,200,000,000 dated November 23, 1999 ("Nov. 23 Subscription Agreement");

(b) Debentures nos. 1-10 issued by TM Holdco to JT LLC in the amount of $1,200,000,000 each dated November 23, 1999 ("Nov. 23 Debentures");

(c) Assumption Agreement dated December 2, 1999 by JTIMC (resulting from the amalgamation of JT NS Corp. and RJR-MacDonald Corp. on November 27, 1999 under the *Companies Act* (Nova Scotia) whereby JTIMC agrees to assume the obligations of JT NS Corp. under the Nov. 23 Subscription Agreement and the Nov. 23 Debentures;

(d) Amending agreement between JTIMC and TM Holdco amending the Nov. 23 Subscription Agreement dated December 12, 2000;

(e) Demand debenture subscription agreement between JTIMC and JT LLC for debentures in the aggregate total amount $410,000,000 dated December 13, 2000;

(f) Demand debentures nos. 1-10 issued by JTIMC to JT LLC in the amount of $410,000,000 dated December 13, 2000;

are valid and enforceable and constitute binding obligations in accordance with their terms under the laws by which they are expressed to be governed.

We have conducted searches for filings or registrations pursuant to the *Personal Property Security Act* (Nova Scotia) as at November 19th, 2004.

2. Opinions

Based and relying upon the foregoing and subject to the qualifications hereinafter set forth, we are of the opinion that:

1) Each Nova Scotia Security Document executed and delivered by a Debtor Company creates in favour of the secured party named therein under the laws of the Province of Nova Scotia, a valid security interest in the Charged Property of the applicable Debtor Company to which the Nova Scotia PPSA applies; and

2) Each Nova Scotia Security Document has been registered, filed or recorded in all public offices where the registration, filing or recording thereof is required under the laws of the Province of Nova Scotia to perfect the security interest constituted in the Charged Property to which the Nova Scotia PPSA applies; and

3) Each Nova Scotia Security Document creates valid and binding obligations of the Debtor Company that is a party thereto which is enforceable against the Debtor Company in accordance wit the respective terms thereof.

4. Registrations Under the Nova Scotia PPSA

The financing statements registered in respect of the Nova Scotia Security Documents (the "**Financing Statements**") must be renewed before the expiry of the applicable registration period in respect of the Financing Statements by registration of a financing change statement in the prescribed form in order for the security interests perfected by the registration of the Financing Statements to continue to be perfected.

The security interests perfected by the registration of the Financing Statements may become unperfected in certain circumstances such as:

(a) if the secured party learns that the Debtor Company has transferred its interest in the collateral; or

(b) if the secured party learns that the Debtor Company has changed its name.

In order to maintain perfection, the secured party must file a financing change statement within 15 days of learning of such a transfer of interest or change of name, or within 15 days of a transfer of a debtor's interest in the collateral with the prior consent of the secured party.

4. Qualifications

The opinions expressed herein are subject to the following qualifications:

(a) the enforceability of any of the Nova Scotia Security Documents and the rights and remedies set out therein or any judgment arising out of or in connection therewith may be limited by bankruptcy, insolvency, winding-up, reorganization, arrangement, moratorium, the Nova Scotia PPSA or other laws affecting creditors rights generally;

(b) the enforceability of any of the Nova Scotia Security Documents and the rights and remedies set out therein may be limited by general principles of equity, and no opinion is given as to any equitable remedy that may be granted, imposed or rendered (including specific performance and injunction);

(c) a receiver or receiver and manager appointed pursuant to the provisions of the Nova Scotia Security Documents may, for certain purposes, be treated by a court as being the agent of the secured party, notwithstanding any agreement to the contrary;

(d) we express no opinion as to the effectiveness of any security interest created by any Nova Scotia Security Documents in any collateral to which the Nova Scotia PPSA does not apply;

(e) no opinion is expressed as to the title of any Debtor Company to any real or personal property, or as to the priority or ranking of any charge, security interest or assignment created by any of the Nova Scotia Security Documents;

(f) we offer no opinion as to whether a security interest may be created in receivables, licenses, permits, privileges, franchises, leases or agreements to the extent that the terms of the foregoing property or any applicable law prohibits its assignment or requires a consent, approval or other authorization or registration which has not been made or given;

(g) our Nova Scotia PPSA search results indicate that other parties may have security interests in personal property of one or more of the Companies which have been registered prior to or subsequent to the Companies' interests under the Nova Scotia Security Documents and which may evidence purchase-money type security interests. It is possible that any one or more of these security interests would have priority over the Companies' interests under the Nova Scotia Security Documents. We have not been requested to render an opinion as to the relative priorities of these interests and we offer no opinion as to priority regarding any such security interests;

(h) our opinion is based solely on the documents constituting the Nova Scotia Security Documents and such opinions may therefore be subject to other rights and interests that may exist at law, by statute or by agreement;

(i) no opinion is expressed as to any charge or security interest or assignment created by any of the Nova Scotia Security Documents with respect to any property of any Debtor company or any proceeds of such property that is not identifiable or traceable, or which by its terms cannot be subject to such charge, security interest or assignment without the consent of a third party which has not been obtained;

(j) no opinion is expressed as to the enforceability of any provision of any of the Nova Scotia Security Documents providing for severability;

(k) no opinion is expressed with respect to the validity, binding nature or enforceability of any provision of the Nova Scotia Security Documents which suggests that modifications, amendments or waivers that are not in writing will not be effective;

(l) no opinion is expressed with respect to any provision of the Nova Scotia Security Documents which purports to relieve a person from a liability or duty otherwise owed or to require compliance regardless of law;

(m) the costs of and incidental to all proceedings taken in a court or before a judge are in the discretion of the court or judge and the court or judge has power to determine by whom and to what extent such costs shall be paid;

(n) pursuant to the *Currency Act* (Canada), a court in Canada will render judgment only in lawful money of Canada;

(o) a court in the Province of Nova Scotia may decline to enforce rights of indemnity and contribution under the Nova Scotia Security Documents to the extent that they are found to be contrary to public policy;

(p) no opinion is given with respect to creation or perfection of a security interest pursuant to, the *Canada Shipping Act* (Canada), the *Copyright Act* (Canada), the *Industrial Design Act* (Canada), the *Integrated Circuit Topography Act* (Canada), the *Patent Act* (Canada), the *Plant Breeders' Rights Act* (Canada), the *Railway Act*(Canada), and the *Trade-Marks Act* (Canada) or the consequences of compliance or non-compliance with such statutes;

(q) no opinion is given with respect to the provisions of the Nova Scotia *Companies Act* applicable to unlimited liability companies such as the Debtor Companies nor with respect to any pledge of shares in the capital stock of either of the Debtor companies or any security interest in any such shares;

(r) to the extent that the security interest or interests created under the Nova Scotia Security Documents:

   (a) attaches to an intangible;

   (b) attaches to goods which are of a type that are normally used in more than one jurisdiction, if such goods are classified as equipment or inventory which are leased or held for lease to others; or

   (c) includes a non-possessory security interest in a security, chattel paper, a negotiable document of title, an instrument or money;

   the validity, perfection and effect of perfection or non-perfection of the security interest is governed by the laws of the jurisdiction in which the place of business of the applicable Debtor Company is located or, in the event it has more than one place of business, at its chief executive office at the time at which the security interest attaches. No opinion is given with respect to whether Nova Scotia is the appropriate place of registration for the various security interests in view of the fact that we understand that the chief executive office of the Debtor Companies is located in Ontario or Quebec;

(s) we have not made any investigations for registrations against or perfection or any security interest in real property collateral which may be charged by the Security Documents (real property collateral would include and extend to mineral, oil and gas properties and interests therein; unextracted minerals, oil and gas and other hydrocarbons; and uncut lumber) and we express no opinion with respect to such real property security interest; and

(t) if any collateral charged by the Nova Scotia Security Documents is comprised of items of "serial number goods" (as that term is defined in the Nova Scotia PPSA), then registration of a financing statement or amendment thereof providing an adequate serial number description of those goods is necessary to protect the security therein as against certain other lenders and buyers. We have not made inquiries as to whether any such serial number registrations are necessary or advisable.

This opinion is intended solely for the use of the parties to which it is addressed and may not be relied upon by any other person or for any other purpose or quoted or referred to in any other document without our prior written consent.

We trust the foregoing is satisfactory. Should you have any questions or comments, please do not hesitate to contact us.

Yours very truly,

BURCHELL MACDOUGALL

SCHEDULE "A"

SECURITY DOCUMENTS

1. General Security Agreement dated November 23, 1999 granted by TM Holdco in favour of JT LLC.

2. Demand Debenture No. 11 in the principal amount of $1,200,000,000.00 dated November 23, 1999 granted by JT NS Corp. to TM Holdco, which Demand Debenture became an obligation of JTIMC on amalgamation on November 27, 1999 or was replaced by Demand Debenture No. 12 dated December 2, 1999 (see below).

3. Demand Debenture No. 12 dated December 2, 1999 in the principal amount of $1,200,000,000.00 granted by JTIMC to TM Holdco as security for the same obligations as referred to in Demand Debenture No. 11 above.

4. Demand Debenture dated December 13, 2000 in the amount of $500,000,000.00 granted by JTIMC to JT LLC as assigned by Assignment of Debenture dated December 13, 2000 by JT LLC to TM Holdco.

SCHEDULE "D"

M E N D E L S O H N

Our file 64,137(0)-1000

January 27, 2005

THORNTON GROUT FINNIGAN
Royal Trust Tower
Toronto-Dominion Centre
77 King Street West
Suite 2200
P.O. Box 329
Toronto, Ontario
M5K 1K7

Attention: Mrs. Leanne M. Hoyles

Dear Sirs:

RE: JTI-MACDONALD CORP. – SECURITY REVIEW

You have asked for our opinion on the validity and enforceability of certain Québec security (specifically described and defined in Schedule A attached hereto) ("**SECURITY DOCUMENTS**") granted by the following entities:

1. JTI-MacDonald Corp. ("**JTIMC**") and its predecessor JT Nova Scotia Corporation ("**JTNS**");

2. JTI-MacDonald TM Corp. ("**JTITM**"); and

3. JTI Canada LLC Inc. ("**JTLLC**").

(all the aforementioned parties are sometimes hereinafter collectively referred to as, the "**GRANTORS**" or individually as the "**GRANTOR**").

1. DOCUMENTS REVIEWED

For the purposes of this opinion, we have examined copies of the SECURITY DOCUMENTS which you have provided to us.

AVOCATS | ATTORNEYS — SOCIÉTÉ EN NOM COLLECTIF | GENERAL PARTNERSHIP
1000 SHERBROOKE O. | W. #2700 MONTRÉAL (QUÉBEC) CANADA H3A 3G4
TÉLÉPHONE 514.987.5000 FAX 514.987.1213 WWW.MENDELSOHN.CA

2. SEARCHES

In preparing our report, we conducted the Movable (Personal) Property Searches and certain Immovable (Real) Property Searches, as more fully described hereunder.

A. Movable (Personal) Property Searches

We have conducted the following searches ("**MOVABLE PROPERTY SEARCHES**") with respect to filings or registrations with respect to the names indicated in Schedule B (comprised of Schedules A-1, A-2 and A-3) ("**SEARCH SCHEDULES**") attached hereto:

2.1 a search with respect to registrations in the Register of Personal and Movable Real Rights (Québec) ("**RPMRR**") with respect to movable (personal) property.

The searches were conducted against the English names, the French names, any combined English/French name and certain predecessor names, as applicable. The results of such searches are also set out in the SEARCH SCHEDULES.

The foregoing searches did not disclose, as of the respective dates indicated in the SEARCH SCHEDULES, any filings or registrations with respect to the names searched other than those indicated in the SEARCH SCHEDULES.

We draw to your attention that there could exist various other rights in favour of third parties which would not be disclosed by the searches such as, for example, the following:

2.2 statutory claims and the rights of third parties whose claims have priority by law and which are not required to be published (registered);

2.3 various rights of a creditor, which rights are preserved by such creditor on the property by observing certain formalities within prescribed delays;

2.4 the following rights of a seller with respect to property sold under certain circumstances to any of the entities whose name has been searched:

(a) certain rights of resolution or revendication of an unpaid seller;

(b) the hypothecary rights of a seller with respect to a hypothec granted by any of the entities whose name has been searched upon the acquisition of property and registered within prescribed delays;

2.5 the rights of third parties resulting from reservations of ownership, sales with a right of redemption, leases with a term of more than one (1) year and leasing contracts (*crédit-baux*) which may be set up against third parties, including hypothecary (secured)

creditors provided such rights are registered within fifteen (15) days from the entering into of agreements containing said rights;

2.6 the hypothecary rights of a creditor of any of the entities whose name has been searched affecting the following movable property:

(a) movable property hypothecated (pledged) with delivery (i.e. with physical dispossession); and

(b) accounts receivable (claims) or movable property represented by a bill of lading or other negotiable instrument, provided that the hypothec affecting such property is published (by registration or delivery) within ten (10) days following the time the creditor gives value.

Also, we draw to your attention that the RPMRR is a computer database which suffers from sporadic glitches and manual transcription errors of the registrar which can give rise to uncertainties. Although rare, there have been instances where a proper search of the RPMRR has failed to disclose all entries.

B. Immovable (Real) Property Searches

The description of the property charged under the DECEMBER 1999 SUPPLEMENTAL DEED (as defined in Schedule A) refers to approximately one hundred thirty-two (132) unrenovated (unconsolidated) lots; since a renovation (consolidation) of the lots had by then taken place, the description of the property charged under the DECEMBER 2000 DEED (as defined in Schedule A) refers to eight (8) renovated (consolidated) lots which appear to cover the same property located at 2455 Ontario Street, Montreal, Quebec, H2K 1W3 ("**PROPERTY**").

For the purposes of determining whether the DECEMBER 1999 SUPPLEMENTAL DEED was registered, we have obtained copies of the Index of Immovables with respect to registrations at the Land Register (Québec) ("**INDEX OF IMMOVABLES**") against some of the unrenovated lots on a random basis given the quantity of lots to be searched. We obtained copies of the INDEX OF IMMOVABLES against all renovated lots.

Please note that we have not examined title to the PROPERTY nor have verified the description of same nor reviewed the content of any other encumbrances. Furthermore, we have not reviewed any surveys or plans of the PROPERTY.

3. ASSUMPTIONS

For the purposes of the opinions herein expressed, we have assumed the following:

3.1 The genuineness of all signatures, the authenticity of all documents submitted to us as originals and the conformity to original documents of all documents submitted to us as certified, facsimile, photostatic or notarial copies.

3.2 The original copies of all documents were in fact signed by the relevant parties;

3.3 The accuracy, completeness and currency of the RPMRR, the INDEX OF IMMOVABLES, the Register of Enterprises (**"COMPANY REGISTER"**) and other public records maintained by public offices where we searched or inquired or have caused searches or inquiries to be made upon such information and advice provided to us by appropriate governmental, regulatory, or other like authorities with respect to those matters referred to therein;

3.4 That the address in the SECURITY DOCUMENTS accurately reflects the head office or a place of business of each of the parties.

3.5 That the domicile (registered office) of GRANTORS is located outside the Province of Québec.

3.6 That all relevant individuals had full legal capacity at all relevant times.

3.7 That on the date each of the SECURITY DOCUMENTS was executed and delivered:

(a) each party to the SECURITY DOCUMENTS validly exists and has the power, authority and qualification to enter into, execute, deliver and perform the SECURITY DOCUMENTS to which it is a party;

(b) each of the SECURITY DOCUMENTS has been duly authorized, executed and delivered by the parties thereto on the dates set out therein;

(c) the authorization, execution, delivery and performance of the SECURITY DOCUMENTS by any party thereto did not contravene or conflict with (i) any provision of such party's constating documents or by-laws; (ii) any existing applicable laws or regulations; or (iii) any of the terms, provision or conditions of any agreement, indenture, instrument or other document to which any party is bound or by which it or any of its assets is or may be bound or subject.

3.8 That for the purposes of any opinion herein relating to the creation, validity or perfection of the SECURITY DOCUMENTS on any property, (i) the laws of the Province of Québec apply to such property and the SECURITY DOCUMENTS; (ii) the applicable GRANTOR has rights with respect to such property and has title to such PROPERTY; (iii) the description of the assets as set forth in the respective SECURITY DOCUMENTS

is correct and sufficient to enable such assets to be identified; (iv) the legal description of the PROPERTY in the SECURITY DOCUMENTS containing same is complete and accurate and in accordance with the *Civil Code of Québec* ("**CIVIL CODE**").

3.9 That the DECEMBER 1999 SUPPLEMENTAL DEED was registered against all 132 unrenovated (unconsolidated) lots.

3.10 That the shares being pledged ("**PLEDGED SHARES**") in the NOVEMBER 1999 MOVABLE HYPOTHEC, DECEMBER 2000 MOVABLE HYPOTHEC, DECEMBER 2000 MOVABLE HYPOTHEC, FEBRUARY 2001 MOVABLE HYPOTHEC, MARCH 2001 MOVABLE HYPOTHEC and MARCH 2001 PLEDGE OF SHARES were delivered to the respective holders and have continuously been held by such holders in the Province of Québec.

3.11 That there are no restrictions on the transfer of the PLEDGED SHARES or that all required consents have been obtained in order to authorize the pledge of the PLEDGED SHARES.

3.12 That BMO had been duly appointed as the person holding the power of attorney (*fondé de pouvoir*) pursuant to Article 2692 of the CIVIL CODE of the creditors and such appointment remains in full force and effect on the date hereof.

3.13 That the debentures secured under the relevant SECURITY DOCUMENT were properly issued in accordance with their respective subscription agreements.

3.14 That the "obligations" purported to be secured under the SECURITY DOCUMENTS were created at the time that the SECURITY DOCUMENTS were entered into.

We have not undertaken any independent investigation to verify the accuracy of such assumptions.

4. OPINION

Based and relying solely upon our examination of the SECURITY DOCUMENTS, the MOVABLE PROPERTY SEARCHES and the searches at the INDEX OF IMMOVABLES and subject to the aforementioned assumptions and the qualifications hereinafter expressed, we are of the opinion that the SECURITY DOCUMENTS, to the extent set forth below, constitute valid security on the assets which form the object thereof located in the Province of Québec, limited to the amounts stipulated therein:

4.1 The NOVEMBER 1999 MOVABLE HYPOTHEC secures the repayment of the indebtedness and the performance of JTLLC's obligations under the NOVEMBER 1999

MOVABLE HYPOTHEC, the loan agreement dated November 23, 1999 between JTLLC and JT International B.V. ("**LOAN AGREEMENT**") and the "loan documents" (as such term is defined therein).

4.2 The NOVEMBER 1999 JTITM DEED secures the payment of the "Debentures" (as such term is defined therein) and the performance of JTITM's obligations under the NOVEMBER 1999 JTITM DEED. We would draw to your attention the following discrepancies:

(a) The list of trademarks scheduled to the NOVEMBER 1999 JTITM DEED was at times unclear and as such, we are unable to confirm that the description contained in the RPMRR registration is accurate; and

(b) In the NOVEMBER 1999 JTITM DEED, the registration made at the RPMRR fails to mention Article 2692 of the CIVIL CODE as is provided for on the RPMRR RH form which is filed in order to effect registration. This article refers to security granted to a *fondé de pouvoir* (person holding the power of attorney) for the creditors as is the case in the NOVEMBER 1999 JTITM DEED.

While we are unable to predict with any certainty whether the foregoing discrepancy would be maintained by a court of competent jurisdiction as a valid reason for rejecting the validity of the registration or enforceability of the NOVEMBER 1999 JTITM DEED, our view is that the more logical position is that this discrepancy would not invalidate the NOVEMBER 1999 JTITM DEED because:

(i) the NOVEMBER 1999 JTITM DEED on its face would appear to be valid;

(ii) enough elements in the publication of the NOVEMBER 1999 JTITM DEED exist to put third parties in good faith on the appropriate notice of their existence such that it is unlikely that any existing or potential creditors of the relevant GRANTOR would be prejudiced.

4.3 The NOVEMBER 1999 JTNS DEED and the DECEMBER 1999 SUPPLEMENTAL DEED secure the payment of the "Debentures" (as such term is defined therein) and the performance of JTNS's and JTIMC's (as successor to JTNS) obligations under the NOVEMBER 1999 JTNS DEED and DECEMBER 1999 SUPPLEMENTAL DEED. We would draw to your attention the following:

(a) the NOVEMBER 1999 JTNS DEED was registered twice under registration numbers 99-0201938-0003 and 99-0201938-0001 to indicate a movable hypothec

without disposition and a movable hypothec with disposition (i.e. pledge) presumably to account for the fact that the GRANTOR disposed itself of assets covered by the hypothec (shares). The NOVEMBER 1999 JTNS DEED makes no reference to the hypothecation with disposition with respect to certain of the assets disposed (i.e. pledged), but disposition is a question of fact with no need for registration. If no disposition actually occurred the result would be a hypothec without disposition which is covered by registration number 99-0201938-0001.

(b) JTNS amalgamated on November 27, 1999 with RJR-MacDonald Corp. to form JTIMC and no registration of a name change has been effected at the RPMRR. Although it is customary to file a notice of name change, it is not a requirement of the CIVIL CODE and should not affect the opposability of the security to third parties.

4.4 The DECEMBER 2000 MOVABLE HYPOTHEC secures the payment of the "Debentures" (as such term is defined therein) and the performance of JTIMC's obligations under the DECEMBER 2000 MOVABLE HYPOTHEC.

4.5 The DECEMBER 2000 DEED secures the payment of the "Debentures" (as such term is defined therein) and the performance of JTIMC's obligations under the DECEMBER 2000 DEED.

4.6 The DECEMBER 2000 MOVABLE HYPOTHEC secures the payment of the "Debentures" (as such term is defined therein) and the performance of JTIMC's obligations under the DECEMBER 2000 MOVABLE HYPOTHEC.

4.7 The FEBRUARY 2001 MOVABLE HYPOTHEC secures the repayment of the indebtedness and the performance of JTLLC's obligations under the FEBRUARY 2001 MOVABLE HYPOTHEC as well as under the LOAN AGREEMENT (which was assigned to JT International S.A. on January 1, 2000).

4.8 The MARCH 2001 MOVABLE HYPOTHEC secures the repayment of the indebtedness and the performance of JTLLC's obligations under the MARCH 2001 MOVABLE HYPOTHEC, the "Grantor Promissory Note" and the "Loan Documents" (as such terms are defined therein).

4.9 The MARCH 2001 PLEDGE OF SHARES secures the repayment of the indebtedness and the performance of the JTLLC's obligations under the MARCH 2001 PLEDGE OF SHARES, the "Grantor Promissory Note" and the "Loan Documents" (as such terms are defined therein). Please note that we were not provided with "Schedule A" containing the description of the shares being pledged and as such we are unable to confirm that the description contained in the RPMRR is accurate.

4.10 The NOVEMBER 1999 JTITM DEED, NOVEMBER 1999 JTNS DEED and the DECEMBER 2000 DEED contain an assignment of claims subject to the *Financial Administration Act* (Canada). Under Article 1642 of the CIVIL CODE, an assignment of the universality of claims, present or future, may only be set up against debtors and third person by the registration of the assignment in the RPMRR and by providing them with a copy or a pertinent extract of the deed of assignment or any other evidence of the assignment. No registration in the RPMRR has been effected with respect to these assignments and we are unable to determine whether any notice was provided to the debtor or third person. Accordingly, we cannot opine on the opposability of the assignment against the debtor or the third person.

4.11 Based on the MOVABLE PROPERTY SEARCHES and searches in the INDEX OF IMMOVABLES, we would like to point out that BMO appears to have assigned its rights under the relevant SECURITY DOCUMENTS to BNY Trust Company of Canada.

5. QUALIFICATIONS

The foregoing opinions are subject to the following qualifications:

5.1 We are attorneys qualified to practice law and to render opinions only as to the laws of the Province of Québec and the laws of Canada applicable therein, and accordingly, we express no opinion as to the laws of any other jurisdiction.

5.2 We express no opinion as to whether the SECURITY DOCUMENTS could be attacked according to the provisions of any applicable bankruptcy, insolvency or creditors' rights legislation or under the CIVIL CODE as reviewable transactions.

5.3 Orders of specific performance and injunctive relief are remedies which may be ordered by a court in its discretion, and, accordingly, they may not be available as remedies to enforce the terms and provisions of the SECURITY DOCUMENTS.

5.4 The SECURITY DOCUMENTS may contain certain provisions (particularly concerning remedies after default) which go beyond and/or expand the strict reading of certain provisions of the CIVIL CODE. It is difficult to assess whether the courts will enforce such provisions. However, even if certain provisions of the SECURITY DOCUMENTS were found to be unenforceable, this would not prevent the holder from benefiting from the hypothecary remedies available to hypothecary creditors provided for under the CIVIL CODE.

5.5 Every creditor must exercise its rights in good faith. No right may be exercised in an excessive and unreasonable manner.

5.6 We express no opinion with respect to the enforceability of any provisions of the SECURITY DOCUMENTS which purport to enable the holder to recover any costs of enforcement or fees. Without limiting the foregoing, it should be noted that the CIVIL CODE provides that a hypothec may secure the capital and the interest accrued thereon, as well as the legitimate costs incurred for recovering or conserving the property charged by the hypothec. We draw to your attention that, under Article 2667 of the CIVIL CODE, notwithstanding any provision of the SECURITY DOCUMENTS to the contrary, no hypothec provided for therein secures the payment of extra-judicial professional fees payable by the holder for services in order to recover the capital and interest secured thereby or to conserve the property charged thereunder.

5.7 Pursuant to Articles 2959 and 2960 of the CIVIL CODE:

(a) Interest owing to the creditor for the current year and the three preceding years will have the same rank as the principal obligation secured under the SECURITY DOCUMENTS; and

(b) Any surplus of interest owing to the creditor will rank from the time of registration of a notice, at the applicable register, setting forth the amounts claimed.

5.8 We would draw to your attention that certain SECURITY DOCUMENTS were not registered at the RPMRR under certain of the trade names of the GRANTORS. Although it is practice to register security documents under trade names, it is our view that the omission to register under the trade names does not prevent the security to be opposable to third parties.

5.9 No opinion is expressed herein with respect to the enforceability in relation to third parties of the SECURITY DOCUMENTS on the following property:

(a) property of the GRANTOR disposed of out of the ordinary course of its business since the time of the execution of the SECURITY DOCUMENTS unless the creditors of such SECURITY DOCUMENTS arranged, in order to preserve the security created by the SECURITY DOCUMENTS on such property, for the publication at the RPMRR of a notice of preservation of hypothec and the transmission of a copy thereof to the purchaser within fifteen (15) days after the creditors of such SECURITY DOCUMENTS were advised of or consented to the transfer of the property;

(b) property ordinarily used in more than one jurisdiction;

SCHEDULE "E"

Reference File No.	Secured Party	Debtor	Date of Registration	Collateral Secured and Comments
856928601	JTI-Macdonald TM Corp.	JTI-Macdonald Corp. ("JTI")	November 22, 1999 (exp. Nov. 22, 2025)	Inv, equip, accts, other, MV incl. ***(debtor changed from JT Nova Scotia Corporation on Nov. 29, 1999)***
857173878	JTI-Macdonald TM Corp.	JTI	November 29, 1999 (exp. Nov. 29, 2025)	Inv, equip, accts, other, MV incl.
858904605	Associates Leasing (Canada) Ltd.	JTI	February 1, 2001 (exp. Feb. 1, 2005)	Equip, MV incl., no fixed maturity date -2000 Subaru Forester S VIN JF1SF6557YH708103
861994143	Associates Leasing (Canada) Ltd.	JTI	May 18, 2000 (exp. May 18, 2005)	Equip, MV incl., no fixed maturity date -2000 BMW 540 I (A5) VIN WBADN6347YGM68747
866387457	Canadian Imperial Bank of Commerce	JTI	October 5, 2000 (exp. Oct. 5, 2005)	Accts, other
867808224	Teletech Financial Corporation	JTI	November 23, 2000 (exp. Nov. 23, 2006)	Equip, accts, other -all present and future acquired telephone and communication systems, including without limitation, all related equipment components, attachments, accessories, replacements and proceeds, supplied by Bell Canada or its affiliates.
867808197	Teletech Financial Corporation	JTI	November 23, 2000 (exp. Nov. 23, 2006)	Equip, accts, other -all present and future acquired telephone and communication systems, including without limitation, all related equipment components, attachments, accessories, replacements and proceeds, supplied by Bell Canada or its affiliates.
867808188	Teletech Financial Corporation	JTI	November 23, 2000 (exp. Nov. 23, 2010)	Equip, accts, other

Reference File No.	Secured Party	Debtor	Date of Registration	Collateral Secured and Comments
867817638	Teletech Financial Corporation	JTI	November 24, 2000 (exp. Nov. 24, 2006)	Equip, accts, other -all present and future acquired telephone and communication systems, including without limitation, all related equipment components, attachments, accessories, replacements and proceeds, supplied by Bell Canada or its affiliates.
868277682	The Trust Company of Bank of Montreal	JTI	December 11, 2000 (exp. Dec. 11, 2025)	Accts, other -secures, among other things, demand debentures in the amount of $410,000,000
868277673	The Trust Company of Bank of Montreal	JTI	December 11, 2000 (exp. Dec. 11, 2025)	Accts, other -secures, among other things, convertible debentures in the amount of $1,200,000,000
868277664	JTI-Macdonald TM Corp.	JTI	December 11, 2000 (exp. Dec. 11, 2025)	Inv, equip, accts, other, MV incl. ***(Assigned by JT Canada LLC Inc. to JTI-Macdonald TM Corp. on Jan. 3, 2001)***
868487265	Associates Leasing (Canada) Ltd.	JTI	December 19, 2000 (exp. Dec. 19, 2005)	Equip, MV incl., $40,330, no fixed maturity date -2001 Infinity I30 Touring VIN JNKCA31A31T018218
869067229	Associates Leasing (Canada) Ltd.	JTI	January 11, 2001 (exp. Jan. 11, 2006)	Equip, MV incl., $64,242, no fixed maturity date -2001 Chrysler PT Cruiser VIN 3C4FY4BB01T587233 -2001 Ford Expedition XLT VIN 1FMRU16W21LB04076
869230116	Associates Leasing (Canada) Ltd.	JTI	January 18, 2001 (exp. Jan. 18, 2006)	Equip, MV incl., $80,224, no fixed maturity date -2001 Chrysler PT Cruiser VIN 3C4FY4BB81T573497 -2001 Chrysler PT Cruiser VIN 3C4FY4BB61T573496 -2001 Chrysler PT Cruiser VIN 3C4FY4BB21T573494

Reference File No.	Secured Party	Debtor	Date of Registration	Collateral Secured and Comments
869589144	Associates Leasing (Canada) Ltd.	JTI	February 1, 2001 (exp. Feb. 1, 2006)	Equip, MV incl., $35,820, no fixed maturity date -2001 Acura TL 3.2 (A5) VIN 19UUA56651A801513
870268257	Associates Leasing (Canada) Ltd.	JTI	March 1, 2001 (exp. Mar. 1, 2006)	Equip, MV incl., $29,558, no fixed maturity date -2001 Ford Windstar SEL VIN 2FMDA56411BB70255
870480504	Associates Leasing (Canada) Ltd.	JTI	March 8, 2001 (exp. Mar. 8, 2006)	Equip, MV incl., $28,494, no fixed maturity date -2001 Chrysler Concorde VIN 2C3HD36J51H657323
871254594	Associates Leasing (Canada) Ltd.	JTI	April 5, 2001 (exp. Apr. 5, 2006)	Equip, MV incl., $53,136, no fixed maturity date -2001 Buick Regal LS VIN 2G4WB55K311285158 -2001 Ford Truck Escape VIN 1FMYU041X1KB34753
872078958	CIT Financial Ltd.	JTI	May 3, 2001 (exp. May 3, 2005)	Inv, equip, accts, other, MV incl.
872558082	Associates Leasing (Canada) Ltd.	JTI	May 17, 2001 (exp. May 17, 2006)	Equip, MV incl., $39,526, no fixed maturity date -2001 Infinity I30 Touring VIN JNKCA31A11T021702
873717399	Associates Leasing (Canada) Ltd.	JTI	June 21, 2001 (exp. June 21, 2006)	Equip, MV incl., $26,794, no fixed maturity date -2001 Chrysler Intrepid VIN 2C3HH76V31H700216
874873935	CIT Financial Ltd.	JTI	July 27, 2001 (exp. July 27, 2006)	Inv, equip, accts, other, MV incl.
875147193	Associates Leasing (Canada) Ltd.	JTI	August 7, 2001 (exp. Aug. 7, 2006)	Equip, MV incl., $48,430, no fixed maturity date -2001 Acura MDX 3.5L (A5) VIN 2HNYD18621H003060
875465145	Associates Leasing (Canada) Ltd.	JTI	August 17, 2001 (exp. Aug. 17, 2006)	Equip, MV incl., $36,622, no fixed maturity date -2002 Ford Explorer XLT VIN 1FMZU73W92UB08483

Reference File No.	Secured Party	Debtor	Date of Registration	Collateral Secured and Comments
876418722	Associates Leasing (Canada) Ltd.	JTI	September 20, 2001 (exp. Sept. 20, 2006)	Equip, MV incl., $39,890, no fixed maturity date -2002 Infiniti I35 VIN JNKDA31A02T001947
876633327	GE Capital Vehicle and Equipment Leasing Inc.	JTI	September 28, 2001 (exp. Sept. 28, 2006)	Equip, MV incl., $81,747, no fixed maturity date -2002 Ford Windstar VIN 2FMZA55482BA37498 -2002 Ford Windstar VIN 2FMZA55412BA37553 -2002 Ford Windstar VIN 2FTNX21LX2EB00165
876844359	GE Capital Vehicle and Equipment Leasing Inc.	JTI	October 5, 2001 (exp. Oct. 5, 2006)	Equip, MV incl., $27,225, no fixed maturity date -2002 Jeep Liberty VIN 1J4GL48K22W216638
877009626	GE Capital Vehicle and Equipment Leasing Inc.	JTI	October 12, 2001 (exp. Oct. 12, 2006)	Equip, MV incl., $80,889, no fixed maturity date -2002 Chrysler Intrepid VIN 2C3AH56M12H152571 -2002 Ford Windstar VIN 2FMZA55412BA44776 -2002 Ford Windstar VIN 2FMZA55422BA44768
877417992	GE Capital Vehicle and Equipment Leasing Inc.	JTI	October 26, 2001 (exp. Oct. 26, 2006)	Equip, MV incl., $56,260, no fixed maturity date -2002 Ford Escape VIN 1FMYU041X2KB27903 -2002 Ford Windstar VIN 2FMZA55412BA52991
877720149	GE Capital Vehicle and Equipment Leasing Inc.	JTI	November 6, 2001 (exp. Nov. 6, 2006)	Equip, MV incl., $40,409, no fixed maturity date -2002 Volvo S60 2.4 M VIN YV1RS61R122094859
878020848	GE Capital Vehicle and Equipment Leasing Inc.	JTI	November 16, 2001 (exp. Nov. 16, 2006)	Equip, MV incl., $54,417, no fixed maturity date -2002 Chrysler Concorde VIN 2C3AD36M02H173282 -2002 Chrysler PT Cruiser VIN 3C8FY48B02T298747

Reference File No.	Secured Party	Debtor	Date of Registration	Collateral Secured and Comments
878916321	GE Capital Vehicle and Equipment Leasing Inc.	JTI	December 17, 2001 (exp. Dec. 17, 2006)	Equip, MV incl., $64,153, no fixed maturity date -2002 Chrysler 300M VIN 2C3AE76K82H186252 -2002 Jeep Liberty VIN 1J4G48K52W259841
879445332	GE Capital Vehicle and Equipment Leasing Inc.	JTI	January 8, 2002 (exp. Jan. 8, 2007)	Equip, MV incl., $77,249, no fixed maturity date -2002 Ford Windstar VIN 2FMZA55442BA79778 -2002 Audi A4 VIN WAULT68E82A130738
880395939	Nexcap Finance Corporation	JTI	February 6, 2002 (exp. Feb. 6, 2005)	Equip, accts, other -lease agreements (operating)
880372854	GE Capital Vehicle and Equipment Leasing Inc.	JTI	February 6, 2002 (exp. Feb. 6, 2007)	Equip, MV incl., $156,634, no fixed maturity date -2002 Ford Windstar VIN 2FMZA55472BB00994 -2002 Ford Windstar VIN 2FMZA55432BB01012 -2002 Ford Windstar VIN 2FMZA554X2BB00956 -2002 Ford Windstar VIN 2MFZA55492BB01046 -2002 Volvo S60 T5 VIN YV1RS53D722128881
880479378	GE Capital Vehicle and Equipment Leasing Inc.	JTI	February 11, 2002 (exp. Feb. 11, 2007)	Equip, MV incl., $25,057, no fixed maturity date -2002 Chrysler PT Cruiser VIN 3C8FY48B52T334254
880689861	GE Capital Vehicle and Equipment Leasing Inc.	JTI	February 19, 2002 (exp. Feb. 19, 2007)	Equip, MV incl., $27,225, no fixed maturity date -2002 Jeep Liberty VIN 1J4GL8K52W300405
880864794	GE Capital Vehicle and Equipment Leasing Inc.	JTI	February 26, 2002 (exp. Feb. 26, 2007)	Equip, MV incl., $66,637, no fixed maturity date -2002 GMC Yukon VIN 1GKEK13V62R240072 -2002 Ford Windstar VIN 2FMZA554X2BB18549

Reference File No.	Secured Party	Debtor	Date of Registration	Collateral Secured and Comments
880953606	GE Capital Vehicle and Equipment Leasing Inc.	JTI	March 1, 2002 (exp. Mar. 1, 2007)	Equip, MV incl., $325,372, no fixed maturity date -2002 Ford Windstar VIN 2FMZA55452BB24033 -2002 Ford Windstar VIN 2FMZA55442BB25447 -2002 Ford Windstar VIN 2FMZA55432BB24046 -2002 Ford Windstar VIN 2FMZA55482BB24043 -2002 Ford Windstar VIN 2FMZA55442BB24040 -2002 Ford Windstar VIN 2FMZA55442BB25481 -2002 Ford Windstar VIN 2FMZA55432BB24080 -2002 Ford Windstar VIN 2FMZA55442BB24041 -2002 Ford Windstar VIN 2FMZA554X2BB24044 -2002 Ford Windstar VIN 2FMZA55402BB25493 -2002 Ford Taurus VIN 1FAHP56S22G208983 -2002 Ford Windstar VIN 2FMZA55482BB25550
881711019	GE Capital Vehicle and Equipment Leasing Inc.	JTI	May 10, 2002 (exp. May 10, 2007)	Equip, MV incl., $39,999, no fixed maturity date -2002 Audi A4 VIN WAULC68E92A224675
881573769	GE Capital Vehicle and Equipment Leasing Inc.	JTI	May 10, 2002 (exp. May 10, 2007)	Equip, MV incl., $190,845, no fixed maturity date -2002 Ford Taurus VIN 1FAHP59S52G220721 -2002 Ford Windstar VIN 2FMZA55432BB41476 -2002 Ford Windstar VIN 2FMZA55462BB41519 -2002 Ford Windstar VIN 2FMZA55422BB41551 -2002 Ford Winstar VIN 2FMZA55472BB40718 -2002 Ford Windstar VIN 2FMZA55462BB40757 -2002 Ford Windstar VIN 2FMZA55442BB40336

Reference File No.	Secured Party	Debtor	Date of Registration	Collateral Secured and Comments
881504235	GE Capital Vehicle and Equipment Leasing Inc.	JTI	May 10, 2002 (exp. May 10, 2007)	Equip, MV incl., $50,000, no fixed maturity date -2002 Toyota Lexus ES300 VIN JTHBF30GX20038035
881452575	GE Capital Vehicle and Equipment Leasing Inc.	JTI	May 10, 2002 (exp. May 10, 2007)	Equip, MV incl., $27,021, no fixed maturity date -2002 Buick Regal VIN 2G4WB55K421236147
881444115	Nexcap Finance Corporation	JTI	May 10, 2002 (exp. May 10, 2005)	Equip, accts, other -lease agreements (operating)
882486162	GE Capital Vehicle and Equipment Leasing Inc.	JTI	May 13, 2002 (exp. May 13, 2007)	Equip, MV incl., $76,276, no fixed maturity date -2002 Jeep Liberty VIN 1J4GL48K42W334318 -2002 Jaguar Jaguar X-Type VIN SAJGA53D12XC73079
882041319	GE Capital Vehicle and Equipment Leasing Inc.	JTI	May 13, 2002 (exp. May 13, 2007)	Equip, MV incl., $218,129, no fixed maturity date -2002 Ford Windstar VIN 2FMZA55492BB61537 -2002 Ford Windstar VIN 2FMZA55412BB62021 -2002 Ford Windstar VIN 2FMZA55462BB61897 -2002 Ford Windstar 2FMZA55432BB61565 -2002 Ford Windstar VIN 2FMZA55422BB62724 -2002 Chevrolet Impala VIN 2G1WH55K429322295
883520244	GE Capital Vehicle and Equipment Leasing Inc.	JTI	May 23, 2002 (exp. May 23, 2007)	Equip, other, MV incl. -2000 Pontiac Grand Prix VIN 1G2WP52K8YF263531
883953576	GE Capital Vehicle and Equipment Leasing Inc.	JTI	June 3, 2002 (exp. June 3, 2007)	Equip, MV incl., $40,000, no fixed maturity date -2002 Volvo V70 VIN YV2SW61R522218833
892249182	GE Capital Vehicle and Equipment Leasing Inc.	JTI	March 6, 2003 (exp. Mar. 6, 2010)	Inv, equip, accts, other, MV incl.

Reference File No.	Secured Party	Debtor	Date of Registration	Collateral Secured and Comments
855437454	GE Capital Vehicle and Equipment Leasing Inc.	JTI-Macdonald Inc.	September 30, 2003 (exp. Sept. 30, 2004)	***This registration is a one-year renewal. It is preceded by a statement by the Ministry that it relates to a registration no recorded in the system (i.e. it has expired or been discharged).***

EXHIBIT “F”

This is Exhibit "F" referred to in the
affidavit of Robert McMaster
sworn before me, this 1st
day of April 2019

[signature]
A COMMISSIONER FOR TAKING AFFIDAVITS

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

2013 QCCS 6085 (CanLII)

No: 500-06-000076-980
500-06-000070-983

DATE: December 4th, 2013

UNDER THE PRESIDENCY OF: THE HONOURABLE ROBERT MONGEON, J.S.C.

500-06-000076-980
CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
-and-
JEAN-YVES BLAIS
Plaintiffs
v.
JTI-MACDONALD CORP.
-and-
ROTHMANS, BENSON & HEDGES INC.
-and-
IMPERIAL TOBACCO CANADA LTD.
Defendants

500-06-000070-983
CÉCILIA LÉTOURNEAU
Plaintiff
v.
JTI-MACDONALD CORP.
-and-
ROTHMANS, BENSON & HEDGES INC.
-and-
IMPERIAL TOBACCO CANADA LTD.
Defendants

JUDGMENT ON MOTION FOR A SAFEGUARD ORDER

2013 QCCS 6085 (CanLII)

OVERVIEW AND OUTLINE OF THE POSITIONS OF THE PARTIES

[1] The Plaintiffs Conseil Québécois sur le tabac et la santé et Jean-Yves Blais on one part, and Cécilia Létourneau on the other part, are suing the three Defendant companies in two separate class actions.

[2] The class actions were authorized in 2005, after the Motions for Authorization had been filed as early as 1998.

[3] The trial on the merits of the two class actions is currently under way. It has, in fact, begun in March 2012 and is expected to last until the latter part of 2014. The Plaintiffs have completed their evidence and the Defendants are in the process of exposing their evidence and arguments. Judgment in first instance is likely to be rendered some time in 2015.

[4] Although the trial is more than half-way completed, the Plaintiffs now seek an order which would have the effect of prohibiting one of the Defendants, JTI-Macdonald Corp. (JTIM), from continuing to effect certain payments of capital and interest pursuant to JTMI's assumption of an obligation of $1.2 billion towards its wholly-owned subsidiary, JTI-Trade Marks Corp. (JTI-TM), as well as payments of royalties for the use of certain trade-marks also payable to JTIK-TM. These payments currently represent, in round figures, approximately $110 million per year and have been made since the year 2000[1].

[5] The Plaintiffs allege that these payments are the result of a series of inter-corporate transactions which were effected at the time of the sale of assets of the R.J. Reynolds tobacco group to Japan Tobacco Inc. (JT) in 1999. In so doing, the Canadian corporate entity, then known as RJR-Macdonald Inc. (RJRM) was purchased by JTIM through what is known as a leveraged buy-out operation.[2]

[6] More specifically and as we will see below, this operation was structured in such a way that the assets of the "target" company, i.e. RJRM, were used to finance the acquisition and, as a result, the "purchaser", that is JTIM, company assumed a substantial debt. In addition, the trade-marks under which tobacco products were being sold were transferred to its wholly-owned subsidiary, JTI-TM, and JTIM was allowed to use the said trade-marks, in exchange for the payment of royalties currently amounting to $20 million annually.

---

1 Except for certain years while JTIM was under CCAA protection. However, certain "catch-up" payments were effected in subsequent years.

2 The corporate structure put in place by the Japan Tobacco group is extremely complex but is outlined in the affidavit of Mary Carol Holbert dated September 12, 2013 and in paragraphs 19 to 56 of JTIM's Plan of Argument.

[7] The debt assumed by JTIM is in the form of an inter-company loan of $1.2 billion in favour of JTI-TM, thus creating an interest obligation of approximately $92 million per year.

[8] The Plaintiffs allege that these transactions were structured so as to render JTIM, the Canadian tobacco company, "creditor proof" and to ensure that the revenues generated from the sale of tobacco products in Canada would be, for the most part, funnelled out of JTIM, out of its subsidiary JTI-TM and into off-shore related corporate entities. The Defendants answer that the corporate structure is perfectly legitimate and was put together mainly for tax-related reasons.

[9] The Plaintiffs allege further that in the event of a favourable judgment in the Class actions, JTIM may not have the financial resources to assume the judgment.

[10] More particularly, the Plaintiffs are concerned with the question of punitive damages. They allege that if the current situation is allowed to continue, JTIM will have little or no capacity to pay any such damages. More importantly, they suggest that the eventual award of such punitive damages by the trial judge is a direct function of JTIM's capacity to pay. Consequently, the Plaintiffs now seek an order whereby all current payments of capital, interest or royalties by JTIM in favour of JTI-TM would be suspended. This would permit the accumulation of approximately $550 million in cash in favour of JTIM over the next five years, thus creating a basis for the allowance of punitive damages.

[11] In support of their position and as an illustration of the consequences of these inter-corporate transactions, the Plaintiffs allege that, in 2003 and 2004, JTMI was sued by the Attorney General of Canada (AGC) and by the Ministère du Revenu du Québec (MRQ) for the recovery of $2.8 billion of unpaid taxes as a result of the illegal smuggling of cigarettes into Canada.

[12] These claims caused JTMI to seek protection under the Companies and Creditors Arrangement Act (the CCAA). With this protection, came an Initial Order by Mr. Justice James Farley of the Ontario Superior Court of Justice which had the immediate effect of suspending any payments of capital, interest or royalties to JTI-TM.[3] This Initial Order was granted at the request of JTIM, and also had the effect of suspending any obligation to pay the tax claims as well as suspending any of JTIM's interest payments to its subsidiary.

[13] In support of its Statement of Claim[4], the AGC made specific allegations on the corporate structure, qualifying the same as fraudulent conveyances, put in place in 1999 and 2001. It is to be noted that, however (and contrary to what was done in the present proceedings), this action was not only directed against JTMI but also against all of the other corporate entities of the JT group parties to these alleged fraudulent conveyances.

[3] Exhibit R-6.

[4] Exhibit R-2 : See Style of cause.

2013 QCCS 6085 (CanLII)

Finally, it should also be noted that the AGC sought a declaration that all the so-called fraudulent conveyances were null and void and/or inopposable to the Plaintiff.[5]

2013 QCCS 6085 (CanLII)

[14] The alleged fraudulent conveyances were described by the AGC as follows:[6]

> **160.** **A series of corporate reorganizations and inter-company transactions undertaken between 1999 and 2001 relating to the assets and business of RJR-Macdonald were conveyances intended to defeat, hinder, delay or defraud the creditors or others of RJR-Macdonald (including the plaintiff) of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures ...**
>
> **161.** **RJR-Macdonald and Japan Tobacco (together with its related entities ...) (collectively the "Fraudulent Conveyance Defendants") orchestrated a complex series of corporate reorganizations, the particulars of which are within the knowledge of the Fraudulent Conveyance Defendants but not the plaintiff.**
>
> **162.** **RJR-Macdonald was a federally incorporated company until 1999. Subsequently:**
>
> (a) **it was continued as a Nova Scotia corporation;**
>
> (b) **it was amalgamated with a new entity incorporated following the JTI transaction described above and known as JT Nova Scotia Corporation;**
>
> (c) **the shares of RJR-Macdonald were transferred to an entity called JT Canada LLC II Inc. ("LLC II") which was a wholly owned subsidiary of another new entity, JT Canada LLC Inc. ("JT LLC");**
>
> (d) **JT LLC was wholly owned by JT International Holding B.V., a Netherlands corporation;**
>
> (e) **the trademarks owned by RJR-Macdonald, which were assets of value, were transferred to another new entity known as JTI-Macdonald TM Corp., newly incorporated in 1999 ("TM Holdco");**
>
> (f) **JT LLC then loaned $1.2 billion to TM Holdco, taking as security the trademarks pledged in return. The trademarks were assigned a value of $1.2 billion;**
>
> (g) **TM Holdco then loaned the funds to a predecessor corporation of JTI-Macdonald Corp; and**

---

[5] Exhibit R-2 : See Conclusions sought.

[6] See Exhibit R-2 at paragraphs 160 and following.

(h) in 2000, JT LLC lent $410 million to JTI-Macdonald Corp. and received corporate debentures in return. The debentures were then transferred to TM Holdco in exchange for notes payable to JT LLC, in the aggregate amount of $410 million."

2013 QCCS 6085 (CanLII)

163. By correspondence dated January 30, 2002, RJR-Macdonald's auditors, Deloitte & Touche, expressly admitted to the plaintiff that the 1999 asset transfers (including of the trademarks) from a predecessor entity to the defendant JTI-Macdonald Corp. was carried out "for creditor proofing purposes" [...].

164. In conjunction with the transactions described above, Japan Tobacco effected a further complicated series of inter-corporate loans and transactions among its affiliates, designed to defeat and hinder the enforcement of any judgment in this action.

165. The particulars of these transactions are within the knowledge of the Fraudulent Conveyance Defendants. Their effect was to create a circular arrangement pursuant to which each of the entities was encumbered by secured debt in favour of a related party. JT LLC was indebted to RJR-Macdonald. RJR-Macdonald was indebted to TM Holdco. TM Holdco was indebted to JT LLC. All loans were secured. This arrangement was a further attempt to insulate the assets of Japan Tobacco and was designed to effect a circular security arrangement.

[...]

168. Japan Tobacco caused and directed the above transactions, knowing that the RJR Group, and in particular RJR-Macdonald, were liable to the plaintiff for the wrongful conduct described in this claim, and with the purpose of defeating the plaintiff's ability to recover on any judgment subsequently obtained by the plaintiff.

169. Japan Tobacco conspired and agreed with its subsidiaries and affiliates, JT International B.V., JT International Holding B.V., JT Canada LLC Inc., JT Canada LLC II Inc., JT International (BVI) Canada Inc., JT International SA and JTI-Macdonald TM Corp. that the assets of RJR-Macdonald would be conveyed to and among these affiliates, to hinder and defeat the plaintiff and other creditors.

170. RJR-Macdonald's assets were conveyed to the affiliates and subsidiaries of Japan Tobacco as described above and through other means known to the Fraudulent Conveyance Defendants but unknown to the plaintiff, at the direction of Japan Tobacco, and with the agreement of those affiliates and subsidiaries.

> **171. The purpose of this agreement was to harm the plaintiff, by making it impossible for the plaintiff to enforce and recover under any judgment against RJR-Macdonald."**

2013 QCCS 6085 (CanLII)

[15] MRQ took a similar approach with respect to its claim for unpaid taxes. In August 2004, the MRQ filed a Motion to Lift the Stay of Proceedings ordered by Farley J. earlier that year[7]. Some of the allegations of fraudulent conveyances were reiterated, insisting on the fact that the JTI group had "unlawfully implemented a number of complex corporate transactions involving JTI ... that were designed to fraudulently defeat, hinder and delay the lawful claims of the Minister and to enable operating profits to be stripped from JTI."

[16] The MRQ Motion was settled when JTIM agreed to provide security to its creditors. JTIM was also allowed to resume its payments of capital, interest and royalties to its subsidiary.

[17] The claims of the AGC and of the MRQ were ultimately settled out of court as a result of a payment of approximately $525 million by the RJR/JTI group and JTIM was allowed to emerge from CCAA protection in 2010, without any decision having been made on the validity of the inter-company transactions surrounding the sale of RJRM to JTIM.

[18] Today, the Plaintiffs allege that the situation remains the same. JTIM's revenues from its tobacco operations are allegedly drained from it through payments of capital and interest on the $1.2 billion obligation and through payments of royalties.

[19] On or about the 28th day of June, 2012, Mr. Justice Brian Riordan rendered a decision ordering the communication of "cleaned copies" of the financial statements of the Defendant companies in the class actions. Those documents included the JTIM financial statements for the period 1998 to 2011, which were eventually communicated on or about the 12th day of October 2012. These documents confirmed the said recurrent yearly payments by JTIM transferring $100 million to $110 million of revenues every year to JTI-TM, out of tobacco operations yearly revenues of $110 million to $130 million.

[20] At paragraphs 31 to 52 of their Motion, the Plaintiffs re-allege the various components of the inter-corporate transactions of 1999-2000-2001 which, according to them, continue to cause the drainage of JTIM's revenues from operations into JTI-TM and then out of JTI-TM into other related members of the JT corporate group, adding, however, that, from 2009 to 2011, JTIM and JTI-TM amended their agreements so as to reduce the interest payable on the $1.2 billion obligation from 7.76% to 0.1% annually. This was also done with respect to the $410 million obligation subscribed in 2000 where the interest payable (LIBOR plus 0.5% per annum) was reduced to 0%. On the other

---

[7] Exhibit R-7.

hand, during that same period, JTIM reimbursed to JTI-TM those interest payments which had been suspended as a result of the Farley Initial Order (see exhibit RME-1).

[21] The $410 million loan was reimbursed by JTIM and is no longer an issue.

[22] The Plaintiffs now allege that the inter-corporate transactions in question have literally drained, and continues to drain, JTIM's capacity to eventually meet its obligation to pay damages, and more specifically punitive damages, to the Plaintiffs:

> **53. In 1999, RJR-M and its subsidiaries were valued at US $2.24 billion. (Paragraph 13 of the Monitor's Fourth Report, Exhibit R-9).**
>
> **54. At that time, (prior to the Transactions) RJR-M was generating a net profit at a rate of $82.7 million per year. (Paragraphs 5 & 6 of the Monitor's Fourth Report, Exhibit R-9).**
>
> **55. Immediately prior to the Transactions, as at November 26, 1999, RJR-M's balance sheet indicated $868 million of assets and $741.5 million of retained earnings and liabilities of only $126.4 million. (Paragraph 6a of the Monitor's Third Report, produced herewith as Exhibit R-10).**
>
> **56. The JTI financial statements (Exhibit R-8) reveal that immediately after the Transactions, its net earnings dropped to $9 million in 2000 and continued to drop to a net loss of $80 million in 2008.**
>
> **57. JTI's financial statements as at December 31, 2011, show a deficit of $334.3 million and liabilities of $2.046 billion, of which $1.775 billion are inter-company debts.**

[23] The Plaintiffs therefore seek "*relief from this Court to ensure that JTI be prevented from further insulating itself and from claiming that it lacks the capacity to pay punitive or any damages*"[8]. They claim that they meet the tests of *prima facie* right, irreparable prejudice and of urgency, as well as alleging that the balance of inconveniences weighs in their favour, which they have to meet in order to obtain the Safeguard Order sought.

[24] The Defendant JTIM vigorously denies that the 1999-2000-2001 inter-company transactions were effected to render it judgment-proof. JTIM suggests that these transactions were put in place to substantially reduce its tax burden, that the transactions were perfectly legal and made sense from a business point of view. JTIM further alleges that these transactions were never hidden or concealed, that the Plaintiffs were fully aware of their existence and effect at least since 2004-2005, and that the Plaintiffs have in any event, failed to ask for the nullity and/or inopposability of same.

[8] See paragraph 59 of the Plaintiff's Motion.

2013 QCCS 6085 (CanLII)

2013 QCCS 6085 (CanLII)

THE QUESTIONS

[25] The Court proposes to address the following issues:

a) What is the true effect of the safeguard order sought by the Plaintiffs?

b) What is the true ambit of article 46 C.C.P. and are the Plaintiffs entitled to an order under this article, given the facts of this case?

c) If so, do the Plaintiffs meet the criteria of urgency, appearance of right, irreparable prejudice and balance of inconveniences to be fulfilled before a safeguard order is made under article 46 C.C.P.?

d) If the Plaintiffs obtain favourable answers to questions a) and b) above, what order should be made and for how long?

[26] The Court will, as it becomes necessary to respond to these questions, further analyse the factual situation in greater depth and detail.

DISCUSSION

[27] Safeguard orders are, by their very nature, exceptional. They are used in cases of nearly absolute necessity in order to prevent an unbalance which will affect the <u>rights</u> of the parties.

[28] Consequently, for a safeguard order to be envisaged, the party seeking it must have some right to invoke or claim into the end results. If the end result will only be to safeguard asset upon which the Plaintiffs make no claim or may not exercise any right thereon, the safeguard order sought should not be granted.

[29] Furthermore, the financial consequences of certain transactions may have the effect of draining the resources of a corporate entity. However, to effectively stop this alleged drainage of resources, the transactions in question must be judicially set aside. If no conclusions are sought in this respect, the safeguard order may not have any effect and more particularly, it may not have the effect of protecting the eventual rights of the Plaintiffs into the proceeds of a judgment not yet rendered in their favour.

A) The Order sought: what effect will it really have upon the parties?

[30] The Plaintiffs allege that it is essential and urgent to stop JTIM from continuing to make multi-million dollar payments to its subsidiary JTI-TM, which in turn, funnels these amounts to other related companies in the JT group, and thus depleting the assets of JTIM. The safeguard order is sought also to give JTIM an added "capacity to pay punitive damages to the Plaintiffs and class members". As the Plaintiffs put it:

> **"In granting the interim relief sought herein, this Court can ensure that what remains in JTI and the revenue going forward will not be further depleted."[9]**

2013 QCCS 6085 (CanLII)

[31] Exhibit RME-2 outlines what would be the estimated capital, interest and royalty payments which would be affected by the Order sought. Approximately $92.2 million per year in interest, $1.3 million per year in capital and $10 million per year in royalties would not be effected, thus building a "reserve" of approximately $517.6 million by the end of 2018.[10]

[32] The Plaintiffs expect that with this "reserve" the trial judge of the class actions will be in a better position to assess the proper amount of punitive damages which could be awarded in a favourable judgment, should the Plaintiffs win their case.

[33] However, the safeguard order will force JTIM to keep the money safeguarded but will do nothing to liberate the said sums or even ear-mark them to be used to settle an eventual judgment. The money may not be "depleted" as suggested by the Plaintiffs but it will remain subjected to all of the contractual obligations of JTIM in favour of JTI-TM, unless the validity, legality or opposability of these transactions is attacked. This point will be more fully elaborated below when the Court analyses the criteria to be met before the issuance of a safeguard order.

B) What is the true ambit of Article 46 C.C.P. and are the Plaintiffs entitled to the order sought, given the facts of the case?

[34] A Safeguard Order under article 46 C.C.P. must be considered under four principal criteria:

a) Urgency
b) Appearance of right
c) Irreparable prejudice
d) Balance of inconvenience

[35] However, before looking into these criteria, a close analysis of article 46 C.C.P. is required.

[36] Article 46 C.C.P. reads as follows:

> **46. The Courts and judges have all the powers necessary for the exercise of their jurisdiction.**
>
> **They may, at any time and in all matters, whether in first instance or in appeal, issue orders to safeguard the rights of the parties, for such time**

---

[9] Paragraph 72 of Plaintiffs' Motion.

[10] See Exhibit RME-2. to this should be added a payment of interest of approximately $46 million due November 18, 2013 and held back by JTIM pending the outcome of the present judgment. The total estimated reserve would therefore amount to $563.6 million.

> **and on such conditions as they may determine. As well, they may, in the matters brought before them, even on their own initiative, issue injunctions or reprimands, suppress writings or declare them libellous, and make such orders as are appropriate to deal with cases for which no specific remedy is provided by law.**
>
> **(emphasis added)**

2013 QCCS 6085 (CanLII)

[37] One may not think of broader or more far-reaching powers, coupled with quasi-total freedom of action, limited only by a proper exercise of judicial discretion.

[38] The first sentence of article 46 C.C.P. empowers Courts or judges to do anything or everything necessary to ensure that justice is or will eventually be rendered in any matter brought before them.

[39] In the matter of *Sanimal Inc., Alex Couture Inc. et al. v. Produits de viande Levinoff Ltée,* 2005, QCCA 265, the Court of Appeal, under the pen of Chief Justice Michel Robert, wrote:

> **[19] Le législateur a modifié le code pour consacrer ce pouvoir de prononcer des ordonnances de sauvegarde à l'article 46 du Code de procédure civile de façon à étendre sa portée à toutes matières et en tout temps. Le texte de l'article 46 se lit maintenant de la façon suivante :**
>
> > **46. Les tribunaux et les juges ont tous les pouvoirs nécessaires à l'exercice de leur compétence.**
> >
> > **Ils peuvent, en tout temps et en toutes matières, tant en première instance qu'en appel, prononcer des ordonnances de sauvegarde des droits des parties, pour le temps et aux conditions qu'ils déterminent.**
>
> **[20] Malgré son appellation, le premier juge rappelle, selon la jurisprudence de cette Cour, que l'ordonnance de sauvegarde est de la nature d'une injonction provisoire :**
>
> > **« ... mesure judiciaire, discrétionnaire, émise pour des fins conservatoires, dans une situation d'urgence, pour une durée limitée et au regard d'un dossier où l'intimé n'a pu encore introduire tous ses moyens. »**
>
> **[21] Quant à sa délivrance, l'ordonnance de sauvegarde est assujettie aux mêmes critères que l'injonction provisoire : l'apparence de droit, le préjudice sérieux ou irréparable, le poids relatif des inconvénients et l'urgence.**
>
> ...
>
> ## Analyse et décision

[25] L'injonction n'est pas, en principe, la procédure appropriée pour obtenir le paiement d'une créance. Notre Cour l'a rappelé dernièrement dans l'arrêt *Provident, Compagnie d'assurance vie et accident.* Le premier juge a eu raison de ne pas ordonner le paiement des sommes dues. Par ailleurs, la mesure de sauvegarde ne constitue pas la reconnaissance d'un droit d'une partie à une somme d'argent.

2013 QCCS 6085 (CanLII)

...

[30] En droit des affaires, particulièrement mais non limitativement, les ordonnances de sauvegarde sont utiles, voire même nécessaires pour rétablir un certain équilibre entre les parties contractantes. Des mesures semblables sont largement utilisées dans des recours en oppression par des actionnaires minoritaires.

[31] L'article 46 confère une discrétion au juge de première instance et, à moins que cette discrétion ne soit utilisée de façon abusive, déraisonnable ou non judiciaire, une Cour d'appel devra hésiter avant d'intervenir pour simplement substituer son opinion à celle du premier juge.

[32] En effet, en certaines matières, le *Code de procédure civile*, dans sa version antérieure à 2003, octroyait aux tribunaux le pouvoir d'émettre des ordonnances de sauvegarde dans certains cas précis : pensons par exemple aux art. 523 (appel) ; 754.2 (injonction - c'est d'ailleurs toujours le cas), 766, par. 5 (certaines procédures), 813.13 (certaines matières familiales) ; 835.4 (recours extraordinaires). Ces dispositions ont été abrogées ou modifiées et l'ordonnance de sauvegarde est dorénavant prévue à l'article 46 C.p.c.[5]. Dans son rapport intitulé *Une nouvelle culture judiciaire*, le Comité de révision de la procédure civile écrit ce qui suit :

> En vertu de l'article 46 du *Code*, les tribunaux et les juges ont tous les pouvoirs nécessaires à l'exercice de leur compétence. Cette règle, essentielle au bon fonctionnement de la justice, doit demeurer, d'autant qu'elle permet aux tribunaux et aux juges, en complémentarité avec d'autres dispositions, soit les articles 2 et 20, de pourvoir aux imprévus et de suppléer aux silences du *Code*.
>
> Par ailleurs, l'ordonnance de sauvegarde, qui vise à protéger les droits des parties pendant l'instance ou à l'étape de l'exécution, est spécifiquement prévue dans plusieurs dispositions du *Code*, soit aux articles 523, 754.2, 766, 813.13 et 835.4, et, pour cette raison, certains se demandent si son application est limitée à ces dispositions. Il convient donc de clarifier la portée de la règle générale de l'article 46 du *Code* pour y préciser le pouvoir du tribunal ou d'un juge de rendre une ordonnance de sauvegarde en tout temps et en toutes matières, tant en première instance qu'en appel. Aux

> conditions qu'il estime justes eu égard aux circonstances de chaque dossier.

2013 QCCS 6085 (CanLII)

[33] On comprend de ce passage que ses auteurs ont voulu élargir et non restreindre la portée de l'ordonnance de sauvegarde et d'augmenter le nombre des cas où elle est susceptible d'être employée.

[34] Par ailleurs, antérieurement à la modification de l'article 46 C.p.c., aux termes de l'article 766, par. 5, C.p.c., disposition que l'on trouvait au chapitre I («Dispositions générales») du Titre II («De certaines procédures relatives aux personnes et aux biens»), on accordait parfois dans les affaires entre propriétaires et locataires des mesures semblables à celles qu'on recherche en l'espèce, de façon à maintenir un certain équilibre entre les parties. Ainsi, dans *Gestion Nomic Inc.* c. *Immeubles Polaris (Canada) ltée*, J.E. 97-1129 (C.A), notre Cour, en vertu du par. 766(5) C.p.c., confirme l'ordonnance par laquelle le juge de première instance avait ordonné le dépôt judiciaire d'une somme de 80 000 $ (sur un total d'arrérages de loyers s'élevant à 109 386 $) et elle écrit que :

> La Cour supérieure, dans le cadre d'une ordonnance de sauvegarde, dispose d'une large discrétion, comme l'indique le texte habilitant. Le dépôt exigé, en argent, au dossier de la Cour ou dans un compte en fidéicommis non susceptible de retrait jusqu'au jugement final, n'est pas un paiement à l'intimée. Le jugement décidera du sort de la somme déposée. Il n'était donc pas utile de mentionner au dispositif qu'il s'agissait d'acomptes.
>
> Dans Gagnon c. Samra [renvoi omis], cette Cour a reconnu récemment la discrétion d'imposer un tel dépôt, sous l'autorité de l'article 754.2 C.p.c. dont le texte habilitant est identique à celui de l'article 766.5°.
>
> Dans 3095-9035 Québec Inc. c. Stermer [renvoi omis], cette Cour a nié ce droit mais il s'agissait d'une affaire de résiliation de bail et de réclamation de loyers commencée par action. Sur requête pour faire déclarer la défense et demande reconventionnelle irrecevable ou alternativement pour faire déposer au greffe les loyers dus et à venir, il a été décidé que l'article 46 C.p.c., le seul article invoqué au soutien de la demande pour forcer le dépôt des sommes, ne pouvait justifier ce recours.
>
> En l'espèce, le pouvoir de sauvegarde est expressément prévu et cette Cour ne devrait pas intervenir sauf en cas d'abus de discrétion judiciaire ou de déni de justice [renvoi omis]. Les faits ci-haut relatés de cette affaire-ci ne permettent pas de conclure qu'il s'agit de l'un de ces cas.
>
> (emphasis added)

[40] In other words, the modifications incorporated into the *Code of Civil Procedure* in 2003 has, in the opinion of the Court of Appeal, broadened the scope of intervention of courts and judges in their powers to issue Safeguard Orders. One should therefore be guided by this new approach rather than look into the manner in which article 46 C.C.P. was interpreted and applied prior to 2003.

[41] The undersigned must be guided by these teachings from the Quebec Court of Appeal. However, Article 46 C.C.P. should not be interpreted so broadly that other specific dispositions of the Code become moot.

[42] Defendant JTIM contends that, however broad and far-reaching article 46 C.C.P. may be, it does not allow the Court to render a safeguard order which would alter the rights of third parties which are either not sued or which have not intervened.

[43] The undersigned agrees.

[44] Any safeguard order rendered by this Court affecting the rights of JTI-TM by reason of the proposed order sought would be illegal because JTI-TM is not a party and because the contractual arrangement pursuant to which JTI-TM is entitled to collect interest or royalties are not attacked either in nullity or as being inopposable to the Plaintiffs. If this is not done, the safeguard order sought does not protect any rights of the Plaintiffs.

[45] JTIM also objects to the use of article 46 C.C.P. when the *Code of Civil Procedure* otherwise provides for specific remedies.

[46] For example, as it was the case in *Société en commandite Adamax Immobilier v. Immobilier Soltron Inc.*[11], article 46 C.C.P. should not be used to circumvent the specific provisions dealing with injunctions or seizures before judgment. In that particular instance, Adamax sued Soltron in resiliation of an accepted offer to purchase a hotel for a total price of $79.8 million. The claim of Adamax was for damages of $25 million.

[47] An amount of $6 million had been deposited in trust in the hands of a law firm, in support of the offer. Adamax then sought an order under 46 C.C.P. to prevent the law firm in question to remit the $6 million to Soltron, alleging that it was Soltron's only tangible asset upon which it could hopefully execute an eventual favourable judgment on its claim for damages.

[48] Mr. Justice Fournier, as he then was a member of this Court, dismissed Adamax's Motion.

[11] EYB 2010-182503; 2010 QCCS 5613 per Fournier J., S.C. as he then was.

2013 QCCS 6085 (CanLII)

[49] In so doing, Fournier J., quoting various authorities[12] held that the inherent powers of the Court, codified in article 46 C.C.P. were essentially suppletive, to be relied upon only when the law is otherwise silent:

> **"Ces pouvoirs inhérents ne sont toutefois pas sans limites quant à leur exercice. La règle de la suprématie de la loi continue de prévaloir de sorte que ces pouvoirs inhérents des tribunaux et des juges ne peuvent être exercés aux fins de mettre de côté le droit applicable, de créer des droits nouveaux ou de refuser de rendre jugement selon la loi. »**[13]
>
> **(emphasis added)**

[50] The Supreme Court of Canada in *Lac d'Amiante* stated even more clearly that:

> **37 De plus, le droit procédural reconnaît des pouvoirs inhérents aux tribunaux pour régler des situations non prévues par la loi ou les règles de pratique. (Voir *Société Radio-Canada c. Commission de police du Québec*, 1979 CanLII 24 (CSC), [1979] 2 R.C.S. 618.) Des décisions de gestion ponctuelles peuvent également être rendues nécessaires par les particularités de certains dossiers. Cependant, ces pouvoirs inhérents ou accessoires, que consacrent d'ailleurs les art. 20 et 46 *C.p.c.*, n'accordent aux tribunaux qu'une fonction subsidiaire ou interstitielle dans la définition du contenu de la procédure québécoise. La loi prime. Les tribunaux doivent baser leurs décisions sur celle-ci. Sans nier l'importance de la jurisprudence, ce système ne lui reconnaît pas le statut de source formelle du droit, malgré la légitimité d'une interprétation créatrice et ouverte sur la recherche de l'intention du législateur telle que l'expriment ou l'impliquent les textes de loi. (Voir J. Dainow, « The Civil Law and the Common Law : Some Points of Comparison » (1967), 15 *Am. J. Comp. L.* 419, p. 424 et 426; A. Popovici, « Dans quelle mesure la jurisprudence et la doctrine sont-elles sources de droit au Québec? » (1973), 8 *R.J.T.* 189, p. 193 et 199.)**
>
> **38 Ainsi, la législature québécoise n'a pas laissé aux tribunaux la même marge de liberté que les législatures des autres provinces. La procédure civile se retrouve principalement dans le Code. Même si les règles de pratique ont pris graduellement de l'ampleur, il demeure qu'elles sont adoptées sous l'autorité de ce Code et dans le cadre général défini par celui-ci.**
>
> **39 Un tribunal québécois ne peut décréter une règle positive de procédure civile uniquement parce qu'il l'estime opportune. À cet égard, dans le domaine de la procédure civile, le tribunal québécois ne possède pas le même pouvoir créateur qu'une cour de common law, quoique l'intelligence et la créativité de l'interprétation judiciaire puissent souvent assurer la flexibilité et l'adaptabilité de la procédure. Bien que mixte, la procédure**

[12] Ferland & Emery, traité de procédure civile, 4th Ed., EYB2003, p. 103; *Lac d'Amiante du Québec c. 2858-0702 Québec Inc.* [2001] 2 SCR 743.

[13] Ferland & Emery, op. cit supra.

2013 QCCS 6085 (CanLII)

> **civile du Québec demeure un droit écrit et codifié, régi par une tradition d'interprétation civiliste. (Voir J.-M. Brisson, « La procédure civile au Québec avant la codification : un droit mixte, faute de mieux », dans *La formation du droit national dans les pays de droit mixte* (1989), 93, p. 93-95; aussi du même auteur : *La formation d'un droit mixte : l'évolution de la procédure civile de 1774 à 1867, op. cit.*, p. 32-33.) Suivant la tradition civiliste, les tribunaux québécois doivent donc trouver leur marge d'interprétation et de développement du droit à l'intérieur du cadre juridique que constituent le Code et les principes généraux de procédure qui le sous-tendent. La dissidence du juge Biron rappelle à juste titre ces caractéristiques d'un régime de droit codifié et souligne pertinemment la nature de la méthode d'analyse et d'examen applicable en l'espèce.**
>
> **(emphasis added)**

2013 QCCS 6085 (CanLII)

[51] The Court of Appeal in *9045-6740 Québec Inc.*[14] reiterated the rule that article 46 C.C.P. only conferred auxiliary powers, accessory or complementary to the exercise of the Court's jurisdiction. Still in *Adamax*, Fournier J. adds, in this context:

> **9 Dans *9032-3031 Québec Inc. c. Rogers Wireless*, on lit:**
>
> **[8] En matière d'injonctions le code a prévu le moyen d'exercer un droit: V. art. 752 et suivants;**
>
> **[9] Il y a l'injonction finale, l'injonction interlocutoire et l'injonction interlocutoire provisoire. De plus, lors de la présentation de la requête pour obtenir une injonction interlocutoire, le tribunal peut rendre une ordonnance nécessaire à la sauvegarde des droits des parties. Il peut également rendre une telle ordonnance au cours de l'instruction;**
>
> **[10] En l'espèce, comme il a été mentionné plus haut, les appelantes n'ont pas présenté une requête pour injonction interlocutoire;**
>
> **[11] À l'audience, l'avocat des appelantes a concédé qu'en réalité les conclusions de la procédure des appelantes étaient celles d'une requête pour obtenir une injonction interlocutoire;**
>
> **[12] Mais une injonction interlocutoire qui n'est pas une injonction interlocutoire provisoire ne peut être prononcée sommairement sans que la partie à qui elle est adressée ait eu l'occasion de faire valoir pleinement les droits qui lui sont offerts par le code: apporter des preuves et, avec la permission du tribunal, contester la requête par écrit;**
>
> **[13] L'article 46 C.p.c. ne saurait être interprété comme permettant à une partie d'obtenir une ordonnance d'injonction interlocutoire sans suivre la procédure prévue à cette fin par le code au chapitre de l'injonction;**

[52] He also adds, as it is the case in the present instance :

---

[14] CanLII, 2003 – 34383 (QCCA) at [8].

[15] Il n'y a rien dans les affidavits déposés au soutien de la demande de sauvegarde qui viendrait étayer le péril objectif exigé pour l'émission d'un bref de saisie avant jugement sous l'autorité de l'article 733 du *Code de procédure civile*, c'est-à-dire des mouvements d'actifs frauduleux qui auraient pour but de permettre à Soltron de se soustraire à l'exécution d'un jugement favorable à Adamax.

[16] Le remède de la saisie avant jugement est prévu à l'article 733 du *Code de procédure civile*. Il vise précisément à mettre sous main de justice tout ou partie du patrimoine d'un débiteur défaillant qui cherche à se soustraire à l'exécution d'un jugement. Si les faits objectifs de la conduite de Soltron ne suffisent pas à justifier une saisie avant jugement, Adamax ne peut se replier sur une ordonnance de sauvegarde pour obtenir un résultat semblable.

[17] Autrement dit, ce n'est pas parce qu'on ne se qualifie pas pour un remède expressément prévu qu'on peut demander au tribunal d'utiliser ses pouvoirs inhérents pour en créer un sur mesure.

[18] Avec respect, c'est à tort qu'Adamax s'appuie sur des décisions rendues notamment dans *Gestion Nomic Inc. c. Les Immeubles Polaris (Canada Ltée)* et *Sanimal c. Produits de viande Levinoff Ltée* pour plaider que les tribunaux ont élargi le champ des ordonnances de sauvegarde à des situations s'apparentant à celle sous étude.

[53] Plaintiffs' Motion does not contain any allegation of peril and the facts alleged could not be interpreted as a Motion for the Issuance of a Writ of Seizure before Judgment.

[54] On the possibility of obtaining a « *Mareva* » injunction without establishing the basic criteria for such an extraordinary measure, Fournier J. cites Lalonde J. in *Quebec (Sous-ministre du Revenu) c. Weinberg*[15] to conclude that in the absence of fraudulent dishonesty such an order should not be made[16].

[15] 2007, RJQ 2240 at paragraphs [19] to [24]:

[19] L'injonction de type *Mareva* n'est prononcée que dans des cas exceptionnels où il est démontré qu'il existe un risque réel de voir disparaître clandestinement les biens d'un débiteur potentiel, au détriment du créancier qui exerce un recours contre lui. Contrairement à la saisie avant jugement prévue au *Code de procédure civile du Québec* (art. 733), l'injonction de type *Mareva* est un moyen procédural qui s'applique à la personne visée et non à ses biens.

[20] Pour conclure à l'émission d'une telle injonction mandatoire préventive, le Tribunal appelé à l'émettre doit se convaincre qu'à moins d'imposer des restrictions sévères à la liberté du défendeur de disposer de ses actifs, pendant l'instance, il est raisonnable de craindre que celui-ci cherche à déjouer l'exécution d'un jugement éventuel par la commission d'actes trompeurs (ex: en camouflant les biens de son patrimoine) de nature à causer un préjudice irréparable au demandeur.

[21] Cette ordonnance est à ce point exceptionnelle, qu'elle ne s'applique qu'en cas extrêmes. Elle fait échec au principe général voulant qu'il n'appartient pas à la Cour d'intervenir *quia timet* (parce qu'il craint) et d'empêcher le défendeur de disposer de ses biens alors que les droits des parties n'ont pas encore été établis.

2013 QCCS 6085 (CanLII)

2013 QCCS 6085 (CanLII)

[55] In *Cousineau v. Alrod*[17], Madam Justice Marie St-Pierre, also as she then was of this Court, wrote in a similar factual context (attempted recuperation of monies held in trust by a notary):

> **[38] Dans le cadre du présent débat, le Tribunal n'a pas à décider, et ne peut décider, des prétentions des parties quant au fond de l'affaire.**
>
> **[39] Ce que cherche la Demande c'est d'obtenir la mise sous saisie de la somme, avant jugement, mais sans établir le péril de sa créance aux termes de l'article 733 C.p.c. Le Tribunal ne peut permettre que ce soit le cas.**
>
> **[40] De plus, et malgré le contenu des allégations de l'affidavit souscrit par le demandeur Cousineau, le présent dossier ne saurait donner lieu à l'émission d'une ordonnance d'injonction de type Mareva: ces faits allégués ne peuvent suffire à justifier une telle mesure.**
>
> **(emphasis added)**

[56] In *9187-5047 Québec Inc. c. Provost*[18], the defendant Provost sought a safeguard order with a view to ordering a party to deposit in the hands of a notary, the sum of $400 000,00 as provided in an agreement for the purchase of shares. Godbout J. of the Superior Court stated that safeguard orders were not appropriate to obtain payment of a debt[19] or to secure the payment of one eventual judgment[20].

[57] To summarize, safeguard orders are not to be used to circumvent existing recourses specifically provided by the law. Generally speaking, they should not be used to replace seizures before judgment or *Mareva* injunctions. Furthermore, safeguard orders are discretionary in nature and should only be used to maintain a *statut quo* or a

---

[22] D'origine britannique, l'injonction de type *Mareva* fut conçue pour parer aux déprédations de marins véreux opérant à partir de refuges lointains et habituellement à la limite du commerce organisé. Cet outil procédural a donc été forgé puis adapté à la faveur des créanciers à la poursuite des affréteurs doués d'un don d'ubiquité qui cherchaient à éluder l'obligation d'honorer les droits de fret.

[23] Une fois rendue, l'ordonnance *Mareva* affuble le défendeur qui y est assujetti d'un constat de malhonnêteté telle, que la Cour a acquis à l'avance, sans entendre sa version des faits, la conviction que celui-ci en raison de gestes sans équivoque de malversation, cherche à échapper à l'exécution d'un jugement éventuel.

[24] Mais attention, cette règle subsidiaire, aussi exceptionnelle soit-elle, peut donner lieu à des abus graves. Il appartient aux tribunaux, en tout temps et à chaque étape de l'instance, de s'assurer que le demandeur qui aurait une réclamation apparente n'use pas de l'ordonnance *Mareva* pour exercer une forme de chantage en forçant le défendeur à régler ou à abdiquer parce qu'il ne peut se permettre de se rendre jusqu'à procès par l'effet de cette ordonnance.

[16] See paragraph 22.
[17] EYB-2012-204507 (C.S.).
[18] EYB-2009-163266 (C.S.).
[19] Idem, at paragraph [22].
[20] Idem, at paragraph [23].

"level playing field" between the litigants. Unless the parties are contractually bound by the terms of a contract "à execution successive", such as the payment of rent, a safeguard order should not be used to obtain the execution of a monetary obligation. The "*Sanimal*" decision cited above is a clear example of this kind of situation, where the general rule of *Provident Compagnie d'assurance vie et accident v. Chabot* was not followed.

2013 QCCS 6085 (CanLII)

[58] Chabot J. properly summarized the exception to the general rule laid down by the *Provident* decision as follows:

> **6. La distinction qui existe entre Sanimal et Provident, elle est là: l'existence de relations contractuelles qui continuent. D'ailleurs, c'est exactement le même principe en matière de bail où finalement une partie continue à profiter tout en désavouant, c'est-à-dire qu'elle continue à occuper les locaux et ne paie pas de loyer : donc elle profite, mais elle désavoue en même temps. C'est pour ça que l'ordonnance de sauvegarde vient là pour rétablir l'équilibre : « put your money where your mouth is ». Même chose pour les taxes municipales : le paiement des taxes municipales constitue une mesure de préservation du bien jusqu'à temps qu'on statue sur le litige, donc une mesure essentiellement conservatoire. Ici, ce qu'on me demande, c'est l'exécution carrément de la prestation des défenderesses par anticipation avant même qu'une défense soit faite, une défense qu'on me dit de déclarer frivole en me basant sur un jugement rendu sur une ordonnance d'injonction interlocutoire provisoire dans un autre dossier. Ce n'est pas à ce stade-ci de le faire.**
>
> **(emphasis added)**

[59] In the present instance, the court is confronted with a rather unique situation where the Plaintiffs are not bound by contract with JTIM. They are not the beneficiaries of an ongoing obligation. They are claiming unliquidated damages in a complex case where judgment has not yet been rendered. Without following the pre-requisites of a seizure before judgment under article 733 C.C.P., or for the issuance of a "Mareva" injunction, the Plaintiffs seek an equivalent remedy against JTIM, ordering it not to dispossess itself of certain assets to the detriment of a corporation which is not a party to the present litigation, and, in addition, where the contractual arrangements pursuant to which the payments of capital or interest or royalties are not attacked in nullity or by way of a paulean action under article 1631 C.C.Q.

[60] The undersigned cannot see how the inherent powers of the Court can be stretched to the point of issuing a safeguard order which would transform article 46 C.C.P. into a duplication of the provisions of the same Code dealing with seizures before judgment (articles 733 and following C.C.P.) or with injunctions (articles 751 and following C.C.P). Nowhere is it alleged that without the benefit of the safeguard order sought, the recovery of the Plaintiffs' claim is in jeopardy and nowhere do we find, in the

present Motion, sufficient allegations which would allow the issuance of a "*Mareva*" injunction.

2013 QCCS 6085 (CanLII)

[61] The conclusions of the Motion of Plaintiffs are not seeking the issuance of a writ of seizure before judgment but the Plaintiffs are expecting the effects of one. Inasmuch as the remedy sought by the Plaintiffs does clearly exist in our law, there is no reason to circumvent the provisions of the *Code of Civil Procedure* which deal specifically with such remedy. Otherwise, if article 46 C.C.P. would allow the issuance of such an order, the whole chapter of the Code dealing with seizures before judgment would be totally useless.

[62] So also for the strict criteria applicable to *Mareva* injunctions.

[63] On the basis of this analysis alone, the Plaintiffs must fail. The Plaintiffs cannot invoke article 46 C.C.P. to obtain the relief sought.

[64] However, the Court considers useful to add the following comments on the criteria of urgency, appearance of right, irreparable prejudice and balance of inconveniences.

[65] The parameters or criteria which must be met in order to have recourse to article 46 C.C.P. is not a matter for the Court's discretion. On the other hand, the assessment of the four criteria to be considered if article 46 C.C.P. applies are a matter where judicial discretion plays an important function.

URGENCY

[66] The Defendant alleges that the Plaintiffs have not established their case on the issue of urgency.

[67] JTIM alleges that the contracts pursuant to which the payments of capital, interest and royalties are being made have been in place since 1999 and known to all interested persons including the Plaintiffs, more particularly as a result of the CCAA proceedings of 2003 in Ontario.

[68] JTIM specifically refers to the proceedings taken against it by the AGC and by the MTQ which publicly alleged the so-called illegality of the corporate structure put in place by the JT group in 1999-2000

[69] The allegations of the Plaintiff on the issue of urgency are found at paragraphs 70 to 73 of their Motion. After carefully reviewing same, the only element to be retained on this issue is that the Plaintiffs were only given access to "clean copies" of the financial statements of JTIM late in 2013 following a judgment of Riordan J. rendered on June 28th, 2012. Permission to seek leave to appeal of the said judgment was dismissed on October 15, 2012 and the financial statements were communicated only on or about October 25, 2012.

[70] Even then, the financial statements communicated at the time were still redacted, at least with respect to some of the notes describing the institution of the present proceedings in the financial statements covering the periods ending in 1998 and 2012.

[71] The concept of urgency applicable to safeguard orders is not as strict as it would be in injunction proceedings. Here, the issues is not measured in terms of the passing of time since one's knowledge of the facts but in terms of whether or not the pertinent facts now require the intervention of the Court in order to safeguard the rights of the parties.

[72] The Plaintiffs did not have all of the necessary information to institute their Motion before the communication of the financial statements in October 2012. Their Motion came in June 2013. The delay to be considered by the Court is consequently not the period 2003 to 2013 but the much shorter period of 7 or so months between October 2012 and June 2013.

[73] See *Trizechahn Place Ville Marie v. 2959-6319 Quebec Inc.*, per Dalphond J.A. [21]:

> **« Même si l'on parle ici d'urgence, il s'agit plutôt de la nécessité d'une ordonnance afin de sauvegarder les droits des parties pendant l'instance. »**

[74] See also CSH (Honoré-Beaugrand) Inc. v. Montréal (Société de Transport de)[22]:

> ...
>
> **[18] Néanmoins nous voyons une différence dans la notion de l'urgence entre l'ordonnance de sauvegarde et l'injonction provisoire "classique". Dans l'injonction provisoire, l'urgence semble être plus pressante, plus immédiate. Le but est de réagir avant que quelque chose d'irrémédiable n'ait lieu.**
>
> **[19] Par contre, dans l'ordonnance de sauvegarde, surtout dans le contexte de faire arrêter un refus injuste de faire des paiements**

---

[21] AZ-97021821, page 11 (C.A.).

[22] AZ-50308897, paragraphs [18] to [20]; see also *Fraternité des Policiers v. Lyne Trudeau*, AZ-50888801:

[17] Ensuite, la notion d'urgence diffère selon que l'on demande une injonction provisoire ou une ordonnance de sauvegarde. En effet, dans le cas d'une injonction provisoire, l'urgence signifie la nécessité d'agir rapidement afin d'empêcher qu'un préjudice irréparable ne soit causé à celui qui demande l'injonction, alors que dans le cas d'une ordonnance de sauvegarde, l'urgence signifie essentiellement la nécessité de maintenir le *statu quo* afin de sauvegarder les droits des parties.

[30] Ce critère comporte deux acceptions : (a) la nécessité d'agir vite et (b) la nécessité de maintenir le *statu quo*. En matière d'ordonnance de sauvegarde, c'est la seconde qui devrait prévaloir. Toutefois, comme l'auteur Sharpe l'a d'ailleurs déjà souligné, l'expression « *statu quo* » - ou en anglais *status quo* – porte à confusion. En effet, était-ce le *statu quo* existant le 20 juin 2012 – lequel favorise la défenderesse – ou celui résultant de la résolution P-3 datée du 24 juillet 2012 et de la mise en demeure P-4 datée du 1er août 2012 – lequel favorise la Fraternité? Dans le second cas, la Fraternité serait en quelque sorte l'instigatrice de l'urgence qu'elle invoque maintenant.

2013 QCCS 6085 (CanLII)

> **périodiques, les tribunaux nous semblent moins exigeants à cet égard. Dans la cause de Trizechahn Place Ville Marie Inc. c. 2959-6319 Québec inc., le juge Dalphond, alors à la Cour supérieure, a noté que « *Même si on parle ici d'urgence, il s'agit plutôt de la nécessité d'une ordonnance afin de sauvegarder les droits des parties pendant l'instance.* »**
>
> **[20] Souvent, nous voyons le cas où le Tribunal note que, si une ordonnance ne se prononçait pas à ce moment, le débiteur risquerait de ne pas pouvoir acquitter un jugement éventuel. En ce faisant, le Tribunal considère la solvabilité, ou au moins les moyens financiers, des débiteurs potentiels pour décider si l'accumulation du montant qui pourrait éventuellement être dû est rendue suffisamment importante pour exiger une intervention à ce moment-là.**

2013 QCCS 6085 (CanLII)

[75] Although JTIM vigorously argues[23] that the Plaintiffs could have known of the allegations of the AGC attacking the inter-company transactions as early as 2005 when the CCAA proceedings were posted on a website, it is far from certain that the present Plaintiffs were, in fact, aware of such allegations.

[76] On its appreciation of this first criterion, the Court is satisfied that the Plaintiffs have satisfied their obligation to act with sufficient diligence to seek a safeguard order pursuant to Article 46 C.C.P.

APPEARANCE OF RIGHT OR "*PRIMA FACIE*" RIGHT TO A SAFEGUARD ORDER

[77] The Plaintiffs are asking the Court to enjoin JTIM from continuing to make payments to its subsidiary (and, by extension, to other members of the JT group) in order to:

a) protect the Plaintiffs' ability to recover damages in general; and

b) protect the Plaintiffs' ability to obtain punitive damages and recover same, in particular.

[78] However, once a close look at the situation which will prevail at the time of the judgment on the class actions is taken, the undersigned is of the opinion that the safeguard order presently sought will be of no help whatsoever in the current context of the present proceedings.

[79] If judgment is rendered in favour of the Plaintiffs, for whatever amount, it will be either satisfied or not satisfied. If it is, the present safeguard order, if granted, would be moot.

[80] If the judgment to intervene is not satisfied, it does not follow that the amount to be set aside or "safeguarded" as a result of the order sought would then be available to

---

[23] See paragraphs 233 and following of the JTIM Plan of Argument.

the Plaintiffs to satisfy any judgment to be rendered because the judgment in question will not have the effect of extinguishing or eliminating JTIM's obligation to pay these amounts to JTI-TM nor will it extinguish or eliminate JTI-TM's obligation to pay these same amounts to other related corporate entities within the JT group.

2013 QCCS 6085 (CanLII)

[81] This is so because the contracts pursuant to which these payments will remain due and payable will not be declared null and void, set aside nor declared inopposable.

[82] The only way the Plaintiffs could ever benefit from the safeguard order sought would be to amend their proceedings, implead the party (or parties) to whom these payments are due and attack the contracts pursuant to which these payments are due.

[83] Unless and until those conclusions are sought, the Plaintiffs have no right or appearance of right to protect or safeguard./

[84] The Plaintiffs cannot argue that the safeguard order will permit or facilitate the award of punitive damages, for the very same reason the trial judge will not be able to take the amount of the reserve accumulated in the hands of JTIM as a result, because these amounts will still be lawfully due and payable to JTI-TM. The trial judge will not be able to ignore, in his decision to award punitive damages that JTIM will still be indebted towards JTI-TM for the total amount of the reserve in question.

[85] Consequently, the undersigned cannot conclude that the Plaintiffs have established an appearance of right or "*prima facie*" right to a safeguard order under Article 46 C.C.P.

IRREPARABLE PREJUDICE AND BALANCE OF INCONVENIENCES

[86] It follows that the two remaining criteria of irreparable prejudice cannot be considered.

[87] But, once again, if, assuming that a "prima facie" right would exist, the undersigned cannot conclude to an irreparable prejudice.

[88] The first reason for this is that the trial judge is not limited to JTIM's capacity to pay punitive damages. This is one - but certainly not the only - criterion to be taken into account in awarding such damages.

[89] Article 1621 C.C.Q.[24] contains certain guidelines which are not limitative. The patrimonial situation of the debtor is only one – albeit important – of such guidelines[25].

---

[24] Art. 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

2013 QCCS 6085 (CanLII)

[90] Secondly, as indicated above, the "reserve" of some $560 million which may result from the safeguard order would have to be weighed against the debtor's other obligations and, unless this amount would be free and clear of the debtor's other liabilities, its creation would not enhance its capacity to pay.

[91] It should be kept in mind that the assets of JTIM and of its subsidiary, JTI-TM are mortgaged pursuant to a series of moveable hypothecs in favour of the creditor corporations members of the JT group to which the proceeds of the payments of capital interest and royalties are ultimately due[26]. Consequently, unless these movable hypothecs are annulled or declared inopposable to the Plaintiffs as judgment creditors, it would follow that JTIM's obligation to repay its secured debts would rank ahead of its obligation to pay the amount of any potential condemnation in the class actions.

[92] As a result, given the present state of these proceedings, the parties involved and the conclusions sought, the granting of the safeguard order would merely create a reserve which would eventually have no impact on the capacity of JTIM to pay any judgment condemnation and the dismissal of the Plaintiffs' Motion would not cause the irreparable prejudice alleged by the Plaintiffs.

---

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.

[25] See Baudouin & Deslauriers, "*La responsabilité civile*", 6th edition, Editions Yvon Blais, 2003, pages 291 and following, no. 350:

> 350 – Critères d'évaluation – Un arrêt récent de la Cour suprême énonce certains critères devant guider les tribunaux de common law dans leur évaluation du quantum de dommages punitifs. Cet arrêt, d'un intérêt indéniable, devrait toutefois avoir une portée plus limitée au Québec compte tenu qu'une disposition spécifique du Code civil fixe certaines balises d'évaluation. Ainsi, au Québec, lorsque la loi prévoyant le recours ne mentionne ni plancher, ni plafond d'indemnité, l'article 1621 C.c. énonce de façon non exhaustive les critères dont le tribunal peut tenir compte pour fixer l'évaluation. Ce texte pose, par ailleurs, un principe général de modération : le montant doit être évalué en rapport avec une fonction préventive. C'est, en quelque sorte, vers l'avenir que le juge doit se tourner pour chiffrer un montant qui empêchera la récidive, plutôt que vers le passé en imposant en quelque sorte une amende basée sur la seule gravité de la conduite reprochée. Parmi les circonstances dont le tribunal doit tenir compte, l'article 1621 C.c. mentionne, outre la gravité de la faute, l'étendue de la réparation, le fait, le cas échéant, que celle-ci puisse être assumée par un tiers (par exemple, l'assureur) et la situation patrimoniale du débiteur. A l'égard de ce dernier aspect, les tribunaux demandent une preuve leur permettant de connaître la « réalité financière » du défendeur. Le législateur veut obliger à évaluer la somme allouée aussi en fonction de la capacité de payer de ce dernier, pour éviter d'une part qu'une condamnation trop sévère pour un débiteur pauvre ne soit une occasion de gêne ou de contrainte trop forte (probablement donc en contradiction avec la vocation préventive) ou, au contraire, pour un débiteur très fortuné, une sorte de permis de mal agir. A cette liste incomplète, s'ajoutent d'autres circonstances prises en compte par la jurisprudence. De l'analyse de ces critères, on peut dégager certaines constantes. D'abord, certains se basent surtout sur la conduite du défendeur elle-même (durée de la conduite, évaluation de la sévérité de celle-ci, nécessité de prévenir des comportements du même type dans l'avenir). D'autres s'attachent davantage à la situation du défendeur (le profit qu'il a tiré de la conduite, ses ressources financières, les autres punitions qu'il a subies) ou à la situation de la victime (impact du comportement sur elle, provocation éventuelle de sa part); plusieurs, enfin, prennent en compte surtout le montant total accordé (nécessité de ne pas dédoubler par l'octroi de ces dommages une indemnisation déjà accordée sous un autre chef).

[26] See Appendix 12 to the Monitor's Fourth Report dated February 16, 2005. See also that section of said Report entitled "Validity of security Registrations", pages 20 and following, paragraphs 55 and following.

[93] As for the balance of inconveniences, the position of both Plaintiffs and Defendant JTIM would follow the same analysis.

[94] The Plaintiffs have nothing to gain from the safeguard order sought and the Defendant JTIM would, in turn, be liable to face additional default interest charges which would not put it in a better financial position.

[95] JTIM has alleged that the suspension of its obligation to pay the interest and royalties would increase its income tax burden. Although the Defendant admits that such additional tax burden could be substantially reduced, if not completely eliminated with the help and participation of JTI-TM and other ultimate beneficiaries of these revenues, the fact of the matter remains that JTIM would not be without suffering any inconveniences.

[96] Therefore, the Plaintiffs do not successfully pass the tests of irreparable prejudice and balance of convenience.

CONCLUSION

[97] The Plaintiffs have chosen to sue only JTIM and not the other members of the corporate group created in 1999 when JT purchased the non-US tobacco assets of R.J. Reynolds-Nabisco. The only corporation of that group presently before the Court is JTIM. Whatever the intent or effect of the integrated series of transactions set up to acquire the tobacco operations of RJRM by the JT group may have been, these integrated transactions are to be considered valid and opposable to the Plaintiffs unless attacked as being invalid and/or inopposable to the same Plaintiffs.

[98] The Plaintiffs cannot avoid the vicissitudes of not attacking the corporate members of the JT group as well as avoiding the difficulties inherent to an action in nullity or in inopposability under 1631 C.C.Q. and expect to achieve the same result by way of a safeguard order under Article 46 C.C.P.

FOR THESE REASONS, the Court

[99] **DISMISSES** the Plaintiffs' Motion for a Safeguard Order;

[100] **WITH COSTS.**

ROBERT MONGEON, J.S.C.

2013 QCCS 6085 (CanLII)

Me Gordon Kugler
Me Sandra Mastrogiuseppe
Me Jonathan Gottlieb
Kugler Kandestin
Attorneys for the Plaintiffs

Me Guy Pratte
Me François Grondin
Me Marc Duchesne
Borden Ladner Gervais
Attorneys for the Defendants

2013 QCCS 6085 (CanLII)

Date of hearing: 11 and 12 November 2013

EXHIBIT "G"

This is Exhibit "G" referred to in the affidavit of Robert McMaster sworn before me, this 1st day of April, 2019

[signature]

A COMMISSIONER FOR TAKING AFFIDAVITS

[Translation]

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL COURT OFFICE

No.: 500-09-024142-143
(500-06-000070-983, 500-06-000076-980)

DATE: March 10, 2014

PRESIDED BY THE HONOURABLE MANON SAVARD, J.C.A.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ (500-06-000076-980)
JEAN-YVES BLAIS (500-06-000076-980)
CÉCILIA LÉTOURNEAU (500-06-000070-983)
APPLICANTS – Plaintiffs
v.

JTI-MACDONALD CORP
IMPERIAL TOBACCO CANADA LTÉE
ROTHMANS, BENSON & HEDGES INC.
RESPONDENTS – Defendants

JUDGMENT

---

[1] To paraphrase my colleague, Dalphond, J. the parties are “facing off”[1] in connection with two class actions instituted by the Applicants. Those actions are currently being heard on the merits by Superior Court Justice Brian Riordan.

[2] At the stage of the Defendants’ presentation of the evidence, the Applicants submitted to Riordan, J. a motion for the issuance of a safeguard order to prevent one of the Defendants, Respondent JTI MacDonald Corp. (“JTI”) from making various payments (interest and royalties) to one of its subsidiaries, JTI-Trade Marks Corp. (“JTI-

[1] 2013 QCCA 1139, paragr. 5.

TM”), until a final judgment on the class actions. JTI makes those payments pursuant to inter-company agreements entered into in 1999 following the acquisition of the assets of R.J.Reynolds. According to the Applicants, those payments, which they claim are for the sole purpose of sheltering JTI from its creditors, jeopardize not only the execution of a favourable judgment which might be rendered, but also their right to obtain punitive damages, which the trial judge will assess based in particular on the debtor’s patrimonial situation according to article 1621 *C.C.Q.* The main conclusions of the safeguard order being sought are:

> ORDER JTI to cease making or accruing interest and/or royalty payments and/or loan repayments and/or payments of any nature whatsoever to related companies until final judgment has been rendered herein;
>
> ALTERNATIVELY, ORDER the furnishing of security, such as Letters of Credit in a form and amount as may be determined appropriate by this Court;
>
> RESERVE Plaintiff’s rights to have the Transactions declared null and void;

[3] Respondent JTI is contesting that motion and argues among other things the legitimacy of the agreements from which the disputed payments arise from a corporate and tax perspective.

[4] Superior Court Justice Robert Mongeon was designated to hear that motion[2]. He rendered judgment on December 4, 2013 and refused to issue the safeguard order being sought[3].

[5] The Applicants are asking for leave to appeal that interlocutory judgment.

*****

[6] Mongeon, J. gave careful and detailed reasons for his decision.

[7] First, he believes that article 46 *C.C.P.* does not give the court the power to issue a safeguard order which would affect the rights of JTI-TM, which is neither a party to nor an intervenant in the litigation, while the validity of the inter-company agreements pursuant to which JTI pays it the disputed amounts is not being challenged (paragraphs 36 to 44).

[8] He goes on to say that the allegations of the motion do not support the existence of the objective jeopardy required for the issuance of a writ of seizure before judgment according to article 733 *C.C.P.*, nor do they establish the conditions necessary for the issuance of a *Mareva* injunction. In that context, he believes that the court cannot use the powers conferred by article 46 *C.C.P.* to circumvent the requirements prescribed by the *Code of Civil Procedure* for the issuance of a seizure before judgment or a *Mareva*

---

2 At the hearing, the Petitioners said that Riordan, J. asked that the motion be heard by another judge.
3 2013 QCCS 6085 (“judgment under advisement”).

injunction (paragraphs 45 to 63). According to the judge, those conclusions would have been sufficient to dismiss the motion.

[9] Justice Mongeon nonetheless continues the analysis by examining the criteria required for the issuance of a safeguard order. After concluding that the Applicants acted diligently (paragraphs 66 to 76), he is of the opinion that they did not establish a *prima facie* case. Even if Respondent JTI failed to pay the amounts it may be ordered to pay in a judgment favourable to the Applicants, the Applicants would be unable to use the amounts that would have been "safeguarded" by the order sought since the judgment on the merits would not have the effect of cancelling the obligations of Respondent JTI toward JTI-TM. As long as the validity of the inter-company agreements is not challenged by the Applicants, they cannot claim to have a *prima facie* right to the amounts paid under them (paragraphs 77 to 85). He adds that the Applicants have not established the existence of irreparable harm in that the amount of punitive damages, if applicable, is not based only on the patrimonial situation of the Respondent and that the "safeguarded" amounts would not increase its ability to pay any amount which may eventually be owed to the Applicants due in particular to the existence of movable hypothecs granted by Respondent JTI which could confer on their holders rights in priority to those of the Applicants (paragraphs 86 to 92). Lastly, with respect to the balance of convenience, it favours the Respondent due to the penalties that would result from its failure to pay the sums owed under the agreements (paragraphs 93 to 96).

*****

[10] The legislator has clearly set out right to appeal from interlocutory judgments in article 29 *C.C.P.*:

> **29.** Est également sujet à appel, conformément à l'article 511, le jugement interlocutoire de la Cour supérieure ou celui de la Cour du Québec mais, s'il s'agit de sa compétence dans les matières relatives à la jeunesse, uniquement en matière d'adoption:
>
> 1. lorsqu'il décide en partie du litige;
>
> 2. lorsqu'il ordonne que soit faite une chose à laquelle le jugement final ne pourra remédier; ou
>
> 3. lorsqu'il a pour effet de retarder inutilement l'instruction du procès.
>
> Toutefois, l'interlocutoire rendu au cours de l'instruction n'est pas sujet à appel immédiat et ne peut être mis en question que sur appel du jugement final, à moins qu'il ne rejette une objection à la preuve

> **29.** An appeal also lies, in accordance with article 511, from an interlocutory judgment of the Superior Court or the Court of Québec but, as regards youth matters, only in a matter of adoption:
>
> (1) when it in part decides the issues;
>
> (2) when it orders the doing of anything which cannot be remedied by the final judgment; or
>
> (3) when it unnecessarily delays the trial of the suit.
>
> However, an interlocutory judgment rendered during the trial cannot be appealed immediately and it cannot be put in question except on appeal from the final judgment, unless it disallows an objection to evidence based upon article 308 of this Code or on section 9 of the

fondée sur l'article 308 de ce code ou sur l'article 9 de la Charte des droits et libertés de la personne (chapitre C-12) ou à moins qu'il ne maintienne une objection à la preuve.	Charter of human rights and freedoms (chapter C-12), or unless it allows an objection to evidence.
Est interlocutoire le jugement rendu en cours d'instance avant le jugement final.	Any judgment is interlocutory which is rendered during the suit before the final judgment.

[11] The Applicants acknowledge that the impugned judgment is an interlocutory judgment and that it was rendered "during the trial". Moreover, they assert that since it was not rendered by the trial judge, it is not governed by the second paragraph of article 29 *C.C.P.* According to them, to rule otherwise would deprive them of their right to appeal that interlocutory judgment before the Court of Appeal since it could not be challenged during any appeal of the final judgment which Riordan, J. will render. They argue that the right to appeal the interlocutory judgment rendered by Mongeon, J., although rendered during the trial, is governed by the first paragraph of article 29 *C.C.P.*, paragraph 2.

[12] Of the opposite view, Respondent JTI argues that there is no immediate right to appeal Justice Mongeon's interlocutory judgment. In its opinion, that judgment was rendered during the trial and remains governed by the second paragraph of article 29 *C.C.P.*, even though it was rendered by a judge other than the one ruling on the merits.

[13] The few authorities on this point lean toward the thesis proposed by the Respondent[4]. They also cover situations which are different from this case. Regardless, I believe that this issue is not decisive here since, even if I were to assume that the judgment is appealable under the first paragraph of article 29 *C.C.P.*, as the Applicants argue, I am of the opinion that the pursuit of justice does not require that leave be granted (art. 511 *C.C.P.*).

[14] It is settled case law that leave to appeal a judgment granting or denying the issuance of a safeguard order will only be granted in exceptional cases, if the interests of justice so require[5].

[15] Article 46 *C.C.P.* gives the judge in first instance discretion and, unless that discretion is exercised in an abusive, unreasonable or non-judicial manner, a Court of Appeal should hesitate before intervening[6].

---

[4] *Rédemptoristes (Les) v. Tremblay*, 2014 QCCA 199, paragr. 17 (single judge). See also *Doyle v. Sparling*, (1986) R.D.J. 585 (with a dissent by Vallerand, J.) and *Kruco Inc. v. Kruger Inc.*, (1987) R.D.J. 622 (the separate reasons of McCarthy, J.) which cover interlocutory judgments involving recusation rendered by a different judge from the one presiding the hearing.

[5] *Publications TVA inc. v. Transcontinental inc.*, 2005 QCCA 1549, paragr. 1; *Sobeys Québec inc. v. Casot ltée*, J.E. 2005-1402 (C.A.), paragr. 5; *Société Parc-auto du Québec v. Fondation du centre hospitalier universitaire de Québec*, J.E. 2003-2099 (C.A.); *Provost v. 9187-5047 Québec inc.*, 2009 QCCA 1545, paragr. 5; *Houdrouge v. Moca Loca Coffee Company Inc.*, 2008 QCCA 176, paragr. 5.

[16] The Applicants assert that the judgment of Mongeon, J. has significant failings. First, they claim that the judge unduly limited the scope of article 46 *C.C.P.* by concluding that that provision does not allow the court, firstly, to issue a safeguard order which would affect the rights of a third party which is neither a party to nor an intervenant in the litigation and, secondly, to circumvent the requirements prescribed by the *Code of Civil Procedure* for the issuance of a seizure before judgment or a *Mareva* injunction. Second, they assert that the judge erred in law when, in *obiter*, he refused to recognize that they met the criteria for a safeguard order (*prima facie* case, irreparable harm and balance of convenience).

[17] Although the issue raised by the Applicants with respect to the scope of article 46 *C.C.P.* is interesting, it cannot justify the requested leave since the judge, notwithstanding his interpretation of that provision, pursued his analysis and held that, at any rate, the facts in this case did not justify the issuance of the safeguard order. We must therefore focus on the grounds raised by the Applicants against that latter conclusion to determine whether the motion for leave should be granted.

[18] The Applicants argue that they have established a *prima facie* right to such an order, namely their right "*to ensure that Respondent acts in good faith and that no further depletion of funds or assets occurs until final judgment so that Applicants' ability to recover damages (compensatory and punitive) is protected*"[7]. They add that the judge in first instance erred in concluding that they had not established a *prima facie* right to the order they were seeking on the ground that they had not asked to have it declared that the agreements under which the payments are made could not be set up against them.

[19] The fact that the Applicants wish to protect their "ability" to execute a possible judgment in their favour (*so that Applicants' ability to recover damages (compensatory and punitive) is protected*) is not sufficient to establish their *prima facie* right to the safeguard order. All Plaintiffs have an interest in their potential debtor being solvent, *a fortiori* those who claim punitive damages of which the quantum is based in particular on the debtor's patrimonial situation[8]. Nonetheless, the spirit of our laws is that, with exceptions [Translation] "[…] a person's property may not be touched, other than after a judgment establishing the rights of that person and after the expiry of the deadlines for appeal […]"[9].

[20] In my opinion, the judge in first instance did not exercise his discretion abusively in ruling that the Applicants had not established a *prima facie* case contrary to this general principle. Firstly, the allegations in the motion cannot justify a seizure before

---

6 *Sanimal v. Produits de viande Levinoff ltée*, 2005 QCCA 265 ((motion for leave to appeal to the Supreme Court denied (S.C.C., 2005-10-11), 30913), [2005] 3 S.C.R. viii); *Spitzer v. Magny*, 2012 QCCA 2059, paragr. 3.

7 Paragraph 63 of the Motion for Leave to Appeal.

8 *Fillion v. Chiasson*, 2007 QCCA 570, paragr. 107.

9 *Freedom Maritime Corporation v. Campbell*, [1975] J.Q. No. 47 (C.A.), paragr. 10.

judgment or the issuance of a *Mareva* injunction (which the Applicants do not contest) and, secondly, the Applicants are not asking the court to declare that the agreements under which the payments covered by the safeguard order are made cannot be set up against them. I cannot accept the Applicants' argument that it was not up to Mongeon, J. to take third party rights into account with respect to the amounts that would have been safeguarded, but rather that it was up to Riordan, J. who will be asked, where applicable, to assess the punitive damages (art. 1621 *C.C.Q.*) and provide measures designed to simplify the execution of the final judgment (art. 1029 *C.C.P.*).

[21] The Applicants have not convinced me that the fact that the safeguard order is part of a class action justifies in this case the substantive and procedural rules governing the issuance of such an order being different from those which would apply otherwise.

[22] Accordingly, the Applicants have not demonstrated, *prima facie*, the existence of errors in the exercise of the discretionary authority vested in the judge in such matters, or that this is one of the exceptional cases which would justify the granting of leave. I am therefore of the opinion that the pursuit of justice does not justify leave being granted.

WHEREFORE, THE UNDERSIGNED:

[23] **DISMISSES** the motion for leave to appeal, with costs.

MANON SAVARD, J.C.A.

Mtre. Gordon Kugler
Mtre. Sandra Mastrogiuseppe
Mtre. Caitlin Szymberski
KUGLER, KANDESTIN
For the Applicants

Mtre. Guy Pratte
Mtre. François Grondin
Mtre. Marc Duchesne
Mtre. Marc-André Grou
BORDEN LADNER GERVAIS
For Respondent JTI-Macdonald Corp.

Hearing date: February 5, 2014

EXHIBIT “H”

This is Exhibit "H" referred to in the
affidavit of Robert McMaster
sworn before me, this 1st
day of April, 2019

A COMMISSIONER FOR TAKING AFFIDAVITS

C A N A D A

PROVINCE DE QUÉBEC

DISTRICT DE MONTRÉAL

C O U R   D ' A P P E L

PRESIDING: **MARK SCHRAGER, J.C.A.**

500-09-025385-154

IMPERIAL TOBACCO CANADA LTÉE,

appelante/intimée incidente,

- c. -

(500-06-000076-980)

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
et

(500-06-000070-983)

CÉCILIA LÉTOURNEAU,

intimés/appelants incidents,

- et -

JTI-MACDONALD CORP.
ROTHMANS, BENSON & HEDGES INC.,

mises en cause.

SFA 8017

Le 6 octobre 2015

C A N A D A

PROVINCE DE QUÉBEC

GREFFE DE MONTRÉAL

C O U R   D ' A P P E L

500-09-025386-152

JTI-MACDONALD CORP.,

appelante/intimée incidente,

- c. -

(500-06-000076-980)

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
et

(500-06-000070-983)

CÉCILIA LÉTOURNEAU,

intimés/appelants incidents

- et -

IMPERIAL TOBACCO CANADA LTÉE
ROTHMANS, BENSON & HEDGES INC.,

mises en cause.

SFA 8017

Le 6 octobre 2015.

C A N A D A

PROVINCE DE QUÉBEC

GREFFE DE MONTRÉAL

C O U R D ' A P P E L

500-09-025387-150

ROTHMANS, BENSON & HEDGES INC.,

appelante/intimée incidente,

- c. -

(500-06-000076-980)

CONSEIL QUÉBÉCOIS SUR LE TABAC
JEAN-YVES BLAIS
et

(500-06-000070-983)

CÉCILIA LÉTOURNEAU,

intimés/appelants incidents,

- et -

JTI-MACDONALD CORP.
IMPERIAL TOBACCO CANADA LTÉE,

mises en cause.

SFA 8017

Le 6 octobre 2015.

C A N A D A

PROVINCE DE QUÉBEC

GREFFE DE MONTRÉAL

C O U R   D ' A P P E L

COMPARUTIONS:

Me ERIC PRÉFONTAINE,
Me DEBORAH A. GLENDINNING,
pour Imperial Tobacco Canada ltée.

Me SIMON V. POTTER,
Me PIERRE-JÉRÔME BOUCHARD,
Me MICHAEL FEDER,
pour Rothmans, Benson & Hedges inc.

Me GORDON KUGLER,
Me PHILIPPE TRUDEL,
pour les intimés/appelants incidents.

SFA 8017 **Le 6 octobre 2015.**

TABLE DES MATIÈRES

PAGE

REPRÉSENTATIONS 6

PLAIDOIRIE (Me KUGLER) 16

PLAIDOIRIE (Me GLENDINING) 62

PLAIDOIRIE (Me PRÉFONTAINE) 75

PLAIDOIRIE (Me POTTER) 91

PLAIDOIRIE (Me PRÉFONTAINE) 124

RÉPLIQUE (Me KUGLER) 125

CAUSE PRISE EN DÉLIBÉRÉ

----

1 In the year two thousand and fifteen (2015), on this
2 sixth (6th) day of October:
3
4 THE COURT (THE HONOURABLE MARK SCHRAGER, J.C.A.):
5 So, I assume firstly that all parties
6 consent that the motions will be heard the same
7 time. Technically, there's one motion in each
8 file, but...
9 Me SIMON V. POTTER,
10 on behalf of Rothmans, Benson & Hedges inc.:
11 It makes no sense otherwise.
12 THE COURT:
13 Yes. So Mr. Kugler, JTI-Macdonald, why don't
14 you tell me what's happening with that?
15 Me GORDON KUGLER,
16 on behalf of Applicants:
17 You already have a copy of this? What
18 happened, as you can see, Maître Pratte was not
19 available. We had made the motion presentable five
20 (5) weeks notice, I think, on September the
21 twenty-first (21st), they were not available, they
22 were not available, they were not available. And
23 then, Maître Pratte was injured so we decided that
24 we would withdraw the motion against them, they
25 represent thirteen percent (13%) and we wanted to

1 get on, they couldn't, they weren't ready until
2 October the twenty-sixth (26th), which happens to
3 be the same day that I'm supposed to undergo...
4 will be undergoing hip surgery. So we...
5 THE COURT:
6 But you intend to proceed at one point with
7 the motion?
8 Me GORDON KUGLER:
9 We're going to proceed today with the
10 motion...
11 THE COURT:
12 No no no...
13 Me GORDON KUGLER:
14 ... against those...
15 THE COURT:
16 ... the two (2) others, I know, but I'm
17 talking about JTI-Macdonald.
18 Me GORDON KUGLER:
19 Well, for the moment, we have withdrawn it
20 against JTI, we have no plans to proceed.
21 THE COURT:
22 Well, for the moment, I have a motion on my
23 role, nothing is withdrawn.
24 Me GORDON KUGLER:
25 I'm withdrawing it now, formally, and I have

1 amended the conclusions to take JTI out of the
2 conclusions.
3 THE COURT:
4 And do you intend to proceed after the
5 twenty-sixth (26th)?
6 Me GORDON KUGLER:
7 No. I mean, after the twenty-sixth (26th),
8 I'm going to be incapacitated for quite... a month
9 or two (2).
10 THE COURT:
11 No, well, I hope less, but it could be more,
12 but I mean, there are other people who can deal
13 with it.
14 Me GORDON KUGLER:
15 Yes, the intention was to simply withdraw it
16 against JTI and there is no plan to proceed
17 against JTI in the future.
18 THE COURT:
19 The problem to where I'm going with this is
20 if it has to be rescheduled, it's not fair to the
21 Court and the judges that you would simply send a
22 notice of presentation and present it in front of
23 another judge.
24 Me GORDON KUGLER:
25 Absolutely.

1 THE COURT:
2 We'd have to take cognizance of the judgment
3 in first instance of two hundred and twenty-five
4 (225) pages and all the others.
5 Me GORDON KUGLER:
6 We are quite aware of that and as I said,
7 our intention is not to proceed against JTI today
8 or ever.
9 THE COURT:
10 Are there any... are you done? Any other...
11 is there any comments on the other side?
12 Me DEBORAH GLENDINNING,
13 on behalf of pour Imperial Tobacco Canada ltée.:
14 Not at this time, thank you.
15 Me SIMON V. POTTER:
16 No no.
17 THE COURT:
18 So if you would... we're going to indicate
19 in the minutes of the proceedings that, given the
20 representations of Maître Kugler concerning the
21 lack of availability of counsel, and Respondents'
22 intention not to proceed with the motion for
23 security against Appellant JTI-Macdonald, the
24 Court takes cognizance of Maître Kugler's request
25 to withdraw the motion and, accordingly, strikes

1 the motion from the role.
2 Me GORDON KUGLER:
3 I have prepared an amended motion which
4 reflects the removal of JTI... the conclusion
5 against JTI and I have made a... I've cleaned up
6 the conclusion substantively, it remains exactly
7 the same, but we noticed that there was an error,
8 for example, we asked that the letter of credit be
9 for an amount of the judgment, but it is possible
10 that the judgment will be on appeal or reduced,
11 and if it's reduced, the letter of credit should
12 be for the reduced amount. So I have modified the
13 conclusions very slightly and I'd like to provide
14 the Court with it.
15 THE COURT:
16 Have you shared this...
17 Me GORDON KUGLER:
18 I have not because this was done yesterday.
19 And if there's any problem, I'll stay with the
20 motion that we had, the conclusions we had.
21 THE COURT:
22 And is it only the conclusion, it's not the
23 allegations?
24 Me GORDON KUGLER:
25 It's not the allegations because, as in my

1 presentation, I will point out, JTI is a solidary
2 Defendant and those allegations remain.
3 THE COURT:
4 There's some factual allegations that
5 pertain purely to JTI.
6 Me GORDON KUGLER:
7 And those factual allegations remain for the
8 reasons which I will explain during my...
9 THE COURT:
10 I mean, let's give your colleagues a moment
11 to digest your conclusions.
12 Me SIMON V. POTTER:
13 My Lord, the conclusions are substantially
14 amended. I don't want this to be... create a
15 problem for today, we're all going to be able to
16 adjust to it, but the amendments which are just
17 seen this second are substantial and, well,
18 there's the... the underlining cover is more than
19 a full page. I want to point that out. I don't
20 want it to be an obstacle, we want to have this
21 motion disposed of quickly so that our clients
22 don't have to worry about this anymore. But I do
23 want to point out that these amendments, which
24 could have been discussed over the past several
25 days, are substantial and change in the number of

1 ways of what was being asked for before. The word
2 «costs» appears, for example, which never appeared
3 before.
4 THE COURT:
5 Really? I have it on my version. You mean
6 the mention «with costs»?
7 Me SIMON V. POTTER:
8 Yes. No...
9 THE COURT:
10 (Inaudible)
11 Me SIMON V. POTTER:
12 No, I mean the mention... if you look under
13 the chapeau of the new conclusion, it now ends «to
14 guarantee, in part, the payment of the
15 condemnations in the judgment in principal, A-L,
16 interests and all costs.
17 THE COURT:
18 Where are you? Sorry.
19 Me SIMON V. POTTER:
20 In the...
21 THE COURT:
22 Oh, okay, in the... yes, okay, I see.
23 Me SIMON V. POTTER:
24 ... those words «principal,» «interests,»
25 «costs» did not appear in the original motion. And

1 the jurisprudence is quite clear that a different
2 approach is taken to security for costs rather
3 than security for principal. In any event, I'm
4 just saying that the change...
5 THE COURT:
6 Yes.
7 Me SIMON V. POTTER:
8 ... we're noticing it right now.
9 THE COURT:
10 Perhaps you want to proceed on your motion
11 as originally drafted?
12 Me GORDON KUGLER:
13 That's fine. It's... I don't consider... I
14 certainly didn't intend it to be any substantial
15 change, I just thought the wording was better. In
16 any event, we'll...
17 THE COURT:
18 I mean, at the end of the day, security is
19 awarded as to the modalities, I would have the
20 discretion, in any event, and it seems that much
21 of your drafting is modalities, although I could
22 understand Mr. Potter's comments about interests
23 and costs which weren't there before, although,
24 prior to that, you merely said «security» for the
25 judgment and the judgment is a condemnation for

1 principal costs.
2 Me GORDON KUGLER:
3 Correct.
4 THE COURT:
5 I don't know that there's a huge difference,
6 but perhaps, with a view to moving things along,
7 we could agree to proceed on the motions
8 originally drafted.
9 Me GORDON KUGLER:
10 Very well.
11 THE COURT:
12 Alors, juste indiquez les conclusions:
13 maître Kugler procède sur les requêtes... sur les
14 conclusions telles que rédigées originalement dans
15 les requêtes.
16 LE GREFFIER:
17 Bien noté, Monsieur le Juge.
18 THE COURT:
19 Ça va? So I had the clerk indicate to you
20 there would be an hour on each side, in total, I'm
21 assuming on this side, you can agree to divide
22 them, if you can't, it will be thirty (30) minutes
23 each. And Maître Kugler, your hour... if you need
24 it all, just keep in mind that it will include any
25 rebuttal remarks that you have to...

1 Me GORDON KUGLER:
2 My intention, when we found out about the
3 hour, is to save some of my hour for rebuttal.
4 THE COURT:
5 That would probably be wise. And you can
6 rest assured that I have read your motion and the
7 accompanying materials.
8 Me GORDON KUGLER:
9 You've read the motion and...
10 THE COURT:
11 I've read the motion and accompanying
12 materials.
13 Me GORDON KUGLER:
14 Not knowing how long we were going to have
15 and I was going to refer, in the course of my
16 argument, to the evidence that is filed as
17 exhibits in this case, instead of having you have
18 to take out this book and that book and which
19 exhibit is it, for the purposes of my argument, I
20 have just... I call it a compendium, but it's
21 nothing of the... it's nothing but the page
22 reference and the quotations that I'm referring
23 to. So I think it might be useful that everyone
24 had it...
25

1 THE COURT:
2 Maybe there's just extracts of what you
3 filed as exhibits...
4 Me GORDON KUGLER:
5 Exactly.
6 THE COURT:
7 ... in support of your motion.
8 Me GORDON KUGLER:
9 Yes. So my one hour starts now?
10 THE COURT:
11 I had started it about a minute ago
12 actually.
13 Me GORDON KUGLER:
14 Good morning. This is a motion under article
15 497, paragraph 2 of the Code of civil procedure
16 which authorizes a judge of the Court of Appeal to
17 order the Appellants to furnish security for a
18 special reason, to guarantee payment of the whole
19 or part of the condemnation, if the judgment of
20 first instance is upheld on appeal.
21 The special reason referred to in article
22 497 was defined in nineteen ninety (1990) in the
23 matter of Blue Bonnets versus Jolicoeur by Justice
24 Baudouin of this Court and it was refined or
25 summarized again by Justice Baudouin seven (7)

1 years later in the case of Europaper versus
2 Avenor.
3 And Europaper is the first authority in our
4 book of authorities. And on page 2 of the
5 decision, where it is highlighted, Justice
6 Baudouin says that,
7 «*Comme j'ai eu l'occasion de*
8 *l'écrire dans Hippodrome Blue*
9 *Bonnets (...), il faut que le*
10 *requérant fasse la preuve de*
11 *circonstances exceptionnelles*
12 *montrant que sans l'octroi de ce*
13 *cautionnement, le recouvrement de*
14 *la créance, reconnue par un*
15 *premier jugement, sera mis en*
16 *péril.*»
17 So that, we submit, is the test and that
18 definition or that test has been consistently
19 applied by this Court and judges, when sitting
20 alone, and in tabs 2, 3, 4 and 5 of our
21 authorities, I believe that each judge has used
22 basically the same test.
23 In the case of Pothitos, which is to be
24 found at tab 3 of our book of authorities, Madam
25 Justice St-Pierre, at paragraph 6, posed the

1 question which I believe is the question that each
2 juge unique must ask him or herself and which Your
3 Lordship, we believe, will be asking yourself as
4 well. We intend to present our argument today
5 under the following headings: A, are there special
6 reasons and exceptional circumstances to order the
7 Appellants to furnish security? B, if so, the
8 amount of security to be furnished. And C, the
9 form of the security to be furnished.
10 Dealing first with the special reasons and
11 the exceptional circumstances, we respectfully
12 submit that it... I'm not even sure if it's being
13 contested, but I assume it will be contested, but
14 there certainly are special reasons and
15 exceptional circumstances in this case to order
16 the Appellants to furnish security.
17 The principal issue then is whether the
18 record before you demonstrates, on the basis of
19 the facts, proven facts, that, in the absence of
20 an order to furnish security, the rights of the
21 Respondents recognized by the judgment of first
22 instance are in jeopardy if the judgment is
23 upheld.
24 A judgment of first instance is presumed to
25 be valid at this stage. The judgment of first

1 instance decided that the health and well-being of
2 the Respondents were ruined by the willful conduct
3 of the Appellants. You can find that quotation at
4 tab 21 of the compendium that I provided a short
5 time ago.
6 And the judgment condemned the Appellants
7 solidarily to pay the approximately hundred
8 thousand (100,000) cancer Respondents and the
9 million addicted Respondents, fifteen point five
10 (15.5) billion dollars in moral and punitive
11 damages plus interests and costs.
12 THE COURT:
13 Can I... that's an appropriate spot to
14 interrupt you because the condemnation is
15 solidary...
16 Me GORDON KUGLER:
17 Yes.
18 THE COURT:
19 ... but there are three (3) appeals, and in
20 your motions, which are, in my exam, identical,
21 you conclude for the furnishing of security
22 jointly in the proportions of liability.
23 Me GORDON KUGLER:
24 As among themselves.
25

1 THE COURT:
2 As amongst themselves. So I just want to
3 make sure that I understand what jointly in the
4 proportions of liability. I don't remember what
5 they are offhand but if in the place of...
6 Me GORDON KUGLER:
7 Thirteen (13)...
8 THE COURT:
9 ... Rothmans...
10 Me GORDON KUGLER:
11 ... twenty (20) and sixty-seven (67).
12 THE COURT:
13 ... it was sixty-seven (67), then, your
14 arguments in your motion are global so that if I
15 came to a global amount of a hundred dollars
16 ($100) to use a benign term...
17 Me GORDON KUGLER:
18 Right.
19 THE COURT:
20 ... and in the case of Rothmans, if it was
21 sixty-seven percent (67%), then you are asking
22 that I order them to furnish security in the
23 amount of sixty-seven dollars ($67).
24 Me GORDON KUGLER:
25 Correct.

1 THE COURT:
2 That... okay. Thank you.
3 Me GORDON KUGLER:
4 So, article 497 speaks of a security and a
5 specified amount to guarantee in whole or in part
6 the payment of - and I'll skip ahead - the amount
7 of the condemnation. So the right of the
8 Respondents, which article 497(2) seeks to
9 protect, in whole or in part, is the right to
10 recover the créance of fifteen point five (15.5)
11 billion dollars if the judgment is upheld.
12 THE COURT:
13 And if my memory serves, the fifteen point
14 five (15.5) is the... approximately five (5) plus
15 interest indemnity today.
16 Me GORDON KUGLER:
17 Today. And then, interest runs at
18 approximately a million dollars ($1,000,000)...
19 THE COURT:
20 A day.
21 Me GORDON KUGLER:
22 ... a day. And when I say the recouvrement
23 de la créance is the right that 497(2) seeks to
24 protect, I'd refer Your Lordship back to the
25 decision of Justice Baudouin in Europaper at page

1 2. where he says,

2 «... *il faut que le requérant*

3 *fasse la preuve de circonstances*

4 *exceptionnelles montrant que sans*

5 *l'octroi de ce cautionnement, le*

6 *recouvrement de la créance,*

7 *reconnue par un premier jugement,*

8 *sera mis en péril.*»

9 THE COURT:

10 So is the créance the capital, the interests

11 or the costs or...

12 Me GORDON KUGLER:

13 The créance...

14 THE COURT:

15 ... or maybe A, B, C above?

16 Me GORDON KUGLER:

17 The créance, to me, is A, B and C above. We

18 shall examine the facts with respect to Imperial

19 Tobacco, and I'm going to refer to Imperial

20 Tobacco each time as ITL in the examinations and

21 in certain of the motions of ITL, they call

22 themselves ITCAN and ITL and Imperial, but it's

23 always the same party when I refer to ITL. And

24 RBH, of course, is Rothmans, Benson & Hedges.

25 So we'll examine the facts with respect to

1 ITL and RBH separately, but it is to be recalled
2 that each Appellant presented affidavits of senior
3 financial officers that they were unable to pay
4 their respective shares of one point one (1.1)
5 billion dollars which had been ordered by
6 provisional execution and that they would have
7 been rendered insolvent if they were forced to
8 make such payments.
9 THE COURT:
10 I think RBH put a bit of a nuance on it and
11 said, «We have available cash, we could pay sixty
12 million (60,000,000)... - I think they said -...
13 by March, we now have seventy (70) in cash...» I
14 mean they... it wasn't as categoric in their case,
15 I think, as in the others.
16 Me GORDON KUGLER:
17 Yes, but again, they were talking about a
18 total payment of, I think, two hundred and fifty
19 million dollars ($250,000) within sixty (60) days
20 and they needed more...
21 THE COURT:
22 In the end of the day, it was «can't pay in
23 accordance with the judgment», that it was
24 nuanced, yes.
25

1 Me GORDON KUGLER:
2 Since the payment of one point one (1.1)
3 billion dollars was impossible for them according
4 to their sworn affidavits and would have rendered
5 them insolvent, a fortiori, they will be rendered
6 insolvent if required to pay fifteen point five
7 (15.5) billion dollars if the judgment is upheld.
8 I'll now use the compendium with Your
9 Lordship in dealing first with the case of ITL.
10 The Chief Financial Officer Thauvette testified
11 and, at tab 6 of this compendium, his answer was,
12 «*Si l'exécution provisoire est*
13 *maintenue et finale, oui, on ne*
14 *pourrait pas faire face à cette*
15 *obligation-là.*»
16 When I asked whether they... ITL could
17 borrow the money or get funding support from
18 British American Tobacco, which hereafter I'll
19 refer to BAT, which is its parent company, the
20 answer given by Mr. Thauvette was, no, they were
21 not able to borrow from BAT. And at tab 4 of the
22 compendium, it was not in BAT's commercial
23 interest to make a payment of seven hundred
24 million dollars ($700,000,000), seven hundred
25 million dollars ($700,000,000) was the share of

1 ITL in the provisional execution order.
2 And then, the next few words I'll come back
3 to later, but are interesting:
4 «*Donc, on ne verra jamais la*
5 *couleur et donc, il n'y a aucune*
6 *raison commerciale de la faire.*»
7 You may recall that their argument was that
8 if we put up the amount for provisional execution
9 and it's distributed and we win on appeal, we will
10 never get the money back, so it's lost. In the
11 event that they lose this appeal on the merits,
12 they will also have to pay the money and they will
13 never get it back. So BAT took the position then
14 that it's not in our commercial interest to pay
15 seven hundred million dollars ($700,000,000) on
16 behalf of our subsidiary, Imperial Tobacco,
17 because we will never get it back.
18 THE COURT:
19 Your... the logic is escaping me. I can
20 understand them saying, «We don't want to pay it
21 provisionally because, if we win, we won't get it
22 back, because it will just be virtually impossible
23 to go claim, I think, divide it up to about ten
24 thousand dollars ($10,000) per class member.»
25

1 Me GORDON KUGLER:
2 And if the judgment of Justice Riordan is
3 upheld on appeal, and now, Imperial goes to BAT
4 and says...
5 THE COURT:
6 Oh.
7 Me GORDON KUGLER:
8 ... says, «Will you please pay fifteen point
9 five (15.5) billion dollars?»
10 THE COURT:
11 Oh, you mean, they won't be able to recover
12 the money that...
13 Me GORDON KUGLER:
14 They're never going to recover the...
15 THE COURT:
16 ... of loan to their subsidiary.
17 Me GORDON KUGLER:
18 They're never going to recover the money
19 back from the Respondents who will be paid in
20 satisfaction of the judgment. In the same way that
21 they wouldn't have gotten the money back had it
22 been distributed following provisional execution.
23 In other words, BAT is the parent, Imperial - I'll
24 come to that in a moment again - asked BAT, «Would
25 you put up the money?» Answer, «No, it's not in

1 our commercial interest to do it because we're
2 never going to get the money back.»
3 THE COURT:
4 Oh okay, I see what you say.
5 Me GORDON KUGLER:
6 At tab 5, he answered, Mr. Thauvette
7 answered once again,
8 «*C'est assez facile, on n'a pas*
9 *les fonds et le Groupe n'est pas*
10 *prêt à financer les fonds.*»
11 At tab 8 - and I'll be coming back to that a
12 little later - but at tab 8, we see the structure
13 that was put in place by Imperial and its related
14 companies with regard to credit and it... Mr.
15 Thauvette explains, he goes through the entire
16 exercise, and he says, «We cannot borrow because
17 of all of the reasons in there...» As I said, I'm
18 going to be coming back to that in a later part of
19 the...
20 THE COURT:
21 You said that was tab 8?
22 Me GORDON KUGLER:
23 Yes.
24 THE COURT:
25 That looks like an extract of your motion,

1 their motion.
2 Me GORDON KUGLER:
3 It's their motion. Yes, in fact, I think
4 it's his affidavit, it's Mr. Thauvette's
5 affidavit. And in paragraph 35, in his affidavit,
6 Mr. Thauvette inquired whether BAT, which is not a
7 party to the proceedings, had a willingness to
8 extend additional credit or waive its consent
9 rights limiting ITL's borrowing... right to borrow
10 additional monies and the answer was no. There is
11 no commercial rationale in paragraph 36, there's
12 no commercial rationale for further encumbering
13 ITCAN's assets to raise money for any purpose
14 other than the operational or business
15 requirements of ITCAN.
16 For the sake of completeness, I'll just
17 mention that at tab 10 of their motion to cancel,
18 it says that ITCAN quite simply cannot pay the
19 PE... the provisional execution amount. Same thing
20 in tab 2 and 3 of our exhibits, not the
21 compendium, but the motion to cancel the PE order
22 and the de bene esse motion. It is alleged, for
23 example, in paragraph 21 of the de bene esse
24 motion, we just cannot pay the amount which was...
25 I think it was seven hundred million dollars

1 ($700,000,000).
2 ITCAN transferred its trademarks to a
3 related company in the year two thousand (2000),
4 and that is found at tab 2 of the compendium.
5 These lawsuits were initiated in nineteen ninety-
6 eight (1998), so in the year two thousand (2000),
7 they transferred their patents to Imperial brands
8 or DuMaurier company.
9 THE COURT:
10 Patents or the trademarks?
11 Me GORDON KUGLER:
12 Trademarks, sorry.
13 THE COURT:
14 I understand that, and then, they've been
15 paying royalties to the company to whom they
16 transferred.
17 Me GORDON KUGLER:
18 Correct.
19 THE COURT:
20 Who, I think, was his own subsidiary.
21 Me GORDON KUGLER:
22 Yes. But it was explained... I don't
23 remember where, yes, in that tab 8 of the
24 compendium, it is explained that the trademarks
25 are protected and they can't borrow against them

1 and they can't do anything against... in other
2 words, they're clearly beyond the reach of the
3 present Respondents.
4 And again, I note that this was done in the
5 year two thousand (2000), which is a year or two
6 (2) after our lawsuits were initiated.
7 So if payment of their share of the
8 provisional execution order of seven hundred
9 million dollars ($700,000,000) was impossible and
10 would have rendered them insolvent, clearly, it
11 will be impossible for them to pay fifteen point
12 five (15.5) billion dollars if the judgment is
13 upheld... and I say fifteen point five (15.5)
14 billion dollars because they are solidary
15 Defendants.
16 Another factor dealing with the special
17 reason is that Imperial Tobacco has earned roughly
18 five hundred million dollars ($500,000,000) from
19 operations each year for the past seventeen (17)
20 years. It has paid virtually the entire amount of
21 their earnings to their related offshore
22 companies. They have admitted that they did not
23 make a provision, take a reserve and, most
24 importantly, put any money aside during those
25 seventeen (17) years to satisfy an eventual

1 unfavourable judgment in these lawsuits. So it has
2 transferred all of its profits to its offshore
3 companies, it has transferred its trademarks to a
4 related offshore company. And it has, in effect,
5 made itself judgment proof vis-à-vis the present
6 Respondents.
7 Justice Riordan, speaking about JTI's
8 similar transfer of profits in failure to set
9 aside any money and to render itself incapable of
10 paying, at tab 20 of the compendium, I'm quoting
11 from Justice Riordan's judgment.
12 «*In the first, we cannot but*
13 *conclude that this whole tangled*
14 *web of interconnecting contracts*
15 *is principally a creditor-proofing*
16 *exercise undertaken after the*
17 *institution of the lawsuit.*»
18 And he says,
19 «*On paper, the sham may well*
20 *succeed.*»
21 So we're not debating the legality or
22 illegality of the transaction.
23 THE COURT:
24 But just a question because I remember this,
25 this (inaudible).

1 Me GORDON KUGLER:
2 M'hm.
3 THE COURT:
4 But there's nothing... he doesn't say
5 anything similar in his judgment about IT.
6 Me GORDON KUGLER:
7 That's correct. And the reason is that it
8 was in the context of determining the amount of
9 punitive damages. And someone will correct me if
10 I'm wrong because I wasn't there, but I was told
11 that both Imperial and Rothmans told the judge
12 that they had the capacity to pay the punitive
13 damages, so their transactions were not gone into
14 at all. JTI, on the other hand, contended it could
15 not pay punitive damages for these types of
16 transactions.
17 THE COURT:
18 But I understand your point. I just want to
19 make sure that when you're talking about the
20 transfer by Imperial Tobacco of its trademarks...
21 Me GORDON KUGLER:
22 M'hm.
23 THE COURT:
24 ... that I have something on my record and
25 so it would be... it's in the deposition that you

1 or your... or Mr. Johnston did of the affiant to
2 the motions for provisions...
3 Me GORDON KUGLER:
4 I'll give you the...
5 THE COURT:
6 You know where I'm getting at, because I
7 have a finding of fact by a trial judge for JTI
8 with respect to transfer of trademarks, but
9 they're out of the picture.
10 Me GORDON KUGLER:
11 Yes, but in our compendium, at tab 2...
12 THE COURT:
13 M'hm.
14 Me GORDON KUGLER:
15 ... you have the testimony when he was
16 questioned under oath...
17 THE COURT:
18 Okay.
19 Me GORDON KUGLER:
20 ... by Maître Johnston.
21 THE COURT:
22 I see it.
23 Me GORDON KUGLER:
24 At tab 2. That's where he says it. So we
25 therefore submit that in the case of Imperial

1 Tobacco, it is clear that the circumstances
2 constitute the special reason and the exceptional
3 circumstances giving rise to... without to be...
4 supporting our contention that without ordering
5 the security be furnished, the recovery of our
6 créance from Imperial Tobacco is in jeopardy, in
7 fact, is illusory, there is...
8 I'd like now to turn to the case of RBH. At
9 tab 17 of our compendium, this is an examination
10 out of Court of William Giff, who is Chief
11 Financial Officer of RBH, and he testified on the
12 thirtieth (30th) of June two thousand and fifteen
13 (2015) and he was questioned by Maître Trudel. And
14 in the middle of the page, starting at line 14, he
15 answers,
16 «*Our general historical practice*
17 *has to pay earnings, so on an*
18 *annual basis, the earnings of the*
19 *company would be dividended to the*
20 *parent.*»
21 And if you look,
22 «*Since the acquisition in two*
23 *thousand and eight (2008)...*»
24 So from two thousand and eight (2008),
25 historical earnings of about one point nine (1.9)

1 billion dollars was paid by RBH to its parent
2 company, Philip Morris International.
3 THE COURT:
4 I just want to ask, if you look at your
5 motion, in footnote, it's paragraph 15... you have
6 it?
7 Me GORDON KUGLER:
8 Paragraph 15, yes.
9 THE COURT:
10 Yes, you said,
11 «*None of the Appellants has taken*
12 *a reserve, made a provision or set*
13 *aside any funds during the past*
14 *seventeen (17) years to satisfy*
15 *the judgment, (inaudible) present*
16 *lawsuits nor do they intend to do*
17 *so.*»
18 Me GORDON KUGLER:
19 M'hm.
20 THE COURT:
21 And your footnote 3 refers to the
22 depositions of Mr. Thauvette and Mr. McMaster for
23 JTI. There's no reference to Mr. Giff.
24 Me GORDON KUGLER:
25 Correct.

1 THE COURT:
2 Is there anything... is the most specific
3 thing you have, what you've just showed me, in
4 your compendium, at tab 17?
5 Me GORDON KUGLER:
6 Yes. They have, as I say, every year, since
7 two thousand and eight (2008), they have paid all
8 of their earnings to their parent Philip Morris
9 International. There is no indication that such
10 practice will cease during the appeal's process.
11 Just like the case of ITL, in the motion to
12 cancel the order of provisional execution, tab 12,
13 RBH alleged that it would be insolvent on a cash
14 flow basis if it had to pay its share of one point
15 one (1.1) billion dollars as per the order and its
16 share was roughly two hundred and fifty million
17 dollars ($250,000,000).
18 At one point, they said we can't pay it
19 within sixty (60) days, but we would be able to
20 pay it a little bit later, but they clearly do not
21 have the fifteen billion dollars ($15,000,000,000)
22 and won't have fifteen billion dollars
23 ($15,000,000,000) at the time this appeal is over,
24 to satisfy the judgment.
25 And in tab 14 of the compendium, Mr. Giff

1 testified that Philip Morris International did
2 have a credit facility for RBH, but on the date of
3 the judgment of Justice Riordan, Philip Morris
4 cancelled that credit facility.
5 Mr. Giff acknowledged that there are no
6 realizable assets of RBH to satisfy any part of
7 the judgment because they do own real estate, they
8 do own their trademarks, but as he pointed out, no
9 one of the tobacco company is licensed to use
10 those trademarks so they have no value. And when
11 asking about... when asked about the credit of RBH
12 to borrow against it, he explained that the
13 lending institutions do not lend on the basis of
14 the trademarks or the real estate or the plant and
15 the equipment because it's of no use from...
16 there's no realizable value. And the only people
17 to whom it could be sold are the two (2) other
18 defendant tobacco companies.
19 THE COURT:
20 Where do I have that?
21 Me GORDON KUGLER:
22 I was afraid you'd ask that because I have
23 it somewhere and I...
24 Me SIMON V. POTTER:
25 It's at tab 15 of the compendium.

1 THE COURT:

2 Thank you.

3 Me GORDON KUGLER:

4 It's at tab 15, thank you.

5 AN UNIDENTIFIED VOICE:

6 It's 30 and following.

7 THE COURT:

8 I'm sorry?

9 AN UNIDENTIFIED VOICE:

10 Page 30 and following of the examination of
11 Mr. Giff.

12 THE COURT:

13 Not at the compendium, it's... Ça va.

14 Me GORDON KUGLER:

15 So what we have seen in the case of RBH is
16 that it has no borrowing capacity from its parent
17 Philip Morris, it would have been rendered
18 insolvent on a cash flow basis according to the
19 evidence they made, if they had had to satisfy the
20 provisional execution order. They have paid all of
21 their earnings to their parent company in the form
22 of dividends. They have no credit, they have no
23 realizable assets. This was done since two
24 thousand and eight (2008), which is long after we
25 filed these lawsuits, ten (10) years later. So

1 far, up to two thousand and fourteen (2014), they
2 have paid one point nine (1.9) billion dollars of
3 earnings in the form of dividends to Philip
4 Morris.
5 Without an order to furnish security, it is
6 clear the recovery of the créance from RBH is in
7 jeopardy and it meets the test referred to earlier
8 originally formulated by Justice Baudouin.
9 I will briefly mention JTI, not asking for
10 security from JTI, but I want to show that this is
11 not a case where JTI has two hundred billion
12 dollars ($200,000,000,000) in cash, it's a
13 solidary Defendant, it will pay the entire award
14 and, therefore, you don't need to order a security
15 for the other two (2). Clearly, it is quite the
16 opposite, JTI was unable to pay the hundred and
17 fifty million dollars ($150,000,000) being its
18 share of the provisional execution order, it earns
19 approximately a hundred million dollars
20 ($100,000,000) a year from operations, but pays
21 that to its offshore subsidiary and will continue
22 to do so throughout the appeal's process; that is
23 to be found, what I just said, at tab 5 of our
24 exhibits, which is the deposition of Mr. McMaster
25 at question 90. And as he said throughout his...

1 THE COURT:
2 At question 90, 9-0?
3 Me GORDON KUGLER:
4 9-0. And as Mr. McMaster said throughout his
5 examination, without funding support from related
6 companies, it cannot pay any amount. And it has no
7 funding support.
8 I want to read for you Justice Riordan's
9 conclusion. It was in respect of JTI, but clearly,
10 it would apply to all three (3) Defendants. And
11 that's found at tab 20, where he says on the top
12 of page 5, Justice Riordan:
13 «*The Interco Contracts represent a*
14 *cynical, bad-faith effort by JTM*
15 *to avoid paying proper*
16 *compensation to its customers*
17 *whose health and well-being were*
18 *ruined, and the word is not too*
19 *strong, by its wilful conduct.*»
20 And during the... throughout the judgment,
21 the wilful conduct that caused the health and
22 well-being of the Respondents to be ruined was the
23 wilful conduct of all three (3) Appellants.
24 So despite the fact that the three (3)
25 Appellants, collectively, earned a billion dollars

1 ($1,000,000,000) a year from operations, they have
2 organized their affairs in such a way to shield
3 themselves from an unfavourable judgment by paying
4 virtually all of their earnings year after year to
5 their offshore related companies.
6 In the seventeen (17) years since this
7 lawsuit was... since these lawsuits were
8 initiated, they have paid collectively almost
9 twenty billion dollars ($20,000,000,000) to their
10 related companies. And they don't put aside any
11 money to satisfy this judgment and, going forward,
12 there is no indication that any money has been or
13 will be put aside.
14 So the evidence that is before you, in our
15 respectful submission, is conclusive and meets the
16 test that security must be ordered in order to
17 preserve the right of the Respondents to recover
18 the amount of the créance established by the
19 judgment in their favour. That concludes the part
20 of the argument dealing with meeting the test.
21 The second heading is amount... it should go
22 without saying, but I'll say it anyway, if you
23 have any questions to me at any time...
24 THE COURT:
25 Don't worry.

1 Me GORDON KUGLER:
2 Fine. As long as they're not difficult,
3 please feel free...
4 THE COURT:
5 You may even answer it.
6 Me GORDON KUGLER:
7 Next comes the amount of the security. We
8 have asked for security in an amount of five
9 billion dollars ($5,000,000,000) or, subsidiarily,
10 two hundred and fifty million dollars
11 ($250,000,000) per quarter, which is approximately
12 their collective earnings from operations going
13 forward during the appeal's process. I would
14 anticipate that the Appellants will argue...
15 THE COURT:
16 Where did you take the two fifty (250) from?
17 Me GORDON KUGLER:
18 They earn a billion dollars ($1,000,000,000)
19 a year, this is when JTI is still in the picture,
20 but it will be scaled down for portion.
21 THE COURT:
22 Right. No, but I mean where in the record am
23 I going to see the two fifty (250)?
24 Me GORDON KUGLER:
25 You're not going to see two fifty (250),

1 they earn a billion dollars ($1,000,000,000) a
2 year, that means they earn two hundred and fifty
3 million (250,000,000) every quarter.
4 THE COURT:
5 M'hm.
6 Me GORDON KUGLER:
7 And we're asking that the security
8 subsidiarily be two hundred and fifty million
9 dollars ($250,000,000) per quarter. I think the
10 record shows that they...
11 THE COURT:
12 He found... the judge found that over the
13 five (5) years between two thousand and nine
14 (2009), two thousand and thirteen (2013), average
15 pre-tax earnings, Imperial Tobacco was, he said,
16 four hundred and eighty-three million
17 (483,000,000), Rothmans was four sixty (460) and
18 JTM was a hundred and three (103).
19 Me GORDON KUGLER:
20 Which is roughly a billion dollars
21 ($1,000,000,000). And I don't have the reference
22 now, but I could find it, they pay their dividends
23 on a quarterly basis to their parent companies, as
24 I recall. I would expect...
25

1 THE COURT:
2 And those are calendar quarters?
3 Me GORDON KUGLER:
4 Yes.
5 THE COURT:
6 Are you aware of any judgment ordering
7 security on the basis that you're discussing now?
8 In other words, quarterly tranches?
9 Me GORDON KUGLER:
10 No. I would anticipate that the Appellants
11 will argue that the amount of five billion dollars
12 ($5,000,000,000) is unprecedented and it is an
13 amount way way beyond anything that's been
14 ordered. That's true, that's true. But there is...
15 THE COURT:
16 I trust that it won't be their only
17 argument.
18 Me GORDON KUGLER:
19 You think it will be their only argument...
20 THE COURT:
21 No, I said I trust that...
22 Me GORDON KUGLER:
23 (Inaudible)
24 THE COURT:
25 ... it won't be their only argument.

1 Me GORDON KUGLER:
2 Okay. But bear in mind, there is no judgment
3 that has ever awarded fifteen billion dollars
4 ($15,000,000,000), and it reminds me of my wife's
5 logic when we were in England and it's... she
6 bought something for a hundred...
7 THE COURT:
8 Pounds.
9 Me GORDON KUGLER:
10 ... dollars ($100), I said, «No, it's a
11 hundred (100) pounds.» She says, «No, when you're
12 in another country, a hundred (100), it's like
13 dollars.» And here, we're talking billions like
14 we're talking millions where we're talking less.
15 But...
16 Me SIMON V. POTTER:
17 In my family, I'm like that, but my wife is
18 the sensible one.
19 Me GORDON KUGLER:
20 So we...
21 Me DEBORAH A. GLENDINNING:
22 I'm not saying anything.
23 Me GORDON KUGLER:
24 We have to put something else into
25 perspective. The Respondents are comprised of a

1 hundred thousand (100,000) cancer victims. And
2 their health and well-being were ruined, but
3 security in an amount of five billion dollars
4 ($5,000,000,000), which is less than one third
5 (1/3) of the condemnation of fifteen and a half
6 (15 1/2) billion dollars... and by the time this
7 appeal is over, it will certainly be sixteen
8 billion dollars ($16,000,000,000) because, as I
9 said, interest is running at a million dollars
10 ($1,000,000) a day. But that represents only fifty
11 thousand dollars ($50,000) for each Respondent,
12 cancer Respondent.
13 Now, the case law on amounts of security
14 that are ordered is, in my view, of very limited
15 value, but nevertheless, any time security has
16 been ordered, it's either a third (1/3) or fifty
17 percent (50%) or a hundred percent (100%) of the
18 amount requested. And the five (5) or six (6)
19 authorities that we submitted, you'll see that, in
20 every instance, it was that. The highest amount,
21 so far, from our research was in the Castor case,
22 where the Court awarded sixteen point nine (16.9)
23 million dollars on a forty-six million dollar
24 ($46,000,000) claim. It is true that there are
25 twenty-seven (27) other cases in the wings that

1 were suspended, but Justice Chamberland, speaking
2 for the Court, said he did not take that into
3 account at all. He was only basing his amount of
4 security on the amount that had been claimed.
5 THE COURT:
6 Let me ask you this. Justice Riordan, in
7 ordering provisional execution, part of his
8 rationale for the amount was that the amount...
9 the billion... the one point one three or three
10 one, I never know which it was...
11 Me GORDON KUGLER:
12 One point one (1.1) billion.
13 THE COURT:
14 ... would be roughly equal and, from memory,
15 it was either he said it was equal to or eighty
16 percent (80%) of the initial deposit that would be
17 required to satisfy the judgment on the merits and
18 then, he made the comment that, in his experience,
19 not everybody who might claim does claim and that
20 might be sufficient to satisfy the judgment so
21 that will be the initial deposit, and then we'll
22 see. And then, he ordered provisional execution in
23 step with that provisional... for that initial
24 deposit.
25

1 Me GORDON KUGLER:
2 M'hm. You ask me that question at the
3 hearing and I'll give the same answer, but I hope
4 it's not in the words of the late great Yogi
5 Berra, «déjà vu all over again», but firstly,
6 Justice Riordan's conclusions condemns the
7 Defendants solidarily to pay fifteen point five
8 (15.5) billion dollars, that's the amount of the
9 award.
10 When ordering provisional execution, Justice
11 Riordan's mindset was different from his
12 conclusion awarding fifteen point five (15.5)
13 billion dollars. The take-up rate, as it's called,
14 when people come to claim their money, is
15 traditionally low in cases where the amount is
16 low. I mean, we acted in a Class action against
17 Shell and each Class member was awarded two
18 hundred dollars ($200) and they had to fill out an
19 affidavit and complete a form and do this, that or
20 the other thing, so the take-up rate was low; for
21 two hundred dollars ($200), who cares?
22 These cancer victims are entitled to two
23 hundred and fifty thousand dollars ($250,000)
24 each. Since we're not making the evidence, but I'm
25 presenting argument, almost immediately after the

1 judgment was rendered and reported on in the
2 newspapers, no official notice was sent to anyone,
3 within weeks, twenty-five thousand (25,000) people
4 called the offices of our colleagues to register
5 to collect the money.
6 THE COURT:
7 Now, so you're telling me that his reasoning
8 about the take-up rate may not obtain, given the
9 circumstances of this case and specifically...
10 Me GORDON KUGLER:
11 It will almost...
12 THE COURT:
13 ... potential reward (inaudible)
14 Me GORDON KUGLER:
15 ... it will almost certainly not obtain...
16 THE COURT:
17 Okay.
18 Me GORDON KUGLER:
19 ... and I think that when... I mean, there's
20 many factors that you may take into account, but
21 article 497(2) speaks of the judgment, their
22 rights under the judgment. Their rights under the
23 judgment are for fifteen and a half (15 1/2)
24 billion dollars.
25

1 THE COURT:
2 I understand. So the clock is running and
3 you still want to speak to the form of the
4 security that you're asking for.
5 Me GORDON KUGLER:
6 I want to deal with one other matter before
7 I get to the form because I anticipate, just from
8 having read the authorities of the Appellants,
9 that they will say that you should not... you must
10 be careful to guard against an award, an amount of
11 security which, in and of itself, will render them
12 insolvent and deprive them of their right to
13 appeal. They have the right to appeal.
14 The case law does say that. And it says it
15 in one sentence where the judge will say, «As my
16 colleague Justice Pelletier said in this case»,
17 and Justice Pelletier refers to and refers to.
18 There has never been a legal analysis that I have
19 seen in all of the cases to support that
20 proposition.
21 In any event, and one of the colleagues on
22 our side said, «It makes no sense to have their
23 inability to satisfy the judgment...»
24 THE COURT:
25 I'm saying this to you, but it's something

1 that I'm going to want them to answer, there's a
2 little bit of cynicism involved saying that I have
3 established a practice, perfectly legal, of
4 declaring all... not retaining earnings or
5 creating a reserve and paying my dividends to my
6 parent out of jurisdiction, so that now, you
7 shouldn't order me to pay an amount that might
8 otherwise be justified because of my past
9 practices.
10 It's a little... it's a little bit cynical
11 in the circumstances of an award of security. It's
12 one thing to say, «I can't pay this amount in
13 sixty (60) days as a matter of fact», it's another
14 thing to seek to avoid security where it might
15 otherwise be justified because of the way you
16 structured your affairs, not because, you know,
17 your business had some kind of fortuitous event
18 and you didn't earn profits, in my mind. Anyway,
19 I'm saying it to you with a view to your
20 colleagues speaking to that.
21 Me GORDON KUGLER:
22 So that takes away the rest of my argument
23 because it's exactly what I had.
24 THE COURT:
25 Yes, no, and I've read that case law and I

1 know it's there and it's my comment.

2 Me GORDON KUGLER:

3 They're taking the position that heads, they

4 win and tails, we lose.

5 THE COURT:

6 Yes.

7 Me GORDON KUGLER:

8 And they're asking you to bless that

9 proposition. I'll save my remarks for rebuttal on

10 that, if it's necessary. Let me turn to the form

11 of security. We submit that Your Lordship may

12 order any form of security which meets the

13 criteria of the law. Article 497(2) simply says

14 the judge may order security, it doesn't limit to

15 ordering them to pay cash. And let me say right

16 off the bat...

17 THE COURT:

18 I think in Castor, it was an LC, wasn't it?

19 Me GORDON KUGLER:

20 No, I think...

21 THE COURT:

22 The sixteen...

23 Me GORDON KUGLER:

24 ... it was in cash. In Cinar, I think it was

25 an LC, a letter of credit. A letter of credit...

1 I'm sure they're not going to dispute it, but in
2 any event, a letter of credit is a legal form of
3 security. You will find that in the remarks of
4 former Justice Rochon in his book which... the
5 extract of which I have provided somewhere, tab 6,
6 I think, of our authorities. Tab 7, at page 160 at
7 the top of the page.
8 He refers to a decision of this Court in a
9 family case which you will find at tab 6 of our
10 authorities, where it says the letter of credit
11 rencontre les exigences of a cautionnement.
12 And we found - and «we» sounds like I had
13 something to do with it, but I did not - but
14 someone found, on our team, a decision rendered by
15 your colleague, Justice Kasirer. I'll talk briefly
16 about the case and then, I think Your Lordship is
17 going to have to read it because it's not
18 something that's one line. But in that case, the
19 Cour of Appeal ordered, under 495.2, the Appellant
20 to furnish security in an amount either by way
21 of...
22 THE COURT:
23 It's just that I'm familiar with the
24 judgment.
25

1 Me GORDON KUGLER:
2 You're familiar with the judgment?
3 THE COURT:
4 This was on the application to withdraw it
5 and what the nature of the security was, there was
6 cash though in that case.
7 Me GORDON KUGLER:
8 It was cash, it could have been a letter of
9 credit. So there is...
10 THE COURT:
11 I think there was a competition between the
12 debtor and the bankruptcy trustee.
13 Me GORDON KUGLER:
14 That's right. So we ask that the security...
15 I mean, one of the modifications to the
16 conclusions which is not now before you or I don't
17 know how you'll deal with it, but in what I had
18 corrected, said, «Let them pay cash», which
19 they... if we had asked just for cash, they'll
20 say, «Well, how do you expect us to pay five
21 billion dollars ($5,000,000,000), we couldn't pay
22 one billion dollars ($1,000,000,000) so how can we
23 pay five billion dollars ($5,000,000,000), so
24 you're depriving us of a right of appeal», that's
25 fine.

1 So if they want to pay cash, that's fine.
2 The letter of credit, to us, seems much easier and
3 much more practical for the form of security. The
4 second reason that we asked for a letter of credit
5 and we're asking that the letter of credit be
6 callable upon the earlier of a judgment dismissing
7 their appeal or the filing of a procedure under
8 the Bankruptcy Act or CCAA.
9 THE COURT:
10 And they're going to tell me why that is in
11 there?
12 Me GORDON KUGLER:
13 Yes. Because they have threatened... I say
14 «they» generally, it may... one of them may not...
15 THE COURT:
16 No no, I read the affidavits, I know they
17 said if we have to pay... one of them alluded to
18 it, one of them specifically said there would be a
19 C-36.
20 Me GORDON KUGLER:
21 That they would file under CCAA. And as I
22 have learned, and you perhaps may know better, the
23 initial order under a CCAA is to suspend all
24 proceedings. If they suspend all proceedings, the
25 appeal... if one of them files under CCAA tomorrow

1 and the proceedings are suspended, they can be
2 under CCAA for five (5) years, I don't know how
3 long this is going to be. And if the proceedings
4 are suspended, the appeal is never going to be
5 heard. And if the appeal is never going to be
6 heard, the letter of credit is never going to be
7 callable if it's only callable upon the dismissal
8 of the appeal. So that is why we ask for what we
9 ask for. However...
10 THE COURT:
11 I don't think it's how I read your
12 conclusion. Oh, I see, okay, so you're saying
13 it's... if they file, it's callable.
14 Me GORDON KUGLER:
15 Correct.
16 THE COURT:
17 But if they file under suspension...
18 Me GORDON KUGLER:
19 The appeal may never be heard.
20 THE COURT:
21 It's a little bit... yes... no, but it's...
22 but the question is, if there's a... if they
23 file...
24 Me GORDON KUGLER:
25 M'hm.

1 THE COURT:

2 ... and there's a suspension of proceedings
3 and execution...

4 Me GORDON KUGLER:

5 M'hm.

6 THE COURT:

7 ... then you can't call anymore.

8 Me GORDON KUGLER:

9 Except...

10 THE COURT:

11 It might be a little bit of chicken egg
12 thing.

13 Me GORDON KUGLER:

14 It might be... sorry?

15 THE COURT:

16 It's a little bit of a chicken egg thing.

17 Me GORDON KUGLER:

18 Correct. It was after we had done that
19 exercise that the decision of Justice Kasirer came
20 to our attention. And Justice Kasirer said that
21 whether it's cash or, I think, letter of credit,
22 that...

23 THE COURT:

24 That title or... the title or entitlement
25 passes...

1 Me GORDON KUGLER:
2 As...
3 THE COURT:
4 ... upon the filing of the security.
5 Me GORDON KUGLER:
6 Correct.
7 THE COURT:
8 It takes it out of the patrimony.
9 Me GORDON KUGLER:
10 It's a resolutory conclusion and we wanted
11 it out of the patrimony of the Defendants, we
12 think that it would be easier for them and
13 certainly easier for us because the objective, the
14 goal of the legislator was, in the event if we
15 establish the special reason and meet the test of
16 497(2), they want to make sure to guarantee the
17 payment to these... the Respondents of the right
18 to recover the créance. And if they're going to
19 hide... not hide, but go under CCAA and never go
20 ahead with the appeal, here we are sitting with a
21 judgment that we waited seventeen (17) years to
22 get and we're not...
23 THE COURT:
24 No, I understand...
25

1 Me GORDON KUGLER:
2 Okay.
3 THE COURT:
4 ... except you're assuming that there's a
5 CCAA filing, which is...
6 Me GORDON KUGLER:
7 There's a threat.
8 THE COURT:
9 Yes, there's a threat, but you're also
10 assuming that, under CCAA, your appeal necessarily
11 stops in its tracks, it may not. There's a CCAA
12 judge that can make that decision at the
13 appropriate time.
14 Me GORDON KUGLER:
15 Correct. We were doing this as a
16 precaution...
17 THE COURT:
18 No, I understand.
19 Me GORDON KUGLER:
20 ... and to satisfy the burden. Now, the last
21 thing... am I close to my hour or about?
22 THE COURT:
23 You passed it five (5) minutes ago and I let
24 you go.
25

1 Me GORDON KUGLER:
2 Okay.
3 THE COURT:
4 But I will... we'll extend similar courtesy
5 to your colleagues if they require it. There's
6 important things here. But I think...
7 Me GORDON KUGLER:
8 They...
9 THE COURT:
10 ... you should wrap it...
11 Me GORDON KUGLER:
12 I will wrap up. If they argue that the order
13 of provisional... the order of... to furnish
14 security of five billion dollars ($5,000,000),
15 that's the amount, will render them insolvent and
16 don't do it because you're defeating the purpose,
17 you're depriving us of a right of appeal, that's
18 not so. They have a choice. The right of appeal is
19 not absolute, it's subject to article 497(2). Now,
20 they have made a choice, it's not like a
21 businessman who's gone insolvent because
22 business... today, they're not insolvent. They
23 earn a billion dollars a year from earnings. So
24 they have a choice, put up the security and don't
25 pay at all any dividends to your parent companies

1 or pay it, as you have done for the past seventeen
2 (17) years to your companies, but you don't have
3 the right of appeal. You can't have both. I've
4 taken more time than I wanted to and I thank you.
5 THE COURT:
6 Thank you. So have you, on the other side of
7 the bar, have you decided how you're splitting
8 your time?
9 Me DEBORAH A. GLENDINNING:
10 Yes, for Imperial, we'll take our initial
11 allocation of thirty (30) minutes. I'm going to do
12 what I thought would be a brief introduction,
13 maybe a bit longer given Maître Kugler's comments
14 and then, Maître Préfontaine will deal with the
15 case law. And then, we will turn it over to our
16 friends for RBH.
17 THE COURT:
18 Okay. So but we... I just don't want... I
19 certainly don't want argument between the two (2)
20 parties as to how the thirty (30) minutes gets...
21 Me SIMON V. POTTER:
22 We will make sure the argument happens in
23 the corridor, My Lord.
24 THE COURT:
25 I appreciate it. So we'll take our

1 traditional eleven o'clock (11:00) break and we'll
2 be back at eleven fifteen (11:15), thank you.
3
4 RECESS
5
6 Me DEBORAH A. GLENDINNING:
7 Good morning. I'll attempt do to my best to
8 stick to my fifteen (15) minute time limit that I
9 arm wrestled Mr. Potter for out in the hallway.
10 I want to deal with exceptionnal
11 circumstances to begin with and just draw your
12 attention to the fact that I'm going to be making
13 submissions on behalf of Imperial's situation,
14 which is unique. We've got three (3) separate
15 Defendants here, three (3) separate Appellants and
16 all of the situations are the same. And I'd like
17 to draw your attention to the simple fact that the
18 exceptional circumstances that are relied on by
19 Maître Kugler in support of his request for
20 security come down to three (3) paragraphs of
21 their motion which essentially say, basically,
22 they've paid dividends in the past and, at
23 paragraph 30, they say there's no indication that
24 they will not continue to do so in the future.
25 That is the sum total of the basis upon

1 which they say they should be entitled to an
2 extraordinary remedy in the amount that they have
3 claimed. And you asked my friend a question about
4 the cynicism, why should we...
5 THE COURT:
6 Just before you go too far, your
7 representative is Maître Thauvette or Mr.
8 Thauvette?
9 Me DEBORAH A. GLENDINNING:
10 Yes. Yes.
11 THE COURT:
12 Did you look at page 16 of his examination?
13 It says a little bit more than that. He said,
14 «*No, we haven't taken a provision*
15 *up to now and we don't intend to*
16 *take one notwithstanding Riordan's*
17 *judgment, because we don't*
18 *consider the outcome*
19 *unfavourable.*»
20 His words.
21 Me DEBORAH A. GLENDINNING:
22 Yes.
23 THE COURT:
24 It's a little bit stronger than they
25 haven't... they've been declaring dividends; they

1 haven't taken a provision and there's no
2 indication that they'll change their course of
3 conduct. It's pretty clear that they're not... you
4 don't recognize the judgment. He's not making any
5 kind of reserve for... any kind of provision for
6 the payment of.
7 Me DEBORAH A. GLENDINNING:
8 He indicated he is not at present making any
9 kind of provision for it; that's right. The
10 evidence goes on to show that Imperial has not
11 paid dividends to BAT since July of o-fourteen
12 ('14). And what I was going to...
13 THE COURT:
14 Do I have that evidence?
15 Me DEBORAH A. GLENDINNING:
16 Yes, you do. That's at... that is in his
17 examination at page 60, question 186 and 187. And
18 he wasn't asked a further question about what your
19 intentions are going forward. He did say he did
20 not intend to make any provision. He wasn't asked
21 what the situation would be going forward.
22 And the reason why... in an attempt to
23 answer your question about why the ordinary course
24 should prevail and that if you paid dividends
25 before, why you should be entitled to continue

1 after is really two-fold in the context of this
2 motion.
3 First of all, the motion does not simply ask
4 for an LC or security to be posted which can be
5 drawn on in the event of final judgment in favour
6 of the Respondents. As you were just discussing
7 with Maître Kugler, it also asks that the LC be
8 posted now and it be drawn immediately in the
9 event of a filing under the Bankruptcy Act or the
10 CCAA. In my submission, that's execution before
11 judgment, because the judgment at that point has
12 not become final, yet my friends seek entitlement
13 to obtain payment before a final judgment is made.
14 That, in effect, gives a super priority to
15 the Plaintiffs in any subsequent bankruptcy or
16 CCAA filing, and that's why special circumstances
17 are required, more than ordinary course of
18 business.
19 The other reason is because even if the LC
20 is posted and is only permitted to be drawn upon
21 upon a final judgment, that nevertheless does
22 precisely what the Code permits it to do. It
23 creates a security interest in favour of the
24 Respondents and elevates their interest above
25 everybody else's.

1 THE COURT:
2 It's supposed to.
3 Me DEBORAH A. GLENDINNING:
4 But the question is so why is it not an
5 entitlement of a Respondent in every single case?
6 Because you need special circumstances. And, here,
7 I want to take you through what the special
8 circumstances are. There's no denying there's been
9 no provision made. And up to the judgment and to
10 today, there's no final judgment and no provision
11 will be made, but what did Maître Kugler say? He
12 drew your attention to statements by Justice
13 Riordan relating completely to JTI and, as you
14 know, there was a completely separate proceeding
15 taken against JTI to seek similar relief and it
16 was dismissed by Justice Mongeon, and that
17 dismissal was upheld by Madam Justice Savard of
18 this Court. And there were specific allegations
19 made against JTI.
20 THE COURT:
21 That was with the transfer of the
22 trademarks.
23 Me DEBORAH A. GLENDINNING:
24 There are...
25

1 THE COURT:
2 You know, his dismissal, it was really... he
3 said, «You can't enjoin a person not to make a
4 payment of royalty under a contract where the
5 other party of the contract is not before the
6 Court.» It's essentially what he said.
7 Me DEBORAH A. GLENDINNING:
8 Well, here, what I'm...
9 THE COURT:
10 He didn't speak to special circumstances and
11 the giving of security.
12 Me DEBORAH A. GLENDINNING:
13 And when I speak to the special
14 circumstances that Maître Kugler alluded to, they
15 are not present with Imperial. There's no
16 allegations of that. He said there was no separate
17 proceeding brought against Imperial because he
18 believes we admitted we could pay billions of
19 dollars in punitive damages; that's just wrong.
20 There was never any such admission. In fact, it
21 was plain that we could not pay billions of
22 dollars in punitive damages, because they've had
23 our financial statements for at least a year
24 before the judgment was rendered, and they knew
25 what our pre-tax earnings were. And that evidence

1 was filed before Riordan.
2 THE COURT:
3 Justice Riordan.
4 Me DEBORAH A. GLENDINNING:
5 Justice Riordan, I beg your pardon. And he,
6 Justice Riordan, knew what our pre-tax earnings
7 were and nevertheless ordered an amount
8 significantly in excess of that to be paid in
9 sixty (60) days, and we couldn't.
10 And that evidence is clear. The reference
11 that Maître Kugler made about the transfer of the
12 trademarks to a wholly-owned subsidiary and the
13 other financial transactions all date back to the
14 year two thousand (2000), when BAT acquired
15 Imperial, and the evidence from Mr. Thauvette's
16 cross-examination is clear: all of these things...
17 all of the financing facilities were put in place
18 fifteen (15) years ago. And that evidence is at
19 page 58 of the transcript, questions 182 and 183.
20 The only thing that's happened recently, and
21 there's no dispute about this, is there was an
22 additional facility extended by BAT in two
23 thousand and fourteen (2014) to permit Imperial to
24 satisfy obligations arising out of a settlement
25 made in the United States, the Flintkote

1 settlement; you may recall that from the last time
2 we were before you.
3 But again, those arrangements were fully in
4 place long before the judgment, and since that
5 time, there have been no dividends paid to BAT.
6 And it's important to note that although Maître
7 Kugler says this case has been outstanding since
8 nineteen ninety-seven (1997), that's not correct.
9 The authorization proceedings were filed in
10 nineteen ninety-seven (1997). This case was not
11 authorized until two thousand and five (2005). And
12 so all of the matters that are circumstances that
13 Maître Kugler points you to pre-dated by five (5)
14 years the commencement of this proceeding.
15 And surely, that cannot satisfy the
16 requirement for special circumstances. This is not
17 a case where, after a judgment, a party goes and
18 moves assets or undertakes transactions to move
19 assets away from a judgment creditor. To the
20 contrary, all of the evidence before the Court is
21 that things are business as usual. In fact, if
22 anything, it's slightly unusual because although,
23 for fifteen (15) years, we have been making
24 dividend payments, they are no longer being made
25 for the time being. And so what...

1 THE COURT:
2 You haven't made... I don't know that you're
3 not making one tomorrow morning.
4 Me DEBORAH A. GLENDINNING:
5 Well, no...
6 THE COURT:
7 Okay.
8 Me DEBORAH A. GLENDINNING:
9 ... but the evidence is clear that there are
10 no dividend payments been made since July fourteen
11 (14) because the money is needed to finance the
12 funding of the other credit facilities that have
13 been extended. There are no funds available for
14 dividends at the moment. And... and there's no
15 dispute about that in the record. So where are the
16 special...
17 THE COURT:
18 This is the line of credit that was
19 cancelled the day after the judgment?
20 Me DEBORAH A. GLENDINNING:
21 No, that's not Imperial...
22 THE COURT:
23 Sorry. Sorry. So I'm confusing you.
24 Me DEBORAH A. GLENDINNING:
25 ... My Lord. That's not Imperial.

1 THE COURT:
2 So where do I see in the record that you're
3 using your current revenues to replace a line of
4 credit?
5 Me DEBORAH A. GLENDINNING:
6 That is in the cross-examination of Mr.
7 Thauvette...
8 Me PHILIPPE TRUDEL:
9 Page 60.
10 Me DEBORAH A. GLENDINNING:
11 Thank you.
12 THE COURT:
13 It's page 60?
14 Me DEBORAH A. GLENDINNING:
15 Yes.
16 THE COURT:
17 Thank you.
18 Me DEBORAH A. GLENDINNING:
19 There are other page references, because
20 it's sort of scattered throughout the transcript.
21 There's four (4) or five (5) others I will give
22 you at the end, but it's clear, there's no dispute
23 from the evidence that we stopped paying
24 dividends, because we had to finance other loan
25 obligations, and that has been the situation since

1 two thousand and fourteen (2014). And all of these
2 other transactions that are referred to as special
3 circumstances have existed for fifteen (15) years.
4 So where are the special circumstances?
5 And Maître Préfontaine is going to take you
6 to the case law that says if there is no intent or
7 fraud or deceit or attempt to put assets beyond
8 the purview of the Respondents, the judgment
9 creditors, there can be no special circumstances.
10 And that is exactly the situation that we have
11 here. And, in fact, it's interesting, because the
12 respondents decided to file no additional evidence
13 or seek to make no additional case before this
14 Court and was already before it on the provisional
15 execution motion. And I submit that the effect of
16 the relief that they are now seeking today, given
17 that they want an LC and they want to be able to
18 draw on it before final judgment is precisely the
19 same outcome. They want money before final
20 judgment which they may never be entitled to.
21 In terms of the amount, it's apparent from
22 all of the evidence that was filed by this Court
23 previously that the obligations and the financing
24 facilities that were put in place back in two
25 thousand (2000) prevent Imperial from raising

1 funds in excess of fifty million dollars
2 ($50,000,000). The evidence on that is clear from
3 Mr. Thauvette's affidavit and from his cross-
4 examination.
5 The evidence was also clear that Imperial
6 could not pay six hundred and seventy million
7 dollars ($670,000,000) in sixty (60) days. The
8 evidence is also clear that it's currently not
9 paying any dividends because all of its funds are
10 going to satisfy outstanding debt obligations.
11 Some have been outstanding for many many years,
12 dating back to two thousand (2000), with the
13 exception of the Flintkote loan, the two (2) other
14 facilities that are in place have been in
15 existence for fifteen (15) years and it's
16 continuing to fund those obligations.
17 THE COURT:
18 Those are to related entities. Are those not
19 related entities?
20 Me DEBORAH A. GLENDINNING:
21 Yes, they are. And it's a stretch to suggest
22 that, somehow, a company that wants to remain as a
23 going concern can pay all of its pretax earnings
24 out, either in cash or by way of letter of credit
25 every quarter. It just can't happen.

1 Furthermore, Mr. Thauvette's evidence is
2 clear: because of its debt obligations, it can't
3 go and raise money. Even if it didn't have a
4 contractual prohibition from raising more than
5 fifty million (50,000,000), it can't go and raise
6 money without securing the debt some way.
7 So whether it's cash or whether it's a line
8 of credit, Imperial would be forced to go and take
9 further security on its existing assets, which
10 it's precluded from doing. And there's been no
11 challenge to that evidence. And it's the fact...
12 THE COURT:
13 But, again, it's precluded from doing by a
14 covenant in favour of related entity.
15 Me DEBORAH A. GLENDINNING:
16 Exactly, but there's no... but there's no
17 indication that it's in a position not to comply
18 with that obligation. It's going to have a
19 decision to make. As you indicated, as the Court
20 indicated previously, there's sufficient evidence
21 to establish, and this is in the judgment on the
22 provisional execution motion, there is sufficient
23 evidence to clearly establish, if an order like
24 this is made, Imperial's appeal rights will be
25 significantly prejudiced. And asking for five

1 billion (5,000,000,000) or two hundred and fifty
2 million (250,000,000) a quarter makes no
3 difference.
4 It doesn't have the cash on hand and it
5 doesn't have the ability to raise the money in the
6 market. And so its back will be against the wall
7 once again.
8 In circumstances where I say there are
9 absolutely no special circumstances in terms of
10 how it's organized its affairs over the past
11 fifteen (15) years and, on that basis alone, the
12 motion must fail because they haven't met the
13 test. I'll now turn it over to Maître Préfontaine.
14 THE COURT:
15 Thank you.
16 Me ÉRIC PRÉFONTAINE:
17 Good morning, Mr. Justice. So briefly, I
18 will walk you through what I believe are the most
19 relevant cases to deal with that. You're certainly
20 familiar with many of them, but I believe one of
21 these cases is actually dealing with an exact...
22 the exact same situation, and it's the case of...
23 briefly referred to by Maître Kugler in... of
24 former colleague Mr. Justice Baudouin in
25 Hippodrome Blue Bonnets that is under tab 13 of

1 our book of authorities.
2 Because, as Maître Glendinning said, the
3 only argument of the respondents is about the fact
4 that - and I'll deal with my own client - Imperial
5 Tobacco is likely to continue to pay dividends to
6 its shareholders.
7 Now, in Hippodrome Blue Bonnets, that was
8 one of the main reasons.
9 THE COURT:
10 Incidemment, maître Préfontaine, si vous
11 préférez plaider en français, soyez à l'aise,
12 O.K.?
13 Me ÉRIC PRÉFONTAINE:
14 Merci, Monsieur le Juge. C'est bien gentil.
15 Unless you believe that my English is so poor that
16 it's better...
17 THE COURT:
18 No, your English is excellent.
19 Me ÉRIC PRÉFONTAINE:
20 I will... for the sake of other people...
21 THE COURT:
22 J'ai bien dit si vous êtes plus à l'aise.
23 Me ÉRIC PRÉFONTAINE:
24 Merci. For the sake of other people in this
25 room, I will... if you allow me, I will continue

1 in English.

2 THE COURT:

3 Yes, no problem.

4 Me ÉRIC PRÉFONTAINE:

5 So in that case, the very reason, if you go
6 at page 460 of the judgment, the Judge says,

7 «*De cette brève revue de la*
8 *jurisprudence, (...) on peut tirer*
9 *les conclusions suivantes:*
10 *1) Les raisons spéciales*
11 *justifiant l'octroi d'un*
12 *cautionnement sont exceptionnelles*
13 - it's everywhere in the case law
14 -. *Il ne peut suffire, sans faire*
15 *revivre de manière indirecte*
16 *l'ancien régime du cautionnement*
17 *d'appel, d'alléguer simplement la*
18 *simple crainte de ne pouvoir*
19 *exécuter le jugement ou de voir*
20 *l'appelant devenir insolvable.*
21 *2) Le requérant doit présenter une*
22 *preuve claire, précise et*
23 *articulée basée sur des faits et*
24 *non sur de simples hypothèses ou*
25 *conjectures de circonstances*

1 *particulières à l'espèce qui*
2 *montrent que, sans l'octroi de ce*
3 *cautionnement, ses droits reconnus*
4 *par le jugement de première*
5 *instance seront effectivement mis*
6 *en péril.*»
7 Si vous allez au paragraphe qui suit:
8 «*Son premier motif tient au fait*
9 *qu'aux termes d'un bail du 1er*
10 *janvier 1983, Campeau Corp., qui*
11 *détient 100 % des actions de*
12 *Hippodrome Blue Bonnets, se voit*
13 *verser tous les profits*
14 *d'opération de cette dernière.*
15 *Certes, on peut dire que*
16 *Hippodrome Blue Bonnets ne*
17 *conserve pas ainsi beaucoup de*
18 *liquidités. La chose ne peut*
19 *cependant être interprétée comme*
20 *signifiant qu'elle est, en*
21 *quelques sorte, en état permanent*
22 *d'insolvabilité. Le versement de*
23 *ces profits doit s'entendre, à mon*
24 *avis, des profits nets*
25 *(c'est-à-dire de ceux qui*

1 *subsistent, les dettes ayant été*
2 *payées).*»
3 So this applies directly to our situation
4 and to the argument of the Respondents. We're not
5 saying that Imperial is insolvent currently.
6 Imperial... the evidence shows that evidently it's
7 making a lot of money... has made a lot of money
8 and is making... is still making a lot of money.
9 So the fact that it has paid dividends to its
10 shareholders in the ordinary course of business,
11 there's no challenge to that, and it's certainly
12 not a reason... it has been considered
13 insufficient reason to order a security.
14 Before I continue with the other arguments,
15 let me go briefly to the Respondents' book of
16 authorities, because it says a lot. What do
17 they... what did they submit in support of their
18 arguments?
19 The first case is another decision by
20 Justice Baudouin rendered a couple of years after
21 Blue Bonnets and, you know, where Justice Baudouin
22 makes certain comments with respect to the effect
23 of insolvency on the decision to order security.
24 What Respondents failed to draw your
25 attention to, if you go to page 2, because I

1 believe these factual elements are important, the
2 paragraph right before the one that was
3 highlighted by the Respondents,
4 *«Le principal motif au soutien de*
5 *la présente requête est qu'il est*
6 *admis que l'intimée n'a plus*
7 *aucune activité, n'a plus de place*
8 *d'affaires, ni d'employé et ne*
9 *possède aucun actif de valeur.»*
10 So, indeed, none of this applies to Imperial
11 Tobacco.
12 I will jump... I will get back to the Castor
13 decision, but before that, because it's a very...
14 similar reasons of your colleague, Mr. Justice
15 Dufresne, under tab 4, in Ressources...
16 THE COURT:
17 Sorry, am I in... your authorities or the...
18 Me ÉRIC PRÉFONTAINE:
19 No, I'm in Respondents' book.
20 THE COURT:
21 You're still in...
22 Me ÉRIC PRÉFONTAINE:
23 Yes, still in Respondents' book.
24 THE COURT:
25 O.K. Ressources Ita...

1 Me ÉRIC PRÉFONTAINE:
2 Itaminéraque vs. Quebec Inc. Again, if you
3 look at paragraph 3,
4 «*La requérante soutient que*
5 *l'appelante, intimée sur la*
6 *requête, n'a plus aucune activité*
7 *ni place d'affaires, (...) et ne*
8 *possède aucun actif saisissable.*»
9 So, again, in that case, these were the
10 factual elements upon which the security was
11 ordered. And I will simply, en passant, refer you
12 to the decision under tab 5... one of the
13 decisions in the Shama Textiles saga. Again, in
14 that case, there was evidence of fraud. So the
15 circumstances were certainly very different.
16 Now, even in the decision of Wightman vs.
17 Widdrington, the Castor case, what was the basis
18 in that case for the order... for ordering
19 security?
20 So, indeed, the circumstances were, I
21 believe, very different. We're talking about a
22 situation where there was a first trial that
23 lasted for over eight (8) years, and a second
24 trial that lasted for almost three (3) years. And
25 there was a... and, again, I was surprised that

1 the extracts that were highlighted by the
2 Respondents are not really the extracts where
3 the... let's say the reasons of the Court on which
4 it is basing its decision. If you look at... for
5 instance, at page 8, paragraph 41, that's where
6 the Court starts to consider the special
7 circumstances basically,

8 «*La tâche des appelants est*
9 *considérable. Les coûts associés à*
10 *la préparation des mémoires*
11 *d'appel seront certainement à la*
12 *mesure de cette tâche.*»

13 And that's where it started to be important.

14 «*L'intimée craint que ces coûts*
15 *réduisent d'autant les fonds*
16 *disponibles pour satisfaire aux*
17 *jugements rendus. Elle a raison*
18 *puisque, depuis le début des*
19 *procédures, les appelants lui*
20 *laissent entendre que les frais*
21 *d'avocats qu'ils ont à payer*
22 *réduisent d'autant la garantie*
23 *d'assurance.*»

24 And then, if you go at paragraph 44, they're
25 talking about a situation that has changed since

1 the beginning of the proceedings and it's a very
2 important issue on which the Court bases its
3 decision.
4 «*Elle soutient que la situation*
5 *des appelants a changé depuis*
6 *l'institution des procédures. Le*
7 *1er juillet 1998, les firmes*
8 *Pricewaterhouse et Coopers &*
9 *Lybrand fusionnaient pour créer*
10 *PricewaterhouseCoopers (PwC). Se*
11 *fondant sur des déclarations*
12 *faites par l'associé directeur de*
13 *PwC au cours du procès et par*
14 *l'avocat de PwC au Canada, après*
15 *le jugement entrepris, l'intimée*
16 *affirme avoir des raisons de*
17 *croire que la fusion s'est faite*
18 *de telle manière que PwC n'est pas*
19 *responsable des dettes de Coopers*
20 *& Lybrand, une situation que, du*
21 *même souffle, elle dit ne pas*
22 *accepter et vouloir contester.*»
23 So when you look close to the end of the
24 judgment to paragraph 49, 50, these are the two
25 (2) main reasons why security was ordered in that

1 case.
2 So the fact that there was this amalgamation
3 and the fact that the insurer... any amount paid
4 to the Appellants' counsel would reduce the amount
5 of the insurance coverage. Indeed, there's no such
6 thing here.
7 In our book, I will briefly refer you to
8 cases where it's been clearly established that
9 something needs to happen or you need to be able
10 to refer to something specific, for instance
11 during the appeal process or something that
12 happened since the beginning of the proceedings to
13 constitute special circumstances that would allow
14 you to order security.
15 So basically, what is the additional risk
16 that the Respondents run with respect to the
17 recovery of their claim as a result of the appeal?
18 Is the appeal in and of itself a risk? And so,
19 briefly, I will refer you to the case of Sodexin.
20 So I'm back in our book, tab 18, for instance
21 where your colleague, Justice Pelletier, says, at
22 paragraph 3,
23 «*Selon les éléments auxquels les*
24 *intimés me renvoient, les*
25 *appelants ne paraissent guère*

1 *solvables. Il s'agit toutefois*
2 *d'une situation qui existait bien*
3 *avant l'inscription en appel. Je*
4 *note de surcroît que l'état*
5 *d'insolvabilité est le seul motif*
6 *invoqué.*»
7 THE COURT:
8 So you're telling me that the declarations
9 of the various appelants in responding to the
10 provisional execution order that «I can't pay» or
11 «I'm insolvent» or «I will file a C-36», you can't
12 consider that?
13 Me ÉRIC PRÉFONTAINE:
14 No. It's not that you can consider that. The
15 question is whether you can consider this as a
16 special circumstance...
17 THE COURT:
18 Yes...
19 Me ÉRIC PRÉFONTAINE:
20 ... to order security. And, in my respectful
21 submission, the answer is no, because this is
22 nothing new. It's not because we're doing
23 something now that we will be insolvent at the
24 end. The reality is that my client is making...
25

1 THE COURT:
2 So as long as you're doing the same thing,
3 but which nevertheless makes you insolvent given
4 the judgment, then you can't order security?
5 Me ÉRIC PRÉFONTAINE:
6 But the reality is that I will not be less
7 insolvent at the end. The situation is...
8 THE COURT:
9 No, but there's a big difference; there's a
10 judgment now.
11 Me ÉRIC PRÉFONTAINE:
12 But there's a judgment that is under appeal.
13 It's not executory. And the reality... the
14 reality, Mr. Justice, is we're appealing and
15 strongly contesting the conclusions of Mr. Justice
16 Riordan.
17 THE COURT:
18 M'hm.
19 Me ÉRIC PRÉFONTAINE:
20 And I would be ready to bet that these
21 conclusions will not stand and the worst case
22 scenario will be significantly reduced. So that...
23 THE COURT:
24 I'm not going to ask you to put a number on
25 it.

1 Me ÉRIC PRÉFONTAINE:
2 But let's say I believe it will happen.
3 Let's say it doesn't happen, okay? The reality is
4 that Imperial Tobacco is likely to continue to
5 make a lot of money... earn and generate
6 significant earnings. So the declarations that
7 were made in the affidavit were with respect to
8 specific circumstances and an order to pay within
9 a certain delay... a certain amount within a
10 certain delay.
11 So this is one (1) example, and in that
12 example, there was a security ordered, but for
13 basically the cost of the appeal, three thousand
14 dollars ($3,000). That was Sodexin.
15 Boyer, tab 5. Again, Justice Côté says, at
16 paragraph 2,
17 «*En l'espèce, la situation*
18 *financière précaire de l'appelant*
19 *existait déjà au moment du procès.*
20 *Or, rien ne permet de conclure que*
21 *la situation qui prévalait en*
22 *première instance a changé.*»
23 So it's just stating the same thing. If
24 nothing has changed really and if...
25

1 THE COURT:
2 I'll just tell you, I have trouble with the
3 logic.
4 Me ÉRIC PRÉFONTAINE:
5 With the?
6 THE COURT:
7 The logic.
8 Me ÉRIC PRÉFONTAINE:
9 The logic?
10 THE COURT:
11 As long as you're consistently insolvent and
12 the fact that you have...
13 Me ÉRIC PRÉFONTAINE:
14 We're not consistently... we're not
15 insolvent.
16 THE COURT:
17 No, but I'm just saying as long as a
18 Defendant is consistent, the impact of the
19 judgment isn't a sufficient change in
20 circumstances that could be the special
21 circumstances...
22 Me ÉRIC PRÉFONTAINE:
23 Well, certainly it wasn't... it wasn't a
24 special circumstance in Blue Bonnets. So I don't
25 know what is different here. If it was not... I

1 don't know... I don't think the law has changed. I
2 don't think these principles have... and that's
3 why I was, I believe, showing you the... even the
4 authorities submitted by the Respondents.
5 Nothing suggests... because that would have
6 a big impact. It would mean that any debtor would
7 be subject to... would be very limited after a
8 first instance judgment simply because there is a
9 possibility that this judgment would be upheld on
10 appeal. I don't think that's the state of the law
11 in Canada, but...
12 So it completes my submissions and there's
13 only one (1) little thing I want to tell you. It
14 is with respect to the conclusion. I simply wanted
15 to refer, to complete the representations by
16 Maître Glendinning with respect to the wording of
17 497. And 497 is clear. If you look at the wording,
18 and it's with respect to the conclusion and the
19 possibility that you could trigger on the security
20 upon the filing of... under CCAA. So 497 says
21 that,
22 «*... security in a specified*
23 *amount to guarantee in whole or in*
24 *part the payment of the costs of*
25 *appeal and the amount of the*

1 *condemnation, if the judgment is*
2 *upheld.*»
3 So I believe the possibility here is to
4 order security until the judgment is upheld. I
5 don't think it would be possible under the Code to
6 order anything different than that.
7 And I wanted to also simply clarify the fact
8 that, in the last decision that was added by
9 Maître Kugler, the Basile vs. Québec Inc.
10 decision, the filing under the BIA came after the
11 judgment of the Court of Appeal.
12 THE COURT:
13 (Inaudible), yes. It was also cash.
14 Me ÉRIC PRÉFONTAINE:
15 It was cash. I don't know if it makes a
16 difference, but... so, yes. And I also invite you
17 simply to look at the case law in terms of what
18 amounts would be reasonable if you consider
19 ordering any security.
20 Oh, and the very last... very last thing I
21 want to tell you, and it's based mainly on the
22 Castor decision, in terms of... if you believe an
23 order for security is warranted here, I believe
24 that the thirty (30)-day delay is certainly not
25 realistic and we would have to consider a longer

1 delay depending on the amount of the order, but
2 certainly, like in Castor, for an amount of that
3 magnitude, it was ninety (90) days that was
4 allowed to the Appelants to provide the security,
5 especially in a context where it could be by way
6 of a letter of credit. It's... by experience, I
7 know it takes forever to put that into place.
8 Thank you.
9 THE COURT:
10 Maître Potter.
11 Me SIMON V. POTTER:
12 I will try very hard not to tread on ground
13 already covered. I might cover some of the same
14 cases, but to say something a touch different.
15 Before I get into it, I would like to
16 correct three (3) or four (4) of the statements
17 that you've heard from Maître Kugler.
18 The statement that RBH said it could not pay
19 X amount as has already been made clear by Maitre
20 Préfontaine, the context was particular then.
21 Could X amount be paid in sixty (60) days? That
22 was the question then. The question today is, I
23 think, a touch different.
24 On the question about how it came to be that
25 there were proceedings against the company now not

1 here before you, Maître Kugler...
2 THE COURT:
3 Sorry? How it came to...
4 Me SIMON V. POTTER:
5 Maître Kugler explained that there were
6 proceedings against JTI because, one (1) day,
7 Maître Kugler explains, he was told - because he
8 wasn't there - there were statements made by
9 Imperial and RBH about their capacity to pay or
10 not to pay punitive...
11 THE COURT:
12 Oh, you mean the proceedings that were taken
13 in front of Justice Mongeon?
14 Me SIMON V. POTTER:
15 Exactly.
16 THE COURT:
17 Oh, okay. All right.
18 Me SIMON V. POTTER:
19 But he explained it by saying there were
20 statements made by Imperial and RBH about their
21 capacity to pay punitives and that's wrong. It's
22 just...
23 THE COURT:
24 I think your colleague made that pretty
25 (inaudible) statement clearly.

1 Me SIMON V. POTTER:
2 Maître Kugler drew your attention to...
3 THE COURT:
4 At this point, unless I have it in Justice
5 Riordan's judgment as a finding of fact or in the
6 materials particularly affidavits and the...
7 Me SIMON V. POTTER:
8 I think it's very wise.
9 THE COURT:
10 ... depositions of your people, it's not a
11 fact as far as I'm concerned, today, in this
12 record.
13 Me SIMON V. POTTER:
14 I think that's very wise. Let me turn to one
15 of those then, Maître Kugler's reference to the
16 credit facility between RBH and its parent
17 company. And he drew your attention, in his
18 compendium tab 14, to pages 19 and 20 of the
19 examination of Mr. Giff, but he failed to draw
20 your attention to pages 25 and 26 of that
21 examination in which it is... several things are
22 extremely clear. It was a short-term two-way back-
23 and-forth facility to handle cash which was either
24 a credit or a debit one way or the other.
25 And when the cancellation was made of that

1 credit facility, money came back to RBH. So what
2 it boils down to is that all that business about
3 the credit facility actually put several tens of
4 millions of dollars into the pockets of RBH.
5 That's... that's what that comes down to.
6 Pages 25 and 26, you can see in the middle
7 of the page it would go back and forth. Excess
8 cash was loaned to or borrowed from. And if you
9 turn the page, you can see X was paid back.
10 THE COURT:
11 I understand.
12 Me SIMON V. POTTER:
13 Okay. And I point this out, because Maître
14 Kugler...
15 THE COURT:
16 (Inaudible) receivable which was roughly
17 about forty-five (45)... well, it seems they're
18 just saying that there was a set off for the
19 repayment of the amount of...
20 Me SIMON V. POTTER:
21 Yes, there were sets off back and forth,
22 back and forth, but Maître Kugler is trying to
23 paint this cancellation of the credit facility as
24 some kind of dastardly scheme to avoid paying the
25 judgment. All it was was putting an end to a back

1 and forth credit facility.
2 THE COURT:
3 No, but I think his point, in fairness to
4 him, is not so much you're seeking to avoid
5 payment. It is that the parent companies are not
6 willing, despite the receipt of dividends over the
7 years, are not willing to make funds available to
8 the sub...
9 Me SIMON V. POTTER:
10 Of the judgment.
11 THE COURT:
12 ... to pay the amount of the judgment.
13 Me SIMON V. POTTER:
14 If that's his only point...
15 THE COURT:
16 And that's... that's... I think that's his
17 argument.
18 Me SIMON V. POTTER:
19 If that's his only point, he does have... I
20 think that's a fair point. The parents are not
21 stepping up to pay this judgment.
22 THE COURT:
23 And I think they said it explicitly.
24 Me SIMON V. POTTER:
25 Some have.

1 THE COURT:
2 Some have.
3 Me SIMON V. POTTER:
4 Right. Now, Maître Kugler also draws
5 attention and refers to his compendium tab 15 to
6 say that somehow RBH has made its assets
7 transferrable only to tobacco companies. There's
8 no need to go there, but the pages of the
9 transcript, what is clear from Mr. Giff is when
10 you look at the assets which are cigarette-making
11 machines or inventory of tobacco or trademarks -
12 you know - attached to tobacco...
13 THE COURT:
14 No no, that's fine.
15 Me SIMON V. POTTER:
16 ... the market for buying them is small.
17 That's all he says. Now, if I can turn to...
18 THE COURT:
19 And I noticed there was a fair bit of
20 inventory in the financial statements, but you
21 would probably agree that the consumers would be
22 hard pressed to seek to execute judgment by
23 seizing inventory of tobacco and cigarettes and
24 selling them...
25

1 Me SIMON V. POTTER:
2 Absolutely. In fact, it's against the law
3 for anyone to own inventory.
4 THE COURT:
5 You need an excise licence.
6 Me SIMON V. POTTER:
7 You need... you can't put it in a truck
8 unless you have a licence which, by the way, these
9 companies do. They are licenced to do exactly this
10 work.
11 Now, turning to the law, Maître Kugler said,
12 «Well, this business about not jeopardizing the
13 right of appeal, why should that be... it's only
14 one (1) case that says so, and other cases kind of
15 mention it. Well, in our collection of cases, it's
16 at least six (6) judgments which say that you must
17 not neutralize the right of appeal and those are
18 at our tabs - there's no need to mention them -
19 but 4, 10, 14, 15, 16, 20. Those...
20 THE COURT:
21 Now, is that a consideration with respect to
22 whether security should be ordered or with respect
23 to the quantum of that security?
24 Me SIMON V. POTTER:
25 You're quite right. It's a distinction to

1 make. It is relevant to the amount and form of the
2 security. It's not... it doesn't go to whether
3 security should be ordered, and I will get to that
4 in a minute.
5 However, the next point that I'm going to
6 make, which these cases also do... they say, «Why
7 is it?» Maître Kugler said there's no rationale to
8 this. There's no rationale for saying it must be
9 exceptional.
10 All these cases say, «We must avoid
11 returning to the days of appeal bond.» And that...
12 THE COURT:
13 It's the same rationale from which the
14 special circumstances or it's got to be
15 exceptionnal.
16 Me SIMON V. POTTER:
17 Yes.
18 THE COURT:
19 It's just that in nineteen sixty-six (1966),
20 they changed the law.
21 Me SIMON V. POTTER:
22 Exactly right. So it's not that there's no
23 rationale. The rationale is clearly there that the
24 law is and the Courts are careful to avoid
25 recreating a law which has been swept away. There

1 is no appeal bond now, except in exceptional
2 cases. So we must avoid going back to the appeal
3 bond.
4 And my argument will conclude by saying that
5 in relation to RBH certainly and probably
6 Imperial, what Maître Kugler's motion amounts to
7 is that, for these companies, there should be an
8 appeal bond. The fact... it's a big judgment,
9 therefore, there should be an appeal bond. That's
10 essentially what it boils down to.
11 Now, the exceptional. I don't want to cover
12 ground already covered, but the Hippodrome case,
13 which is our tab 14 - Maître Préfontaine has
14 mentioned it, so has Maître Kugler - but the
15 requirement is for facts, des faits précis,
16 clairs, articulés, une preuve, pas des hypothèses,
17 pas de simples craintes.
18 And, of course, as Maître Préfontaine said,
19 the simple fact that dividends are being paid
20 doesn't answer the question whether there's an
21 exceptional situation.
22 And in that case, it was explicitly said...
23 not only what Maître Préfontaine said about the
24 dividends, but the dividends are all right as long
25 as it's payment out of net profits, that it's not

1 impairing the assets, qu'il n'y a pas d'état
2 permanent d'insolvabilité. And this is our case.
3 We have companies that are performing. They're
4 profitable companies. They're selling. They're
5 making money. The thing that makes them insolvent
6 is the judgment.
7 THE COURT:
8 So the sixty-four dollar ($64) question is
9 we go along our merry way. We don't order
10 security...
11 Me SIMON V. POTTER:
12 Yes.
13 THE COURT:
14 ... and you get final judgment and it's for
15 a substantial amount.
16 Me SIMON V. POTTER:
17 Yes.
18 THE COURT:
19 Five billion (5,000,000,000), fifteen
20 billion (15,000,000,000), it doesn't really
21 matter. And you continue your practice, you and
22 your... and the other companies, of declaring
23 dividends out of your annual earnings. You won't
24 be able to pay. It'll be the same situation
25 essentially as it was when the judgment came out

1 and you were ordered to provisionally execute.
2 Me SIMON V. POTTER:
3 Right. I agree it's a question. However,
4 there's... from the Plaintiffs' side and from the
5 Respondents' side and the Petitioners' side, there
6 is no evidence... there's no statement in there
7 about RBH's dividends and what's happening to
8 RBH's position as the appeal progresses. In fact,
9 you drew attention to the question, you know,
10 «What about Mr. Giff? Does he say anything about
11 dividends going forward?» The question was never
12 asked of him. And I can tell you that nobody has
13 asked me.
14 So there is no evidence before you as to
15 what is happening on those dividends. Now, to turn
16 to your question, which I think is the correct
17 question, what is the situation going to be of the
18 Plaintiffs' side when the judgment is final if
19 ever that happens, if the judgment is maintained?
20 It will be exactly what they thought it was
21 when they sued for twenty-seven billion dollars
22 (27,000,000,000). They know for a fact that when
23 that judgment comes out and they want to get their
24 money, they're going to have to rely on the
25 revenues of these companies and come to some kind

1 of an arrangement. They've known that for all the
2 years that the case was going: pre-certification,
3 post-certification. No one ever thought that 27 or
4 20 or 15 or 1 was going to be paid the day after a
5 final judgment.
6 So the answer to your question is that if we
7 go along on our merry way without knowing whether
8 dividends are being paid or not, because it's not
9 in the record and no one asked the question in
10 relation to my client, the fact is the Plaintiffs
11 are going to be exactly where they always expected
12 themselves to be.
13 THE COURT:
14 So the only difference really or the
15 essential difference in the positions is that
16 they're saying, «Start reserving your revenues
17 today.»
18 Me SIMON V. POTTER:
19 Yes.
20 THE COURT:
21 And you're saying, «Well, I shouldn't have
22 to reserve my revenues until there's a final
23 judgment of the Court of Appeal.
24 Me SIMON V. POTTER:
25 I'm saying essentially that for a couple of

1 reasons, but I'm also saying that they don't have
2 evidence for you, la preuve don't parle
3 Hippodrome. It's not there; they didn't ask for
4 it. They didn't seek it. They had the chance. They
5 had the chance against the two (2) other companies
6 and they took it. They had the chance against me
7 and they didn't. It's not there. Now, what is
8 there is the statement at paragraph 20 of their
9 motion that as far as they know, Rothmans pays out
10 less in dividends than its earnings. Maître Kugler
11 mentions to you the number of one point nine (1.9)
12 billion over a long period, but the fact is that's
13 a number which is earnings.
14 The page that he refers you to to justify
15 the one point nine (1.9) mentions a smaller, not a
16 much smaller, but a smaller number for dividends.
17 What that means is, as far as the Court is
18 concerned as to what the Plaintiffs have put
19 forward...
20 THE COURT:
21 No, but I think... isn't part of it made up
22 of interest that's paid to related entities?
23 Me SIMON V. POTTER:
24 Not in my case.
25

1 THE COURT:
2 That's not in your case?
3 Me SIMON V. POTTER:
4 No. No. In the RBH case, no. So in the RBH
5 case, what you have is a company, the Canadian
6 company, the company here, Rothmans, paying out
7 less in dividends and its profits, and presumably
8 becoming more and more solvent all the time. And
9 that is stated to you by the respondents at their
10 paragraph 20 of their motion.
11 It is certainly not the case that prevailed
12 in Europaper, the second case cited to you by
13 Maître Kugler which talked about an appellant
14 which was en insolvabilité complète. And in this
15 regard, My Lord, let's make a distinction between
16 some of these cases which are dealing with
17 appellants who are insolvent or have no activities
18 in the jurisdiction.
19 THE COURT:
20 I just... you know...
21 Me SIMON V. POTTER:
22 Even...
23 THE COURT:
24 I don't want to fence too much in the facts,
25 but you're insisting you're not paying out

1 dividends and I have in front of me the financial
2 statements that give two thousand and fourteen
3 (2014), two thousand and thirteen (2013) which you
4 filed with your motion.
5 Me SIMON V. POTTER:
6 Yes.
7 THE COURT:
8 And you consistently show that there's no
9 retained earnings.
10 Me SIMON V. POTTER:
11 In those two (2) years, it's true.
12 THE COURT:
13 Well, but...
14 Me SIMON V. POTTER:
15 But there's no evidence of what's going
16 on...
17 THE COURT:
18 No no, but retained earnings, by definition,
19 are cumulative, Maître Potter. So if you have no
20 retained earnings, you have no retained earnings.
21 Me SIMON V. POTTER:
22 Oh...
23 THE COURT:
24 If you had retained earnings in two thousand
25 and twelve (2012), that's an interesting

1 historical event, but...
2 Me SIMON V. POTTER:
3 At that snapshot in time, there were no
4 retained earnings, but the numbers advanced to you
5 by the Petitioners here at their paragraph 20 and
6 the numbers presented to you by Maître Kugler this
7 morning indicate that it's not everything that
8 goes. But even if it were everything, the fact is
9 the company is solvent. It's operating. It's
10 generating profits. It's doing exactly what the
11 company was doing, generating the kind of revenue
12 which they would one day need once they got to a
13 final judgment, nothing... nothing has changed.
14 And, as I say, there's no evidence before - you,
15 the Plaintiffs, could have gotten it, but they did
16 not - as to what has happened since the judgment.
17 And as I was saying, this is not a case of
18 insolvabilité complète right now as was the case
19 in Europaper and many of the other judgments that
20 are before you, the precedents that are before
21 you. And I think the Court should be careful to
22 make a distinction.
23 In the cases which are dealing with an
24 insolvent appellant, that's an appellant which
25 comes to Court insolvent. It's not an appellant

1 which runs the risk of being driven to insolvency
2 by the Plaintiffs. It's a bit of a distinction to
3 make. It would mean that, in every case in which a
4 Plaintiff sues for enough, he should get security
5 in appeal.
6 THE COURT:
7 I don't think your colleagues are going...
8 Me SIMON V. POTTER:
9 No, but a lot of these...
10 THE COURT:
11 I understand the hyperbole is making your
12 point.
13 Me SIMON V. POTTER:
14 Thank you. Thank you for that exit ramp.
15 Now, a lot of the cases also have to do not just
16 with shortage of money or insolvency or the fact
17 that, you know, activities aren't happening, but
18 with activities which are clearly untoward, much
19 much further than simply paying dividends.
20 THE COURT:
21 Yes, you're talking about the Shama
22 Textiles, that type of thing.
23 Me SIMON V. POTTER:
24 Exactly.
25

1 THE COURT:
2 The type that's close to 733 behaviour.
3 Me SIMON V. POTTER:
4 That's correct. And for example, in
5 Wightman, the one case mentioned by the
6 Petitioners here at paragraph 34 of their motion,
7 there were, there, clear signs of impropriety, but
8 not just that. It was also les moyens d'appel
9 paraissent plutôt précaires.
10 Several of the judgments point... rely on
11 the fact that the appeal looks a bit shaky itself,
12 and the Petitioners here don't even advance that
13 ground.
14 Now, let's talk about the facts having to do
15 with RBH, because Maître Kugler wanted to look at
16 them one by one. Let's just do it. If we go to the
17 motion which is before you, and turn, first of
18 all, to page 4, these allegations at paragraphs 15
19 to 19, even though Maître Kugler suggested to you
20 that you should take the Justice Riordan brush
21 having to do with JTI and apply it to Imperial and
22 RBH, the fact is all of that page has nothing to
23 do with my client, 15 to 19. Nothing to do with my
24 client.
25 And if we turn then to RBH, when they get to

1 RBH, what do they say? Paragraph 20,
2 «*RBH is profitable and RBH pays*
3 *less than its full profits and*
4 *dividends.*»
5 That's what they say. Then, they turn to the
6 credit facility which is a red herring. That's at
7 21. Then, they turn to 22 and they say, «Oh, PMI
8 issued something on July sixteen (16) strongly
9 suggesting - says the Affiant here, Maître Trudel
10 - that RBH's share would have been paid.» And they
11 refer to Exhibit R-10.
12 Now, if you go to Exhibit R-10, which is tab
13 10 of the Plaintiffs' exhibits, it's very very
14 clear and this should be just no surprise to
15 anyone who has ever seen the financial statement
16 of a multinational company. It's very clearly a
17 statement coming from someone reporting and
18 telling the world on a consolidation basis what is
19 happening to it. And this is very very clear on
20 page 1. There's reference to companies... the
21 mention of the litigation is on page 3 and it is
22 from that that the Petitioners before you say,
23 «Well, it seems very very... strongly suggestive
24 that PMI is going to stump up and pay it.» But you
25 just have to turn the page to see that the

1 reference is to consolidated results in that
2 title. The first line under that title ends with
3 the word «worldwide.» If you turn the page,
4 they're looking at total PMI, including Asia and
5 so on. It's very clearly a simple statement as to
6 what a particular judgment would have looked like
7 in a consolidated statement. So paragraph 22...
8 THE COURT:
9 No, but his point is that... I think you're
10 avoiding it, is that the parent is saying if it's
11 recorded as a liability, here's the impact on a
12 per share basis.
13 Me SIMON V. POTTER:
14 Right.
15 THE COURT:
16 So that if you record it as a liability, is
17 it unreasonable to assume that you're paying it?
18 Me SIMON V. POTTER:
19 If it's recorded as a liability by RBH in
20 Canada, it would necessarily have an impact on a
21 consolidated statement; that's all it's saying.
22 But it doesn't mean PMI is going to guarantee the
23 payment or pay it or lend the money.
24 THE COURT:
25 No.

1 Me SIMON V. POTTER:
2 Which is, by the way, the conclusion that
3 they reach...
4 THE COURT:
5 I didn't understand him to say that the
6 parent was going to pay it. I understood him to
7 say that he interpreted the press release as
8 indicating that it would be paid.
9 Me SIMON V. POTTER:
10 Oh. Well, I don't read it that way, but...
11 THE COURT:
12 Okay.
13 Me SIMON V. POTTER:
14 ... as long as we're not reading an
15 intention of PMI in there, I'm happy. So what that
16 really means then is that the Plaintiffs have in
17 allegations before you against...
18 THE COURT:
19 No, but he goes further. He says that if you
20 say you don't have the current resources to pay
21 and your parent is saying, «It would be paid», he
22 draws the conclusion that there would be some
23 financial assistance from the parent...
24 Me SIMON V. POTTER:
25 Well, that's a conclusion which I think is a

1 step really too far, and it's a conclusory
2 conclusion and, in any event, it has nothing to do
3 with whether there should or should not be
4 security here.
5 THE COURT:
6 Okay.
7 Me SIMON V. POTTER:
8 And if you look at the allegations the
9 Plaintiffs are making about RBH, you have 20 that
10 it's a profitable company. On 21, it's the credit
11 facility which is a red herring. And on 22, okay,
12 it belongs to a multinational family. That's it.
13 That's all... that's the only thing they say about
14 RBH. They then move on to ITL.
15 So there is no clear allegation or fact or
16 proof that RBH is doing anything untoward, that
17 RBH is using the appeal in order to undo anyone's
18 right to anything. There's no evidence of that
19 before you.
20 The company is a good going concern and my
21 submission to you is that that is the only good
22 guarantee for the Plaintiffs. It's the key piece,
23 the company is a good going concern. The only way
24 they're going to get money is to make sure these
25 companies are good good going concerns.

1 There's no hiding of assets. There's nothing
2 untoward, no assets are disappearing or being sold
3 or sent to other companies or being given to
4 people's son as a gift, which is one of the cases
5 being used by the Plaintiffs. There's no
6 conversion of assets. There's no rendering of RBH
7 less solvent than it was before.
8 There is certainly, My Lord, absolutely
9 nothing to allow taking the Riordan conclusion to
10 which your attention was drawn in tab 20 of the...
11 Maître Kugler's compendium, the Riordan
12 conclusion, and saying, «Well, that applies...»
13 THE COURT:
14 About JTI.
15 Me SIMON V. POTTER:
16 «... that applies to RBH too.» There's
17 nothing to justify that.
18 THE COURT:
19 I understand you. I understand your point.
20 Me SIMON V. POTTER:
21 Yes. Now, these cases make it very very
22 clear that you don't get security just because the
23 parent company hasn't stepped up and says it's
24 going to pay the whole shot. You don't get
25 security just because the company is still

1 operating the way it was and turning a profit, and
2 paying dividends. None of the cases say that
3 Quebec should be a place where investors and
4 Canadian companies suddenly can't get their
5 dividends out of Canada, because the subsidiary is
6 in an appeal. None of them say that. In fact, one
7 of them explicitly says dividends are okay unless
8 you're impairing the assets of the company.
9 Maître Kugler tries to bring in the
10 dividends by saying, «Even though I didn't ask the
11 question, nobody asked the question of Mr. Giff,
12 there is no indication that the dividends will
13 cease.»
14 You don't get security just because there
15 isn't proof that the dividends are going to cease.
16 You need facts, allegations, not hypotheses, not
17 questions, not double negatives. You need facts
18 and they're just not here.
19 Now, I'd like to expound a tiny bit. I don't
20 know how much time I've got, but I'd like to
21 expound a tiny bit on Maître Préfontaine's, «There
22 has to be something new.»
23 There has to be, according to Sodexin, le
24 risque additionnel. Sodexin in tab 18. In
25 Valkanas, our tab 20, it has to be un péril futur.

1 That judgment says, at page... in paragraph 13,
2 security is not there to deal with une situation
3 déjà cristallisée.
4 And that's consistent. That's logically
5 consistent with the idea that security here has to
6 be for something that is going to... which is
7 going to make it so that the appeal is
8 jeopardizing the recovery, not just the world...
9 THE COURT:
10 Aren't you making the same argument?
11 Me SIMON V. POTTER:
12 Well, I'm...
13 THE COURT:
14 You're saying there's nothing to indicate
15 that you won't continue, in the face of this
16 judgment, to declare dividends and send your
17 profits offshore. Really... and you're saying,
18 «Well, that's a supposition.» It's really the same
19 thing; isn't it?
20 Me SIMON V. POTTER:
21 Well, no. I'm saying that you can't complain
22 about having sued someone for twenty-seven billion
23 (27,000,000,000) or fifteen billion
24 (15,000,000,000) or whatever it is knowing full
25 well all along that, you know, nobody is going to

1 be able to pay that in one shot, and then complain
2 about it in appeal. La situation était
3 cristallisée avant. It's not something that's
4 happening during the appeal which is making his
5 position worse. No one is making the Plaintiff's
6 position worse.
7 Now, on that, I just want to draw attention.
8 I don't ascribe bad motives, but I think it is
9 important to note that this business about risque
10 additionnel, péril futur, la cristallisation, this
11 was already in Hippodrome and in Europaper.
12 In Hippodrome, it's «sera,» «sera mise en
13 péril.» In Europaper, it's «seront.» But Maître
14 Kugler, carefully as he spoke to you, used the
15 present. He always said, «My claim is», or «The
16 recoveries are.» These cases, all of them, make it
17 very very clear that it has to be something...
18 something has to be happening during the appeal to
19 hurt. It's not the simple fact that I may not be
20 able to collect my debt. That's not what the cases
21 say. The cases say, «Is something happening in the
22 appeal, during the appeal?» That is, are people
23 getting rid of their assets?
24 So, here, we have a situation in which RBH
25 is not worsening the situation at all, but the

1 Respondents here do want to better their
2 situation. They are asking for a letter of credit
3 or cash and they are asking for that so Maître
4 Kugler said he wants it for us, in our favour,
5 that we can draw on even before a final judgment.
6 Let's imagine that there won't be a letter of
7 credit or any kind of security that they can draw
8 on before they actually win, right? But even so,
9 what they want is a situation which either by
10 letter of credit or the operation of the Kasirer
11 logic, which they put before you, they want it so
12 that they get a super priority over all the other
13 unsecured general creditors, of which they are
14 contingently one today.
15 But they want to get their money before the
16 employees do. They want to get their money before
17 the governments do, because they expect us... they
18 expect your judgment to force assets to be put
19 aside for them and to go straight to them. That is
20 a super priority and it is unfair. It is what many
21 cases have called a fraud on the bankruptcy.
22 THE COURT:
23 I'm just glad you saved that argument for
24 last.
25

1 Me SIMON V. POTTER:
2 It's an unfairness.
3 THE COURT:
4 I don't think that's a consideration under
5 497. It may one day be if security is ordered and
6 if there's a judgment and if there's an
7 entitlement to appropriate the security. It might
8 be a question for another judge and another venue,
9 assuming there's an insolvency, but...
10 Me SIMON V. POTTER:
11 It's where I wanted to go. Any security,
12 whatever it is, and in my submission, it must not
13 be a letter of credit which can just be drawn down
14 by the Plaintiffs, any security must be in a form
15 in which a judge eventually decides where the
16 money goes.
17 I mentioned that they want a super priority
18 over the government, and that's clear from Maître
19 Kugler's statement that he calculates the...
20 THE COURT:
21 No, but I'm just saying that the nature of
22 the rights of someone who benefits from an order
23 of security are not an argument against ordering
24 the security, because they'll be preferred over
25 other creditors. They're supposed to be when they

1 get secured.
2 Me SIMON V. POTTER:
3 It goes to the form, I agree with you.
4 THE COURT:
5 Okay.
6 Me SIMON V. POTTER:
7 But I am pointing out that what they are
8 asking for is something which would give them a
9 prejudgment of priority against all those other
10 people. Even the tranche, they calculate as pre-
11 tax. So that's clearly asking for a priority over
12 the government and over everybody else as well. So
13 what I am saying is if there is to be any security
14 at all, it cannot be in the form of a letter of
15 credit. Sure, letters of credit are acceptable. An
16 appellant ordered to post security can, if he
17 wants, post a letter of credit; it's acceptable.
18 But that doesn't mean that, in a case like this,
19 it should be imposed. And it shouldn't...
20 THE COURT:
21 But, again, are you talking to the form of
22 the security being an LC or you're calling...
23 you're speaking to the trigger mechanism of that
24 LC?
25

1 Me SIMON V. POTTER:
2 I was speaking... no, that trigger... I'm
3 setting aside the trigger... I'm assuming that if
4 there is any security, the trigger will be an
5 eventual final judgment in their favour.
6 THE COURT:
7 Even hypothetically, if it's an LC that can
8 be called upon on the affidavit of Respondents'
9 attorney accompanied by a final judgment of the
10 Court of Appeal, that's not appropriate
11 securities?
12 Me SIMON V. POTTER:
13 In my submission, it is not. Even if it...
14 and then, it's because it's an LC. And the reason
15 it's not is that it would be asking you, Judge, to
16 prejudge the question in a difficult situation
17 following a final judgment. What should be the
18 priority among governments, employees, suppliers?
19 Particularly in a situation in which this is a
20 class action. None of the precedents which have
21 been given to you are class action.
22 LA COUR:
23 And you distinguish the LC from depositing
24 cash?
25

1 Me SIMON V. POTTER:
2 Well, the only reason I say deposit in cash
3 appears to present a problem. It is that Maître
4 Kugler took pains to present to you the Kasirer
5 judgment which would allow him to claim the
6 deposit in cash in priority over everybody else.
7 THE COURT:
8 Yes, there's... yes. (Inaudible)
9 Me SIMON V. POTTER:
10 So where I'm heading to is the fair thing,
11 if you're going to order any security at all, and
12 I think there shouldn't be any, is to do what
13 Justice Riordan did: order that amounts be
14 deposited in trust accounts and that it only come
15 out with a further judgment of the Court. That's
16 what I think would be the fair thing.
17 Now, a letter of credit, if I can just...
18 work on that is very clear that requiring a letter
19 of credit would clearly impair the assets of these
20 companies. Any company that goes to get a letter
21 of credit, and this is in our tabs 22, 23, 24, has
22 to go to a bank or a lender and the lender is
23 going to say, «Well, what's the security?» So
24 unsecured assets would become secured.
25

1 THE COURT:
2 M'hm.
3 Me SIMON V. POTTER:
4 And that affects everybody.
5 THE COURT:
6 Well, that's...
7 Me SIMON V. POTTER:
8 That affects the world out there.
9 THE COURT:
10 That's for the bank to decide and it could
11 be security of the requesting party. It could be
12 security of a third party.
13 Me SIMON V. POTTER:
14 Assuming a third party is willing to do it,
15 that's true.
16 THE COURT:
17 It could also... it can also be a signature;
18 it could be a covenant. It depends. It's for the
19 bank to decide.
20 Me SIMON V. POTTER:
21 Yes. And then, if you require security to be
22 posted, having those things in mind and they don't
23 happen, that's our right of appeal which is gone.
24 THE COURT:
25 Well, that's your...

1 Me SIMON V. POTTER:
2 We have a right of appeal. So, to me, the
3 proper guarantee for the Plaintiffs is to hurry up
4 towards the final judgment which, by the way, is
5 already happening. We're likely to be pleading
6 this case next September, which is very very fast.
7 The proper guarantee, the proper protection for
8 them is to hurry along towards the final judgment
9 they say they want, and to leave the companies in
10 a going concern without impairing their assets,
11 without having a run of creditors on them, without
12 signalling to the outside world that everyone
13 better show up and get security. The proper thing
14 is let's just get to final judgment.
15 So those are... those are my points.
16 Costs... and I say this because the new motion
17 which you're not considering... costs. To the
18 extent that the Court is worried about the
19 Respondents' costs, the motion doesn't seek
20 security for costs, only now in the amended
21 conclusions. There is nothing in the motion which
22 sets out what is likely to be the costs. There is
23 nothing in the motion that says that costs are
24 imperilled. And, in fact, since this is a class
25 action, essentially, we get to distribution and

1 who comes first? The lawyers' costs. They're first
2 in line.
3 And a final word about the tranche,
4 asking... Maître Kugler's explanation was telling
5 about the tranche that he has asked for. He is
6 essentially asking for an order that there be no
7 further dividends, and that the money be put
8 aside. That looks a lot like the seizure before
9 judgment to me. It looks a lot like a safeguard
10 order, and I submit to you with great respect, My
11 Lord, that a safeguard order can be rendered only
12 by three (3) judges.
13 And as a perfectly final remark, as I did on
14 the question of the provisional execution motion,
15 you can understand that a judgment like this will
16 be followed in the investor press around the world
17 and I respectfully request that your judgment be
18 rendered after... after four thirty (4:30) in the
19 afternoon. Thank you, My Lord.
20 THE COURT:
21 Thank you.
22 Me ÉRIC PRÉFONTAINE:
23 Mr. Justice, if you allow me just one (1)
24 quick correction, it will be like less than twenty
25 (20) seconds, just to make sure, in case it's

1 important to you.
2 Maître Kugler earlier referred to Imperial
3 brands as an offshore corporation, Imperial's
4 brand holding the trademarks of Imperial Tobacco.
5 So just so it's clear, Imperial brands is a Quebec
6 corporation with its head office on Saint-Antoine
7 Street in Montreal, and it's a subsidiary of
8 Imperial Tobacco Canada Limited, the Appellant. So
9 Maître Kugler's representations in that respect
10 were clearly not based on the evidence in the
11 record. Thank you.
12 THE COURT:
13 So a brief rebuttal, Maître Kugler?
14 Me GORDON KUGLER:
15 I'll start with Mr. Potter's. I refer you
16 once again to tab 18 of our compendium. Mr. Giff
17 testified that all of its earnings...
18 THE COURT:
19 All what?
20 Me GORDON KUGLER:
21 All of RBH earnings are paid as dividends to
22 PMI since two thousand and eight (2008), all of
23 their earnings, one point nine (1.9) billion
24 dollars has been paid.
25 As you properly pointed out, their financial

1 statements show no retained earnings. Everything
2 is paid. Mr. Potter candidly admitted, in response
3 to a question of Your Lordship, the judgment will
4 not be paid, period. «We are a profitable company.
5 We earn five hundred million dollars
6 ($500,000,000) a year. You will not be paid,
7 period. We are paying that money as dividends
8 which we have done since two thousand...»
9 THE COURT:
10 Well, in fairness, he didn't quite say, «You
11 will not be paid.» He said the only way to be paid
12 is out of earnings.
13 Me GORDON KUGLER:
14 Out of earnings after the judgment.
15 THE COURT:
16 Yes.
17 Me GORDON KUGLER:
18 But the earnings between today and the
19 judgment...
20 THE COURT:
21 No no, I know.
22 Me GORDON KUGLER:
23 ... are gone.
24 THE COURT:
25 No, I heard what he said, and I noted it.

1 But in fairness to him, he did say, «You will not
2 be paid» in the sense it's not going to get a
3 cheque for some substantial amount, but it'll come
4 out of earnings after a final judgment. That's
5 what he said.
6 Me GORDON KUGLER:
7 And after God knows what else they may do.
8 The purpose of Article 497(2) is to prevent that
9 very situation. I'm not playing words with «is in
10 jeopardy,» «will be in jeopardy.» You have an
11 admission: it will not be paid.
12 So that means this appeal is for nothing. If
13 the Respondents lose the appeal, they get nothing.
14 If they win the appeal, they get nothing. That's
15 the purpose of Article 497. You couldn't have...
16 he's looking for precise facts. You have an
17 admission from the counsel of RBH: will not be
18 paid.
19 There are... let me turn now to what Maître
20 Glendinning said. And I say this some... I guess
21 respectfully. They say something without giving
22 the rest of the picture. Imperial is not paying
23 dividends today. Why? Because they're repaying
24 their parent company five hundred million dollars
25 ($500,000,000) which was loaned to Imperial to pay

1 a trademark patent case in the United States. And
2 the five hundred million dollars ($500,000,000)...
3 THE COURT:
4 Are you referring... is that the Flintkote
5 case?
6 Me GORDON KUGLER:
7 Yes.
8 THE COURT:
9 And...
10 Me GORDON KUGLER:
11 And the five hundred million dollars
12 ($500,000,000) will be repaid in one (1) year. So
13 when... Maître Glendinning was very careful to
14 say, «We are not paying dividends today, but after
15 we reimburse them the five hundred million dollars
16 ($500,000,000)», the inference clearly is we will
17 resume the dividends. Why not? We've been doing it
18 for fifteen (15) years and she harped and harped
19 at the fifteen (15) years, and that our law suit
20 was only filed in nineteen... in two thousand and
21 five (2005).
22 Our law suits were initiated... the motions
23 for authorization were done in nineteen ninety-
24 eight (1998) and, from nineteen ninety-eight
25 (1998) onward, all of these companies, in their

1 financial statements, noted as a contingent
2 liability that a motion for authorization has been
3 taken in Quebec.
4 THE COURT:
5 But where do I see that they're paying...
6 because I have financial statements up to the end
7 of two thousand and fourteen (2014).
8 Me PHILIPPE TRUDEL:
9 It's page... excuse me, page 25 of
10 Thauvette's examination. The loan was December two
11 thousand and fourteen (2014), five hundred million
12 dollars ($500,000,000) and repayment was within
13 the next year, and that's why they didn't pay any
14 dividends in two thousand and fourteen (2014). We
15 have that at page 60.
16 THE COURT:
17 Thank you.
18 Me GORDON KUGLER:
19 There have been two (2) significant changes.
20 Opposing counsel says there's a necessity that
21 there be a change. The first is our law suits were
22 filed, the authorizations were filed in nineteen
23 ninety-eight (1998). All of the moves that they
24 made were later. In two thousand (2000),
25 immediately after our law suit, a year and a half

1 later, Imperial transferred its trademarks to
2 Imperial Brands, which is based in Quebec. But
3 what did Imperial Brands do? They secured those
4 trademarks for some kind of indebtedness or
5 something with an offshore company, in other
6 words, to put it beyond the reach of the
7 Respondents.
8 The second change is that there's a judgment
9 rendered in May of two thousand and fifteen (2015)
10 condemning them to pay fifteen billion dollars
11 ($15,000,000,000). «No, we will not put any money
12 aside. We will continue to ship it out.» And
13 Maître Potter says, «That's just too bad.»
14 In one of the cases, Justice Dalphond said -
15 that we've cited -, «If this isn't the case for
16 the motion for security to be granted, I can't
17 think of another case that's better.»
18 Maître Potter said PMI, the parent companies
19 are not stepping up to the plate to satisfy the
20 judgment. That's fine. That's the choice they're
21 making. Let them make the choice. Then, put up the
22 security or you lose your right to appeal. That's
23 why Article 497(2) is there. Without 497(2), there
24 couldn't be security. It was put in by the
25 legislator for a reason. This is the reason.

1 One of them said it's a stretch to have them
2 put up security in the amount of their earnings.
3 Why? What are they doing with those earnings? You
4 know what they're doing with the earnings: they're
5 taking those future earnings and paying it to
6 their parent companies. That's why put up the
7 security for the future. What they did in the
8 past, the money is not there, but they're
9 profitable companies. I mean, whoever heard of
10 companies earning a billion dollars
11 ($1,000,000,000) and coming before the Court and
12 saying, «We are not paying one cent ($0.01) on the
13 judgment a year or two (2) or three (3) from now,
14 because we're going to take that billion dollars
15 ($1,000,000,000) and we're going to pay it to our
16 parent companies.»
17 THE COURT:
18 I will just remind you you're in rebuttal
19 and I think that that's been the major thrust of
20 your arguments and it's certainly understood by
21 me.
22 Me GORDON KUGLER:
23 I think that I am done... I thank you.
24 THE COURT:
25 Well, I thank counsel for the presentation

1 and I'm sure you're... none of you are surprised
2 that I'm taking the matter under advisement.
3 Me GORDON KUGLER:
4 Thank you.
5
6 ----------------------
7

EXHIBIT "I"

This is Exhibit "I" referred to in the
affidavit of Robert McMaster
sworn before me, this 1st
day of April 2019

R Bengino

A COMMISSIONER FOR TAKING AFFIDAVITS

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025385-154, 500-09-025387-150
(500-06-000070-983, 500-06-000076-980)

DATE: October 27, 2015

PRESIDING: **THE HONOURABLE MARK SCHRAGER, J.A.**

IMPERIAL TOBACCO CANADA LTD.
ROTHMANS, BENSON & HEDGES INC.
APPELLANTS – Defendants

v.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
JEAN-YVES BLAIS
CÉCILIA LÉTOURNEAU
RESPONDENTS – Plaintiffs

JUDGMENT

---

[1] Respondents have filed identical motions in each of the three appeals seeking orders against Appellants, jointly, to furnish security.

[2] At the commencement of the hearing, the motion against JTI-Macdonald Corp ("JTM").[1] was withdrawn because attorneys were unavailable due to health issues. Hence, reference in this judgment to the "Appellants" should be read as referring to Imperial Tobacco Canada Ltd ("ITL") and Rothmans, Benson & Hedges Inc. ("RBH"), unless the context indicates otherwise.

---

1 Record no: 500-09-025386-152.

[3] On May 27, 2015, the Superior Court, District of Montreal (the Honourable Brian Riordan) condemned the three Appellants to pay moral and punitive damages aggregating in excess of $8 billion, which today would exceed $15 billion with interest and additional indemnity.

[4] The 237 page judgment in first instance culminated two class actions commenced in 1998 against the three Appellant cigarette companies. The class actions were authorized in 2005; the joint trial commenced on March 12, 2012 and terminated on December 11, 2014. More than 70 witnesses, including 27 experts, were heard over a total of 251 hearing days. In excess of 20,000 exhibits were filed in evidence. The judgment found that Appellants were liable under the *Charter of Human Rights and Freedoms*,[2] the *Consumer Protection Act*[3] and under the *Civil Code of Quebec*[4] (*C.C.Q.*) for faults causing injury to others and for failure to properly inform consumers of the risks and dangers associated with the products manufactured by Appellants.

[5] In the conclusions of the judgment, the judge ordered an initial deposit of $1,131,090,000 in partial satisfaction of the two awards within 60 days broken down as follows:

	BLAIS		**LÉTOURNEAU**	
ITL	$670,000,000	(compensatory)	$72,500,000	(punitive)
	$30,000	(punitive)		
RBH	$200,000,000	(compensatory)	$46,000,000	(punitive)
	$30,000	(punitive)		
JTM	$130,000,000	(compensatory)	$12,500,000	(punitive)
	$30,000	(punitive)		
TOTAL	**$1,000,090,000**		**$131,000,000**	

[6] The judge also ordered provisional execution "with respect to the initial deposit of one billion dollars of moral damages, plus all punitive damages".

[7] Applying the proportions of liability found by the trial judge (JTM 13%, ITL 67% and RBH 20%), provisional execution payments amounted to:

---

2 *Charter of Human Rights and Freedoms*, CQLR, c. C-12.
3 *Consumer Protection Act*, CQLR, c. P-40.1.
4 *Civil Code of Quebec*, CQLR c C-25.

i) JTM $130 million

ii) ITL $670 million

iii) RBH $200 million

[8] All Appellants petitioned this Court to cancel the order for provisional execution. In support of their motions, Appellants filed affidavits and financial information to support their claims that, on a cash basis, they could not pay their respective amounts of the provisional execution orders within the sixty day period imposed by the judgment. RBH stated explicitly that the obligation to pay rendered it insolvent on a cash basis and ITL alluded to the possibility of filing proceedings under the *Companies' Creditors Arrangement Act* ("*C.C.A.A.*").[5]

[9] By judgment of July 23, 2015,[6] this Court granted Appellants' motions and cancelled the provisional execution after identifying a weakness in that part of the judgment ordering provisional execution and the existence of a prejudice for the Appellants arising from the order of provisional execution.

[10] The Court pointed out that provisional execution may be incompatible with class actions because it is only upon final judgment that class members are definitively determined. Moreover, the Court observed that unless funds were provisionally distributed to class members, there would be no benefit to them but added that distribution on a provisional basis raised the problem of obtaining reimbursement should Appellants ultimately succeed in their appeals.

[11] On the issue of prejudice the Court said the following:

> [42] The affidavits filed by ITL and RBH in support of their motions to cancel provisional execution indicate that payment within 60 days of judgment causes serious financial prejudice to them. The evidence filed discloses a significant impact for Appellants despite that they are profitable and sizeable. In the case of JTM, its portion of $142,530,000 exceeds its annual earnings before interest, taxes and other expenses and well exceeds cash on hand of approximately $5.1 million. RBH's $246,030,000 exceeds its projected cash on hand at the end of July by approximately $125 million. ITL's provisional execution amount of $742,530,000 is approximately double its annual profit (before extraordinary items) and greatly exceeds current cash and credit availability to pay such sum.
>
> [43] Serious prejudice has been held sufficient to cancel provisional execution where the effect is to negate the right of appeal. At least, in the case of JTM and ITL, based on the affidavits, this appears to be the case. The judge based his

---

5 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

6 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224.

calculations of Appellants' ability to pay on historical earnings and balance sheet worth. He obviously did not analyze current cash and credit availability as set forth in the affidavits submitted to us. Respondents have pointed to numerous facts put in evidence in the lower court where Appellants have transferred profits and assets to related companies. Respondents assert that if Appellants are today unable to pay, this is their own doing and that of corporations related to them. However, these arguments are not helpful to Respondents given the other considerations germane to provisional execution and elicited above. This is not to say however that such facts and arguments could not give rise to other recourses or orders.

[12] In virtue of the instant motions, Respondents seek security from Appellants in the aforementioned proportions, aggregating $5 billion, within 30 days of judgment or, subsidiarily that such security be provided by way of quarterly instalments of $250 million each commencing as at June 26, 2015. The proposed form of the security requested is irrevocable letters of credit issued by a Canadian bank listed in Schedule I of the *Bank Act*.[7]

[13] Other than facts found by the judge, the Respondents rely on the affidavits filed by Appellants in support of their motions to cancel provisional execution as well as the depositions of the affiants. Respondents submit that Appellants have arranged their affairs so as to be, in effect, judgment proof for any substantial condemnation and that there is every indication that, pending appeal, Appellants will continue to direct their earnings to related entities located out of jurisdiction so that they will be unable to pay any significant condemnation that may be maintained in appeal.

[14] Appellants have argued for the dismissal of the motions. Following are summaries of their submissions.

POSITION OF ITL

[15] ITL pleads that there are no grounds upon which to order it furnish security. The facts which Respondents invoke in support of their motion are not current. The transfer of trademarks to a subsidiary, which hypothecated them in favour of a related out-of-jurisdiction company occurred in the year 2000. The payment out of earnings as dividends to the out-of-jurisdiction parent, stopped in 2014, but in any event these payments merely reflect "business as usual". Thus, because there are no relevant facts occurring after judgment which might jeopardize the satisfaction of that judgment, there is no "special reason" to justify the ordering of security pursuant to article 497 of the *Code of Civil Procedure ("C.C.P")*.[8]

---

[7] *Bank Act*, S.C. 1991, c. 46.
[8] *Code of Civil Procedure,* CQLR c. C-25.

[16] ITL adds that should I rule that there are grounds justifying security, the amounts requested are such as to drain all pre-tax earnings and put the going concern viability of ITL in peril. Moreover, ITL is unable to grant security in order to obtain borrowed funds because of its covenant to a related corporation. The latter currently provides credit facilities to ITL. Furthermore, an order of security payable in quarterly instalments would not alleviate this inability to pay.

POSITION OF RBH

[17] RBH submits that because of the magnitude of the judgment, Respondents are in effect seeking an appeal bond. However, the quantum of the judgment is an insufficient ground under article 497 *C.C.P.* The courts have stated that security will only be ordered where indicated by clear and precise facts; hypotheses based on subjective fear of Respondents that a judgment will not be satisfied does not suffice.

[18] RBH has been paying dividends in amounts less than net earnings throughout the litigation, so that Respondents' position once and if they obtain judgment from the Court of Appeal will be the same as it was at the outset of proceedings. Security should not be ordered for a situation existing prior to judgment; Respondents must demonstrate that their position has worsened and that their ability to obtain satisfaction of an eventual judgment will be in jeopardy. Respondents will simply have to obtain satisfaction out of the companies' revenues.[9] Counsel conceded that RBH's tangible or hard assets were of no value upon which to execute a judgment since plant and machinery were only appropriate to the manufacture and sale of cigarettes and inventory required government licensing to sell.

[19] Although RBH maintained in July 2015 before this Court that it could not pay its share of the provisional execution order, this only meant that it could not pay during the 60 day period provided in the judgment and should not be taken as a general admission of insolvency. The cancellation by RBH's parent of its credit facility within 2 days following the Superior Court judgment made it clear that it could not pay the provisional execution order, but is not a justification to order RBH to furnish security. In other words, the inability to satisfy the order of provisional execution should not be projected or be understood as an inability to satisfy a final judgment.

[20] RBH joined ITL by declaring that any security (particularly a letter of credit) cannot be ordered payable following the institution of proceedings (as Respondents seek) under either the *Bankruptcy and Insolvency Act* ("*B.I.A.*")[10] or *C.C.A.A.* That would be a "fraud on the bankruptcy". Moreover, as to the furnishing of security, RBH objects

---

9 This appeared to contradict counsel's assertion that there was no proof that RBH would continue to pay dividends notwithstanding the judgment since its representative was not directly asked the question during the examination on the affidavit supporting the motion to cancel provisional execution.

10 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 2.

to a letter of credit arguing that this would potentially give Respondents priority over other creditors should RBH become subject to any of the insolvency legislation. Should security be ordered, RBH would prefer that it be in the form of cash deposited in a lawyer's trust account.

[21] RBH points out that security for court costs was not requested in the motion originally filed and of which the undersigned is seized and, in any event, in a class action, costs are paid out of first proceeds of recovery.

[22] Lastly, RBH pleaded that the security requested requires the equivalent of an order not to declare any further dividends which, in essence, is a seizure before judgment under article 733 *C.C.P.* or a safeguard order, both of which are within the jurisdiction of the Court but not of a judge sitting alone.

DISCUSSION

[23] Article 497 *C.C.P.* provides that:

> **497.** Sauf les cas où l'exécution provisoire est ordonnée et ceux où la loi y pourvoit, l'appel régulièrement formé suspend l'exécution du jugement.
>
> Toutefois, un juge de la Cour d'appel peut, sur requête, pour une raison spéciale [...], ordonner à l'appelant de fournir, dans le délai fixé dans cette ordonnance, un cautionnement pour une somme déterminée, destiné à garantir, en totalité ou en partie, le paiement des frais d'appel et du montant de la condamnation, au cas où le jugement serait confirmé.
>
> Si l'appelant ne fournit pas le cautionnement dans le délai fixé, un juge de la Cour d'appel peut, sur requête, rejeter l'appel.

> **497.** Saving the cases where provisional execution is ordered and where so provided by law, an appeal regularly brought suspends the execution of judgment.
>
> However, a judge of the Court of Appeal may, on a motion, for a special reason (...), order the appellant to furnish, within the time fixed in the order, security in a specified amount to guarantee in whole or in part the payment of the costs of appeal and the amount of the condemnation, if the judgment is upheld.
>
> If the appellant does not furnish security within the fixed time, a judge of the Court of Appeal may, upon motion, dismiss the appeal.

[24] The granting of security is a matter of discretion. It is an exceptional remedy and as such, Respondents must indicate facts upon which I may draw the conclusion that

there is a danger that the judgment, if maintained in appeal, may not be susceptible of execution.[11] Clear and precise facts are required; mere hypotheses will not suffice.[12]

[25] The judgment of Baudouin, J.A., in *Blue Bonnets* is the oft quoted starting point in considering a motion for security. The condemnation in that case of wrongful dismissal amounted to $412,956 plus interest and additional indemnity. This sum corresponded to 36 months of salary. Just prior to the presentation of the motion for security, the appellant deposited the equivalent of 12 months of salary which it recognized owing. Baudouin, J.A., summarized the then existing decisions of judges of this Court applying article 497 *C.C.P.* to state that given the change in the law (in 1966) to make security on appeal the exception instead of the rule, it is insufficient to merely allege fear to be unable to execute the eventual judgment or that appellant will become insolvent. He continued that to justify the granting of security a moving party must:

> [...] présenter une preuve claire, précise et articulée basée sur des faits et non sur de simples hypothèses ou conjectures de circonstances particulières à l'espèce qui montrent que, sans l'octroi de ce cautionnement, ses droits reconnus par le jugement de première instance seront effectivement mis en péril.

[26] Baudouin, J.A., in applying these criteria to the facts before him dismissed the motion for security because even though the appellant distributed its earnings as dividends, it did so net of expenses, so that it was not in a "permanent state of insolvency" and that the "heavy" hypothecation of its assets in the absence of fraud was not sufficient as a "special reason" to order security under article 497 *C.C.P.* The report does not disclose the quantum of the appellant's earnings so that there is no means of comparison with the liability in virtue of the judgment appealed.

[27] Several years later, in *Europaper S.A. v. Avenor inc.*[13] Baudouin, J.A., again sitting on a motion[14] seeking security for a costs award of $92,694 found that recovery was in jeopardy because of the appellant's "insolvabilité complète" reflected by the fact that it had ceased activity, and had no place of business, no employees or assets of value. He concluded:

> Il y a donc là une importante différence factuelle avec l'arrêt *Blue Bonnets* [...], où le moyen invoqué était la simple crainte éventuelle de difficultés financières d'une des principales parties du litige.

[28] The decided cases on point have considered a variety of factual circumstances as potentially constituting special reasons and, as such, have refined our understanding

---

11 *Brouillette v. Grégoire*, 2011 QCCA 376 (Kasirer, J.A.); *Sodexin Financement mercantile inc. v. Aly*, 2009 QCCA 1860 (Pelletier, J.A.) [*Sodexin*]; *Nadeau v. Nadeau*, 2008 QCCA 300; *Hippodrome Blue Bonnets inc. v. Jolicoeur*, [1990] R.D.J. 458 (Baudouin, J.A.) [*Blue Bonnets*].

12 *Blue Bonnets*, *supra*, note 11.

13 *Europaper S.A. v. Avenor inc.*, AZ-97011392, 1997 CanLII 10448 (Baudouin, J.A.).

14 *Ibid.*, p. 2.

of the test. An accounting firm subject to a multi-million dollar judgment amalgamated with another firm, which asserted that it was not liable for the delictual acts of the partners of the judgment debtor firm. It was ordered to furnish security of $16.9 million.[15] The sale of a company's principal assets has been held sufficient grounds to order security,[16] just as the funnelling of all revenues to a related company has been deemed a special reason.[17] While the apparent insolvency of the judgment debtor continues to be a justification for the furnishing of security, at the end of the day, the correct criterion for the exercise of the discretion, is whether in the absence of security, the execution of the judgment would be in jeopardy.[18] The interpretation of "special reason" in article 497 *C.C.P.* has gone beyond restricting it to cases akin to those where a seizure before judgment could be issued.[19] Naturally, insolvency may constitute a special reason as may fraudulent behaviour, but neither is the criterion *per se*. Moreover, the insolvency discussed by Appellants and seemingly in many of the judgments, is insolvency on a cash basis. The *B.I.A.* defines an insolvent person in a threefold manner including a definition based on the value of assets on a forced sale being less than liabilities (or, a balance sheet test).[20]

[29] I do not subscribe to Appellants' theory that the clear and precise facts underlying an order of security, in appeal, must have occurred since judgment was rendered in first instance. While the existence prior to judgment of the facts invoked may have been noted in certain decisions of my colleagues,[21] no judgment has asserted the existence of such a hard and fast rule. Indeed, in *Widdrington* (which is the highest award of security in appeal of which I am aware), the most salient fact alluded to is the amalgamation of the two accounting firms, which occurred in July, 1998 i.e. after the institution of proceedings in first instance but years before the appeal.

[30] Appellants have submitted a judgment of Mongeon, J.S.C., of 2013,[22] dismissing an application for a safeguard order against JTM because it had transferred its trademarks valued at $1.2 billion to an "offshore" subsidiary in 1999, the year following the institution of proceedings in the Superior Court. The transferee then pledged the trademark to secure an indebtedness. JTM pays substantial royalties to the transferee in consideration of the use by it of the trademark. Its president agreed that the purpose

---

15 *Wightman v. Widdrington (Succession de)*, 2011 QCCA 1393 [*Widdrington*].

16 *Gagné v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2003 CanLII 55068, J.E. 2003-497 (Dalphond, J.A.).

17 *Entreprise Enapex inc. v. Recouvrements métalliques Bussières ltée*, 2008 QCCA 261 (Rochette, J.A.).

18 *Pothitos v. Demers*, 2013 QCCA 603, para. 15 (St-Pierre, J.A.); *Shama Textiles inc. v. Certain Underwriters at Lloyd's*, 2012 QCCA 473, paras. 13-14 (Dalphond, J.A.).

19 André Rochon, *Guide des requêtes devant le juge unique de la Cour d'appel*, Cowansville, Éditions Yvon Blais, 2013, pp. 158-159.

20 *B.I.A.*, *supra*, note 10, s. 2, "insolvent person".

21 *Sodexin*, *supra*, note 11.

22 *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2013 QCCS 6085; leave to appeal denied in *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2014 QCCA 520 (Savard, J.A.).

of the transaction was "creditor proofing" and Riordan, J.S.C., also characterized "the tangled web of interconnecting contracts" as a creditor proofing exercise.[23] The judgment of Mongeon, J.S.C., however is of no assistance to Appellants as it did not address any point before me for adjudication. It did not support the contention that facts pre-appeal cannot be relied upon. Mongeon, J.S.C., faced with a demand to enjoin JTM from continuing the royalty payments, concluded that he could not do so because the other party to the royalty contract was not a party to the litigation. Mongeon, J.S.C., held that all parties to the contract should be parties to the litigation, in order that he alter their contractual rights.

[31] As a final argument, counsel for RBH likened the motions before me to applications for a seizure before judgment under article 733 *C.C.P.* or a safeguard order and in any event beyond the jurisdiction of a judge in chambers and within the jurisdiction of the Court. The argument is clearly wrong as it flies in the face of the clear wording of article 497 *C.C.P.* according jurisdiction over the motions before me to a "judge of the Court of Appeal".

[32] From 2008 to 2013, RBH's average annual earnings from operations was approximately $450 million. It paid $300 million annually on average to its parent, Phillip Morris International ("PMI"). RBH had benefited from a credit facility with PMI but as indicated, that was cancelled the day following the judgment in first instance. Historically, RBH's short term credit comes from the PMI cash pool, so given the cancellation, it appears to have little short term availability of cash. In June, RBH's representative confirmed its inability to pay its share of the provisional execution ($200 million) within sixty days, but projected that it could pay the amount by March 2016. At the time of the judgment, its available cash was $70 million.

[33] Despite RBH's assertion that it does not pay out all of its earnings, its financial statements clearly show negative shareholder equity for 2013 and 2014. Counsel's attempts to qualify its insolvency on a cash basis by stating that it only said it could not pay the provisional execution <u>within 60 days</u> does not change the conclusion that it was insolvent if it was obliged to pay. The *B.I.A.* measures insolvency by the ability to pay debts <u>when due</u>.[24] In answer to my questioning how Respondents would obtain satisfaction upon receipt of a favourable judgment on the merits, counsel stated that they would have to wait to be paid out of cash flow. By way of illustration, if RBH owed $1 billion (including interest and additional indemnity) upon judgment of the Court on the merits, it would require more than two years, at least, to satisfy that judgment. This is not payment <u>when due</u>.

[34] RBH confirms that its real estate and equipment being appropriate for tobacco production only are not readily marketable. Counsel informed me that the sale of tobacco products requires special government permits so that inventory could be

---

[23] *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382, para. 1101.
[24] *B.I.A.*, *supra*, note 10, s. 2, "insolvent person".

difficult if not impossible to seize and sell in execution of a judgment. Also, the trademarks are not owned by RBH. Thus, it appears that the only real “assets” on the balance sheet against which a creditor might execute judgment are the accounts receivable which is the cash flow and which is substantially and regularly paid out in dividends to PMI.

[35] Irrespective of whether RBH is technically insolvent, it is certainly unable to satisfy the judgment of the Superior Court even if the quantum was reduced. That fact and the on-going practice of distributing earnings leads the undersigned to conclude that Respondents are in jeopardy of not being able to execute any substantial award that this Court may uphold.

[36] ITL earned $535 million from operations in 2014 and paid $334 million in dividends to its out of jurisdiction parent, British American Tobacco Corp. (“BAT”).

[37] Not only has ITL never set aside funds for a condemnation in this matter, it has still not done so even after the judgment of first instance herein because it does not consider the outcome unfavourable according to its representative during the deposition. I understand that he meant that the outcome would not be unfavourable until all appeals have been exhausted.

[38] Similar statements could be made concerning ITL’s tangible assets as those of RBH. The trademarks are also encumbered.

[39] ITL is indebted to BAT under various financing agreements. The credit facilities are fully drawn upon. BAT was not willing to fund the provisional execution award and I am given to understand that BAT makes no commitment to fund a final judgment.

[40] Though counsel asserted that payments of dividends stopped at the end of 2014, this results from payments made to BAT for the repayment of the loan made to finance the settlement of other litigation (*i.e.* the Flinkote matter). In other words, the funds were not available to pay a dividend. Though there is equity for the shareholders on the balance sheet of 2014, there is no liquidity to pay a judgment.

[41] I am also of the opinion that Respondents are in jeopardy of not being able to satisfy any substantial judgment against ITL.

[42] The depositions conducted by Respondents’ attorneys of the affiants upon the motions to cancel the provisional execution make it clear that the Appellants intend to continue payments (dividends and otherwise) to their out-of-jurisdiction related entities while the appeal is pending. That practice caused them to protest their inability to satisfy the order of provisional execution. It is reasonable to deduce that should their appeals fail completely or merely reduce the condemnation marginally, leaving a substantial condemnation, the Appellants will be unable to pay just as they were unable to pay the provisional execution in a timely fashion. This state of affairs is not due to any cause

extraneous to the will of Appellants such as an unsuccessful business. Rather, their businesses are profitable. The situation is the result of the ongoing business practice continued consistently during the litigation of paying out surplus earnings. This was not illegal. However, there is now and has been since May 27, 2015, a judgment, which includes a condemnation with interest and additional indemnity aggregating approximately $15.5 billion at today's value. Interest and additional indemnity run at approximately $1 million per day. This changes the equation radically. Even if the grounds of appeal are not frivolous, in the circumstances Appellants cannot be allowed to continue on a course of conduct where they will not be able to satisfy the judgment.

[43] A judgment pending appeal benefits from a presumption of validity.[25] Findings of fact of the trial judge are compelling as only a palpable error of fact justifies a reversal by an appellate court. It is not an answer for the Appellants to state that they are not behaving differently now than they were prior to the judgment of the Superior Court. That judgment, in the circumstances, and despite the appeal requires that they do behave differently given the circumstances presented to me. It is in my opinion far too cynical to adopt the position that we were so foresightful and efficient in ordering our affairs so as not to have the liquidity to satisfy the judgment, that there is no special reason existing to re-balance the situation. Counsel for Respondents characterized the situation as "heads I win, tails you lose". Sometimes, the vernacular is pointedly apt.

[44] 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. Of course, the companies are not empty shells because it is in their obvious interest and that of their parent companies that they continue to operate so as to continue to generate profits. The structure and *modus operandi* was put in place years ago because no doubt Appellants could observe the seriousness of the case and resolve of the Respondents to conclude that a substantial award was possible, even perhaps likely. In these circumstances, now that there is a judgment condemning them to pay $8 billion ($15.5 billion at today's value) and nothing to suggest that the practice (of distributing virtually all earnings) will not continue and notwithstanding that the transfer and encumbrance of trademarks may have occurred long ago, I am faced with a situation where on balance I conclude that the Respondents are in jeopardy of not obtaining satisfaction of any substantial amount confirmed in appeal. I am mindful that Appellants stated clearly that they could not pay the provisional execution award as ordered. Positive action is necessary to convince me that the reaction to a final judgment would not be the same. These circumstances taken together are a "special reason". I will order that security be furnished.

---

[25] *Épiciers unis Métro-Richelieu inc. v. Syndicat des travailleuses et des travailleurs des épiciers unis Métro-Richelieu (C.S.N.)*, 1997 CanLII 10141 (Baudouin, J.A.); *Québec (Ministre de l'Agriculture, des Pêcheries et de l'Alimentation du Québec) v. Produits de l'érable Bolduc & Fils ltée*, AZ-50134137, J.E. 2002-1239, para. 6 (Pelletier, J.A.); *Droit de la famille — 102409*, 2010 QCCA 1725, para. 2 (Rochon, J.A.); *Soft Informatique Inc. v. Gestion Gérald Bluteau Inc.*, 2012 QCCA 2018, para. 12 (Dalphond, J.A.); *Droit de la famille — 151906*, 2015 QCCA 1309, para. 6 (Kasirer, J.A.).

[45] What amount of security is appropriate? The initial deposit required in the class action as awarded by Justice Riordan was $1.131 billion on the rationale that 80% of the estimated compensatory damages might be enough to satisfy claims:

> [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 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.

[46] Counsel for Respondents noted that Justice Riordan's reasoning here may be strained because lower "take up rates" in class actions are prevalent where the amount distributed to each member is minimal which will not be the case here. However, I have no evidence of these assertions. I prefer to rely on the judgment.

[47] Also, as the Court noted in cancelling the provisional execution, it cannot be said that the grounds of appeal are frivolous, so that the $5 billion of security requested being nearly the capital amount of the judgment and given Justice Riordan's reasoning above, is not an appropriate amount of security. An amount of security approaching the entire amount of the judgment in first instance is to be avoided as too closely equivalent to provisional execution.[26]

[48] No amount of security for legal costs was requested in the motions as filed so that consideration does not enter into the calculation. Moreover, article 1035 *C.C.P.* provides that first proceeds of collection of class action judgments are directed towards the payment of costs.

[49] Considering the foregoing, the security will be calculated on the basis of the initial deposit of $1.131 billion or, based on the proportions of liability determined by the judge (ITL 67% and RBH 20%), the order against ITL will be $758 million and against RBH $226 million. Both figures are rounded.

---

[26] *Bell v. Molson*, 2013 QCCA 377 [*Bell*]; *Agaisse v. Duranceau*, 2015 QCCA 1320, para. 7; *Laforest v. Côté*, 2015 QCCA 119 (G. Gagnon, J.A.), para. 17.

[50] I am mindful of judgments holding that the amount of security ordered should not, in effect, negate an Appellant's right to appeal.[27]

[51] This Court considered a similar principle in cancelling the provisional execution where Appellants pleaded their inability (or at least inability within 60 days following judgment) to pay the amount of the provisional execution as set forth in the extract quoted above.

[52] I see the current situation as somewhat different. The Appellants chose not to reserve funds to satisfy an eventual condemnation as was their right. However, now that there is a judgment, which I have stated, benefits from a presumption of validity, the situation is changed. Given my conclusions based on the facts in the record, it is not acceptable that Appellants merely say that they have no funds to satisfy the judgment or an order to furnish security and continue to distribute earnings because that is "business as usual". A strategic decision is required by Appellants in caucus with their parent companies and related entities who have received the benefit of the profitable operations over the years and who continue to do so. Are they willing to do the necessary to help fund security to allow Appellants to continue their appeal? I do not question Appellants' right to appeal but neither can I stand idly by while Appellants pursue an appeal which will benefit them if they win but which will not operate to their detriment if they lose. Continuing the practice of distributing earnings out-of-jurisdiction at this point is at best disingenuous and at worst, bad faith.

[53] That being said, in fixing the mode of payment, I am willing to make some compromise to the cash requirements of Appellants. As Justice Riordan said, the object of the exercise is not to bankrupt the Appellants,[28] nor should Appellants appeal rights be defeated by the amount of security.[29]

[54] Accordingly, I will order that the security be provided in quarterly instalments as Respondents concluded, subsidiarily, in their motions. I am unaware of any legal impediment to so ordering. In this manner, each instalment of security will not exceed quarterly earnings.

[55] The trial judge found that the average annual net earnings before tax of Appellants was as follows:

ITL – $483 million

RBH – $460 million

---

27 *Bell*, *supra*, note 26, para. 10; *Camirand v. Gagnon*, 2013 QCCA 375; *Inversiones Bellrim, s.a. v. Guzzler Manufacturing inc.*, 2009 QCCA 1685 (Dalphond, J.A.); *Inversiones Bellrim, s.a. v. Guzzler Manufacturing Inc.*, 2009 QCCA 550 (Dufresne, J.A.); *Sharma Textiles inc. v. Certain Underwriters at Lloyd's*, 2007 QCCA 771 (Bich, J.A.).

28 *Létourneau v. JTI-MacDonald Corp.*, 2015 QCCS 2382, para. 1068.

29 *Labene v. Paquette*, 2015 QCCA 962 (Mainville, J.A.), para. 6, and *supra*, note 27.

On a quarterly basis, this computes to:

ITL – $121 million (rounded up)

RBH – $115 million

[56] I have financial statements for 2014 of ITL and RBH, which were filed in the record of this Court with the affidavits in support of the motions to cancel provisional execution. For 2014, RBH's net pre-tax earnings were $495 million. ITL shows a loss due to the pay out of the settlement of the Flinkote litigation. For consistency, I will use the averages determined by the judge for the period 2008 to 2013 as quoted above.

[57] Respondents concluded in the alternative for security to be deposited by way of quarterly instalments of $250 million each in the aggregate. As indicated, I have decided to award security equal to the initial deposit of $1.131 billion or $758 million for ITL and $226 million for RBH. The RBH security will be payable by way of six quarterly instalments and that of ITL in seven quarterly instalments so that the amount of each instalment does not exceed average quarterly earnings. In both cases, payments will commence at the end of December, 2015. In addition to the six months since the judgment, this allows 60 days before the first instalment as requested at the hearing by counsel of RBH.

[58] Accordingly, the Appellants will be ordered to furnish security as follows:

Payable on or before last juridical day of	ITL ($758 million)	RBH ($226 million)
December, 2015	$108,285,000	$37,666,000
March, 2016	$108,285,000	$37,666,000
June, 2016	$108,285,000	$37,666,000
September, 2016	$108,285,000	$37,666,000
December, 2016	$108,285,000	$37,666,000
March, 2017	$108,285,000	$37,666,000
June, 2017	$108,285,000	

The instalments bring us to March 2017 and June 2017. A hearing for the appeal has been tentatively scheduled before this Court during the autumn of 2016. I think it safe to assume that given the projected volume of the joint record, a lengthy advisement can be anticipated. If judgment is rendered before June or even March 2017, the remaining instalments of security will not be payable.

[59] The above amounts are less than average quarterly revenue. They are far easier to manage financially than a single lump sum. Again, according to the figures that we have, I am fully cognizant that Appellants may require some infusion or assistance of their related entities on a short or medium term basis in order to furnish the security. However, the amounts compared to earnings are such that it cannot be said, in my view, that the security ordered has negated the right to appeal.

[60] The security will be in the form of cash or irrevocable letters of credit issued by a Schedule I Canadian bank to remain in force until final judgment of this Court, or further order of this Court.

[61] As to the form of security, an argument was attempted by counsel for Appellants concerning the legality or appropriateness of letters of credit as security.

[62] This Court has held that an irrevocable letter of credit of a Canadian bank could constitute valid security in lieu of the deposit of cash.[30]

[63] A letter of credit of a bank is an undertaking by that bank. The latter is not a party to the litigation. The Appellants voiced concerns that this undertaking would remain despite any insolvency proceedings initiated by the Appellants. However, the deposit of cash at the office of the Court (in effect with the Ministre des Finances)[31] is also security in the sense that a litigant has, conditionally, a right exercisable in respect of the deposit.[32] This is not as Appellants seem to suppose a "fraud on the bankruptcy" or the granting of a "super priority". Valid security, consensual or court ordered, is supposed to offer priority to its beneficiaries in an insolvency and is so recognized in the *B.I.A.*[33] The effect of such security in the event of an insolvency may be the subject of a decision by a judge or court having jurisdiction but at present the question is hypothetical. In any event, Appellants will have the option of depositing the cash or furnishing letters of credit.

[64] Counsel for RBH suggested that any security take the form of a deposit in one of the lawyer's trust accounts. This is a matter for consent if any, by the parties but should not, in my view, form part of a court order.

[65] Accordingly, I will order security and allow letters of credit to be provided to Respondents' counsel instead of cash deposits in court at each Appellants' option.

[66] The security becomes payable upon a final judgment of this Court maintaining in whole or in part the judgment of first instance. It cannot be payable, as suggested by Respondents on a *B.I.A.* or *C.C.A.A.* filing. Any applicable stay of proceedings arising from such a filing would have to be respected; any exception should be court ordered at

---

30 *Droit de la famille – 2054*, AZ-97011711, 1997 CanLII 10660 (C.A.); see also article 1574 *C.C.Q.*
31 *Deposit Act*, CQLR, c. D-5, s. 8.
32 *Basille v. 9159-1503 Québec inc.*, 2014 QCCA 1653 (Kasirer, J.A.).
33 Ss. 69(2), 69.1(2), 69.3 (2), 71 and 136 *B.I.A.*, *supra*, note 10.

the appropriate time by the court having jurisdiction. The undersigned cannot order now that a letter of credit be payable following an insolvency filing which may impose a suspension of such recourse.

[67] The letter of credit will be payable upon receipt by the issuing bank of a sworn statement by one of Respondents' attorneys certifying that the Court of Appeal has rendered judgment in this matter and specifying the amounts due by Appellants. A copy of the judgment will be annexed to the sworn statement. Since an appeal to the Supreme Court does not automatically operate a stay, I need not include that possibility in the conditions of payment of the letters of credit. In the alternative, the letters of credit will be payable subject to further order of the Court. Any letter of credit must of course be issued by a Canadian bank listed in Schedule I of the *Bank Act* and be irrevocable, payable in whole or in part and remain in force until final judgment either by renewal or replacement prior to expiry.

CONCLUSIONS:

[68] **IN RECORD FILE NO: 500-09-025385-154**

FOR ALL THE FOREGOING REASONS, THE UNDERSIGNED:

[69] **GRANTS** in part Respondents' motion to order Appellants to furnish security;

[70] **ORDERS** Appellant, Imperial Tobacco Canada Ltd, to furnish security in accordance with article 497 *C.C.P.* in an amount of $758 million, which security may at Appellant's option, be in the form of cash or letter of credit and shall be furnished in equal consecutive quarterly instalments of $108,285,000 each, on or before the last juridical day of the following months: December, 2015, March, 2016, June, 2016, September, 2016, December, 2016, March, 2017 and June, 2017.

[71] **DECLARES** that security in the form of cash shall be deposited at the Registry of the Court of Appeal, Montreal, and that security by way of letter of credit be delivered to one of the attorneys of Respondents and comply with the following:

i) be issued by a Canadian bank listed in Schedule I of the *Bank Act*;

ii) make reference to the record number of the Court of Appeal;

iii) be irrevocable;

iv) remain in force until: a) judgment on the merits in this Court record either by renewal or replacement prior to expiry or b) further order of the Court of Appeal;

v) be payable: a) upon receipt by the issuing bank of a sworn statement of one of Respondents' attorneys declaring that judgment has been rendered

and stating the amount owing by the Appellant pursuant to the judgment on the merits, a copy of such judgment to be annexed to such sworn statement or b) upon further order of the Court of Appeal.

[72] **DECLARES** that any and all costs or expenses incurred to furnish the said security will be for the account of Appellant, Imperial Tobacco Canada Ltd.

[73] **THE WHOLE** with costs to follow suit.

[74] **IN RECORD FILE NO: 500-09-025387-150**

FOR ALL THE FOREGOING REASONS, THE UNDERSIGNED:

[75] **GRANTS** in part Respondents' motion to order Appellants to furnish security;

[76] **ORDERS** Appellant, Rothmans, Benson & Hedges Inc., to furnish security in accordance with article 497 *C.C.P.* in an amount of $226 million, which security may at Appellant's option, be in the form of cash or letter of credit and shall be furnished in equal consecutive quarterly instalments of $37,666,000.00 each on or before the last juridical day of the following months: December, 2015, March, 2016, June, 2016, September, 2016, December, 2016 and March, 2017.

[77] **DECLARES** that security in the form of cash shall be deposited at the Registry of the Court of Appeal, Montreal, and that security by way of letter of credit be delivered to one of the attorneys of Respondents and comply with the following:

i) be issued by a Canadian bank listed in Schedule I of the *Bank Act*;

ii) make reference to the record number of the Court of Appeal;

iii) be irrevocable;

iv) remain in force until: a) judgment on the merits in this Court record either by renewal or replacement prior to expiry or b) further order of the Court of Appeal;

v) be payable: a) upon receipt by the issuing bank of a sworn statement of one of Respondents' attorneys declaring that judgment has been rendered and stating the amount owing by the Appellant pursuant to the judgment on the merits, a copy of such judgment to be annexed to such sworn statement or b) upon further order of the Court of Appeal.

[78] **DECLARES** that any and all costs or expenses incurred to furnish the said security will be for the account of Appellant, Rothmans, Benson & Hedges Inc.

[79] **THE WHOLE** with costs to follow suit.

MARK SCHRAGER, J.A.

Mtre Deborah Glendinning
Mtre Éric Préfontaine
OSLER, HOSKIN & HARCOURT
For Imperial Tobacco Canada Ltd.

Mtre Simon V. Potter
Mtre Pierre-Jérôme Bouchard
McCARTHY TÉTRAULT
For Rothmans, Benson & Hedges Inc.

Mtre Gordon Kugler
KUGLER, KANDESTIN
Mtre Philippe Trudel
TRUDEL, JOHNSTON & LESPÉRANCE
For Conseil québécois sur le tabac et la santé, Jean-Yves Blais et Cécilia Létourneau

Date of hearing: October 6, 2015

EXHIBIT "J"

This is Exhibit "J" referred to in the
affidavit of Robert McMaster
sworn before me, this 1st
day of April 2019

A COMMISSIONER FOR TAKING AFFIDAVITS

Court File No. 04 CL 5530

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 JTI–MACDONALD CORP.

ELEVENTH REPORT OF THE MONITOR DATED JANUARY 13, 2006

BACKGROUND

1. On August 24, 2004, JTI-Macdonald Corp. ("JTI-M" or the "Applicant") filed for and obtained protection from its creditors under the C*ompanies' Creditors Arrangement Act* R.S.C. 1985. c. C-36, as amended (the "CCAA") pursuant to the Order of the Honourable Mr. Justice Farley dated August 24, 2004 (the "Initial Order"). Pursuant to the Initial Order, Ernst & Young Inc. ("EYI") was appointed as Monitor (the "Monitor") during this CCAA proceeding.

2. In this Eleventh Report, the Monitor will provide this Honourable Court with an analysis of the Applicant's proposal to make principal, interest and royalty payments currently due to its subsidiary JTI-Macdonald TM Corp. ("JTI-TM"), subject to certain protections.

3. Capitalized terms and corporation name abbreviations not defined in this Report are as defined in the Initial Order, the Monitor's Fourth Report dated February 16, 2005 (the

"Fourth Report"), or the Crown Claims Bar Order of this Honourable Court dated May 3, 2005 (the "Crown Claims Bar Order"), as applicable. All references to dollars are in Canadian currency unless otherwise noted.

INVOLVEMENT OF EYLLP IN ANALYSIS OF TAX ISSUES

4. As discussed in greater detail below and as described in the affidavit accompanying the Applicant's motion materials, the Applicant has indicated that there are significant tax consequences to JTI-M and to certain of its affiliates if the Applicant does not make the payments in question. The Monitor has engaged its affiliate Ernst & Young LLP ("EYLLP") to review and advise the Monitor on the tax consequences indicated by the Applicant. The views and understanding of EYLLP on the tax issues in question are reflected in the Monitor's analysis of those issues in the following paragraphs. Neither EYLLP nor EYI is a law firm and consequently the comments on tax issues in this report do not, and are not intended to, constitute a legal opinion on any of the tax consequences discussed herein.

ORGANIZATIONAL STRUCTURE AND INTERCOMPANY OBLIGATIONS

5. The organizational structure and intercompany obligations amongst JTI-M and its affiliated companies are described in detail in the Monitor's Fourth Report dated February 16, 2005, and are summarized in the chart attached as Appendix A hereto.

6. Pursuant to paragraph 18 of the Initial Order, pending further order of this Honourable Court, JTI-M may not make payments of principal, interest or royalties to related parties. JTI-M has not made any such payments. As a result, as at December 31, 2005 JTI-M

owed a total of approximately $186 million to JTI-TM with respect to scheduled principal, interest and royalty payments that have not been paid on their respective due dates. Details of the amounts owed are provided in Appendix B to this Report. Appendix B also indicates the default interest rates applicable to unpaid balances under the relevant instruments and agreements.

7. As illustrated in Appendix A and subject to the Monitor's qualifications contained in the Fourth Report, JTI-TM is indebted in the amounts of $1.2 billion and $410 million, respectively, to JT Canada LLC Inc. ("JTLLC") and JT International (BVI) Canada Inc. ("JTI-BVI"). JTLLC, in turn, owes $1.15 billion to JT International S.A. ("JTI-SA"). The scheduled principal and interest payments from JTI-M provide the genesis of the funding for the scheduled principal and interest payments by these entities, which have no other ordinary course source of funds sufficient to make the payments. Accordingly, as a result of the provisions in the Initial Order JTI-TM and JTLLC have been unable to make their scheduled interest and principal payments with respect to their own intercompany debt obligations. Consequently, as at December 31, 2005 JTI-TM owed approximately $157.1 million in scheduled principal and interest payments and default interest to JTLLC, JTI-TM owed approximately $18.4 million in scheduled interest payments and default interest to JTI-BVI, and JTLLC owed approximately $150.4 million in scheduled principal and interest payments and default interest to JTI-SA. Details of the amounts owed and of the default interest rates applicable to the respective debt obligations are set out in Appendix C to this Report.

MONITOR'S REVIEW OF DEBT AND OTHER OBLIGATIONS AND SECURITY

8. As described in the Monitor's Fourth Report, the Monitor reviewed certain transactions involving JTI-M and JTI-TM in respect of the acquisition of JTI-M by the Japan Tobacco group of companies. The Monitor reviewed the transactions and documentation that give rise to and records the inter-company debt and royalty obligations. The Monitor also obtained opinions with respect to, among other things, the validity of the security interests of JTI-TM in the assets of JTI-M in Ontario, Nova Scotia, and Quebec. Reference should be made to the Monitor's Fourth Report, including the qualifications therein, regarding the existence and validity of the debt and royalty obligations and the security interest held in respect thereof.

CONSEQUENCES OF FUNDING DEFERRAL

Income Tax Consequences to JTI-M

9. Subparagraph 18(b) of the Initial Order prevented JTI-M from making its scheduled interest, principal and royalty payments. JTI-M has continued to accrue interest and royalty expense with respect to these obligations and has deducted this interest and royalty expense in its financial statements and in the preparation of its corporate income tax returns for 2004. On its 2004 income tax return, JTI-M deducted approximately $74.0 million in accrued interest and royalties owed to JTI-TM that continue to remain unpaid pursuant to the Initial Order. Management has also advised the Monitor that on its 2005 income tax return, JTI-M will deduct approximately $125.2 million in interest and royalties accruing (but unpaid) to JTI-TM during 2005.

10. Section 78 of the *Income Tax Act* (Canada) ("ITA") generally provides that where a taxpayer owes an amount in respect of a tax-deductible outlay or expense to a person with whom the taxpayer was not dealing at arm's length at the time the expense or outlay was incurred, then the unpaid amount must be included in taxable income of the taxpayer for the third taxation year following the year in which the amount was incurred unless, (a) before the end of the second taxation year after the amount was incurred, the amount is paid by the taxpayer, or (b) before the taxpayer's deadline for filing its tax return for the third taxation year after the amount was incurred, the taxpayer and creditor jointly elect to deem the amount to have been paid and loaned back to the taxpayer by the creditor. If the taxpayer and creditor jointly elect as described above, the amount is deemed to have been paid and loaned back on the first day of the third taxation year after the amount was incurred.

11. Consequently, unless the amounts incurred and deducted by JTI-M for its 2004 taxation year are paid by the end of its 2006 taxation year, or JTI-M and JTI-TM jointly elect as described above, there will be a $74.0 million inclusion in JTI-M's taxable income for 2007. Similarly, absent timely payment or a joint election JTI-M will have a 2008 taxable income inclusion of approximately $125.2 million with respect to the unpaid interest and royalties deducted in its 2005 taxation year.

12. A joint election under Section 78 would not address other tax issues that arise from non-payment of the amounts in question, most notably increased capital taxes in JTI-M and its Canadian affiliates and the ability of those Canadian affiliates to fund their ongoing income tax liabilities, both of which are described in greater detail below. In addition, the Monitor notes that the election would apply only for income tax purposes and would

not stop the continuing accrual of default interest with respect to the overdue payments in question.

Capital Tax Consequences to JTI-M

13. In addition to the income tax consequences described above, an accumulation of accrued interest and royalties payable results in an increase in taxable capital of the Applicant for federal purposes and in certain provinces. Interest and royalties that have been due and outstanding for specified periods (365 days for federal purposes, 120 days for Ontario, and 6 months for Quebec) are included in the calculation of the capital tax base. Currently, the rates for 2006 are 0.125% for the federal capital tax (the "large corporations tax"), 0.3% for the Ontario capital tax and 0.525% for the Quebec capital tax. Large corporations tax may be offset by the surtax imposed on federal income tax, and provincial capital taxes are deductible in computing income for tax purposes, although JTI-M has advised the Monitor that neither of the above provisions immediately benefits the Applicant, which currently pays no federal surtax and is currently in a loss position for provincial income tax purposes.

14. JTI-M estimates that if the amounts for which the Court's payment approval is sought remain outstanding at December 31, 2006, it will be required to pay approximately $796,000 in additional capital taxes for the 2006 taxation year, and that if the amounts remain outstanding in subsequent taxation years it will pay larger incremental capital tax amounts for those years as interest will continue to accrue on these balances. The additional 2006 capital taxes consist primarily of federal capital tax (approximately 23%

of the total incremental capital taxes), Ontario capital tax (approximately 19%) and Quebec capital tax (approximately 57%).

15. EYLLP notes that, unlike the treatment of the unpaid amounts for corporate income tax purposes, there is no election or other relief available that could change the treatment of these amounts for capital tax purposes. EYLLP also notes, however, that large corporations tax is scheduled to be reduced to 0.0625% for the 2007 calendar year and to be eliminated thereafter, and that the province of Ontario has announced plans to phase out its capital tax, reducing the rate commencing in 2009 and eliminating capital tax effective in 2012, meaning that the incremental capital tax impact of the overdue payments remaining outstanding will decline slightly over the long term.

Income and Capital Tax Consequences to Affiliated Companies

16. Each of JTI-TM and JTLLC (the "Canadian Affiliates" and, with JTI-BVI, the "Affiliates") faces income and capital tax issues similar to those described above with respect to the payments stayed at the JTI-M level and the payments that they, in turn, are unable to make to affiliated companies under their respective debt obligations. In addition, the deferral of the payments due from JTI-M presents the Affiliates with a sizeable funding problem. Each of these issues is discussed in greater detail below.

Income Tax

17. As with JTI-M, each of the Canadian Affiliates has deducted the interest payable on its respective intercompany loans for corporate income tax purposes. If the amounts deducted but unpaid with respect to the 2004 and 2005 taxation years are not paid by the

end of 2006 and 2007, respectively, these amounts will be added back to the Canadian Affiliates' taxable income in 2006 and 2007. The Section 78 election discussed above is also available to the Canadian Affiliates to prevent the re-inclusion of the unpaid amounts in their taxable income. As discussed below, however, making this election would cause a sizeable funding problem in JTLLC due to the withholding tax consequences of the election.

Capital Tax

18. As with JTI-M, unpaid interest and royalties owed by the Canadian Affiliates that remain outstanding for specified periods increase the capital tax base of those entities, resulting in increased capital taxes payable. JTI-M estimates that if the outstanding balances as at December 31, 2005 remain outstanding at December 31, 2006, JTI-TM will pay approximately $97,000 in additional capital taxes and JTLLC will pay approximately $81,000 in additional capital taxes for the 2006 taxation year. JTI-M also estimates that the Canadian Affiliates will pay larger incremental capital tax amounts for subsequent taxation years because default interest will continue to accrue on the unpaid balances, thereby increasing their respective capital bases.

Funding Issues

19. For each of the Affiliates the interest rate on the intercompany loans receivable exceeds the interest rate on any intercompany loans payable, resulting in net income for tax purposes in each entity. This liability is calculated on an accrual basis, meaning that, in the near term, income tax liability arises in each affiliated company even if the interest payments are not received. This tax liability is not reduced by the Section 78 election

described above. JTI-M has advised the Monitor that it estimates the income taxes payable by JTI-TM, JTI-BVI and JTLLC for the 2005 taxation year to be approximately $9.5 million, $3.7 million and $2.6 million, respectively, and that income taxes of $7.5 million, $3.1 million and $0.8 million, respectively, were paid by those entities in respect of the 2004 taxation year.

20. JTI-M indicates that without receiving their scheduled principal, interest and royalty payments, the Affiliates have insufficient cash reserves to continue to fund their respective income tax and capital tax liabilities.

21. The Monitor notes that a further funding issue will arise if JTLLC does not receive the necessary payments from JTI-TM to allow JTLLC to make the outstanding interest payments to JTI-SA and instead makes a joint election with JTI-SA under Section 78 of the ITA, as described above, with respect to the interest accrued but unpaid to JTI-SA. If joint elections are made with respect to the amounts deducted by JTLLC in its 2004 and 2005 taxation year, which Management advises the Monitor amounted to $52.8 million and $88.8 million, respectively, JTLLC will be deemed to have paid the interest amounts in question to JTI-SA, a non-resident, in January 2007 and January 2008, respectively. JTLLC will therefore be required to forthwith remit withholding taxes equal to 10% of the amounts deemed paid, resulting in required withholding tax payments of $5.3 million in early 2007 and $8.9 million in early 2008. Management has advised the Monitor that unless JTLLC receives the related payments from JTI-TM, JTLLC will have insufficient cash reserves to make the withholding tax payments.

JTI-MACDONALD MOTION

Summary of Motion

22. JTI-M has made a motion to this Honourable Court for an order authorizing it to pay JTI-TM the interest, principal and royalty amounts due to JTI-TM as at December 31, 2005 in the combined amount of approximately $186 million (consisting of approximately $146.9 million with respect to the $1.2 billion secured debentures owed to JTI-TM, approximately $19.2 million with respect to the $410 million secured debentures owed to JTI-TM, and approximately $19.8 million with respect to the royalty license agreement between JTI-TM and JTI-M). As a result of the challenges made to the tax structure and security granted by JTI-M to certain related entities, JTI-M proposes to provide the Monitor with three demand letters of credit in the amounts of approximately $146.9 million, approximately $19.2 million and approximately $19.8 million, corresponding to the amounts to be paid with respect to the instruments noted above.

23. The draft Court order accompanying the Applicant's motion provides that the Monitor will be entitled to draw upon any of the letters of credit, (a) if the issuing bank, ING Belgium SA/NV, gives the Monitor notice of the expiry of the letter of credit, or (b) upon the making of a final order by a court of competent jurisdiction (after the expiry of all appeal periods and/or the exhaustion of all appeals) that the security or royalty agreement in respect of which payments were made is void or otherwise unenforceable against JTI-M.

Letter of Credit Terms

24. The three letters of credit proposed to be issued by ING Belgium SA/NV ("ING Belgium") have the following key terms:

    a. Each letter of credit can be drawn by the Monitor by presenting a written demand to ING Bank of Canada in Toronto, Ontario specifying the amount of the letter of credit and certifying that it is entitled to draw on the letter of credit in question. The draft letter of credit specifies that on receipt of the written demand, ING Belgium will pay the amount stated in the demand without enquiring whether the Monitor has a right to that amount, subject only to the amount of the demand not exceeding the available amount of the letter of credit. The Applicant has arranged for ING Belgium to provide the Monitor with a monthly statement indicating the available amount of each letter of credit, taking into account the accrual of interest described below. The letters of credit can therefore readily be converted to cash if the circumstances specified in the draft Court order arise;

    b. Each letter of credit will automatically be renewed annually for a further period of one year unless ING Belgium provides the Monitor with three months' written notice by registered mail or courier that it elects not to renew the letter of credit. The Monitor also notes that under the draft Order, the Monitor is required to provide the Applicant with prompt written notice if it receives written notice of non-renewal from ING Belgium so that JTI-M has an opportunity to obtain one or more replacement letters of credit. The Monitor considers three months to be adequate notice for the Monitor to take action, including consultation with the

affected parties and, if necessary, application to this Honourable Court for directions, prior to the expiry of a letter of credit; and

c. Each letter of credit accrues interest on the initial amount described above at the one-month CAD LIBOR rate minus 1/8% per annum. This rate currently exceeds, and has for the last five years consistently exceeded, the interest rate available on investments of comparable liquidity and credit risk and consequently exceeds the rate of return usually achieved by JTI-M on its invested funds.

25. ING Belgium is Belgium's fourth-largest bank and is a subsidiary of ING Groep N.V., one of the world's largest financial services companies. According to Moody's Investor Services, ING Belgium had total capital of EUR 7.24 billion at December 31, 2004. In its November 16, 2005 credit opinion Moody's assigned ING Belgium a Bank Financial Strength rating (Moody's opinion of a bank's intrinsic safety and soundness) of B, which Moody's indicates means an institution has "strong intrinsic financial strength." By way of comparison, Moody's latest ratings assigned a Bank Financial Strength rating of B+ to Royal Bank of Canada and ratings of B to each of the other four largest Canadian chartered banks.

26. Based on the above, the Monitor is satisfied that allowing the payment of $186 million from the funds held by the Applicant and providing the proposed letters of credit to secure the return of those monies if the underlying liabilities are ultimately held to be void provides the Crown Claimants and third-party creditors of JTI-M with the same available liquidity as if the funds were retained and invested by the Applicant.

Impact on JTI-Macdonald Liquidity

27. As at January 12, 2006 JTI-M had cash and liquid investments of $272.0 million, meaning that if the proposed payments were made as at the date of this Report, the Applicant would have remaining cash and liquid investments of approximately $86.0 million.

28. JTI-M has generated positive net cash flow of more than $100 million since it first filed for CCAA protection and management indicates that the Applicant is expected to remain strongly cash flow positive. Based on the Applicant's cash flow projections discussed in the Monitor's Tenth Report dated November 7, 2005, JTI-M is expected to generate positive net cash flow of approximately $29 million for the period from January 23, 2006 to June 3, 2006. The Monitor notes that although JTI-M typically experiences significant negative cash flow at the end of each month, when it makes its required tobacco tax payments, to date these payments have invariably been less than $40 million per month and positive cash flow for the remainder of each month has, in most cases, exceeded the amount of the tobacco tax payment.

29. Based on the above, the Monitor believes that JTI-M will be able to carry on its business in the ordinary course with cash and liquid investments of $86.0 million without subjecting itself and its stakeholders to any significant liquidity risk.

DISCUSSIONS WITH CROWN CLAIMANTS

30. Following service of the Applicant's motion, it invited all of the Crown Claimants to meet to explain the basis for the motion and to attempt to address any concerns that the

Crown Claimants might have. On January 10, 2006 the Applicant and the Monitor conducted a conference call with counsel to certain of the Crown Claimants for this purpose.

31. On the conference call, counsel to the Crown Claimants raised a limited number of issues with respect to the proposed arrangement, including:

a. The Crown Claimants questioned whether the fact that the Applicant is operating under CCAA protection modifies the income tax considerations described above. The Monitor has discussed this issue with EYLLP, which has advised that it is not aware of any provision of the ITA or the CCAA that would operate to modify the rule of law in Section 78 of the ITA in the Applicant's current circumstances;

b. The Crown Claimants questioned whether the issuance of the letters of credit by ING Belgium, a non-resident financial institution, provides adequate protection to the interests of the Crown Claimants. The Applicant's position is that this creates no risk for the Crown Claimants; and

c. The Crown Claimants suggested that provisions should be built into the draft Order to protect against the Monitor losing its status and ability to make demand under the letters of credit. The Applicant has agreed to amend the draft Order to provide appropriate protections;

d. The Crown Claimants expressed general concerns about whether the other terms of the proposed letters of credit and the draft Order, including the terms on which the proposed letters of credit may be drawn and the fact that the entity requesting the

letter of credit (JT International Holding BV, the parent company of JTI-SA and JTLLC) is a non-resident affiliate of JTI-M, provide adequate protection to the interests of the Crown Claimants.

32. The Monitor expects that discussions between the Applicant, the Monitor and the Crown Claimants with respect to these and any other issues raised by the Crown claimants will continue on an expedited basis.

CONCLUSION

33. The Monitor is satisfied that if JTI-M remains unable to make the principal, interest and royalty payments that are the subject of the Applicant's motion, the Applicant and its subsidiary, JTI-TM, will incur increased income taxes (subject to the Section 78 election discussed above), capital taxes and, in the case of JTI-TM, funding costs in connection with its corporate income tax liability that will reduce the assets of JTI-M that are available to its stakeholders generally. The Monitor also notes that JTI-M's inability to make the payments has a flow-through effect to its Canadian affiliates, JTI-BVI and JTLLC, resulting in increased capital taxes and funding costs in those entities.

34. The Monitor is satisfied that the terms of the letters of credit proposed to be provided by JTI-M to the Monitor before the payments are made leave the Crown Claimants and the Applicant's other stakeholders with the same available liquidity as if the funds used for the payments were retained and invested by the Applicant pursuant to its ordinary course investment strategy.

35. The Monitor is satisfied that the cash and liquid investments remaining in JTI-M following the payments would be sufficient to allow the Applicant to continue to carry on its business in the ordinary course without incurring any significant liquidity risk.

36. Consequently, the Monitor recommends that this Honourable Court grant the Applicant's motion to make certain principal, interest and royalty payments to JTI-TM after providing the letters of credit described above to the Monitor.

All of which is respectfully submitted by:

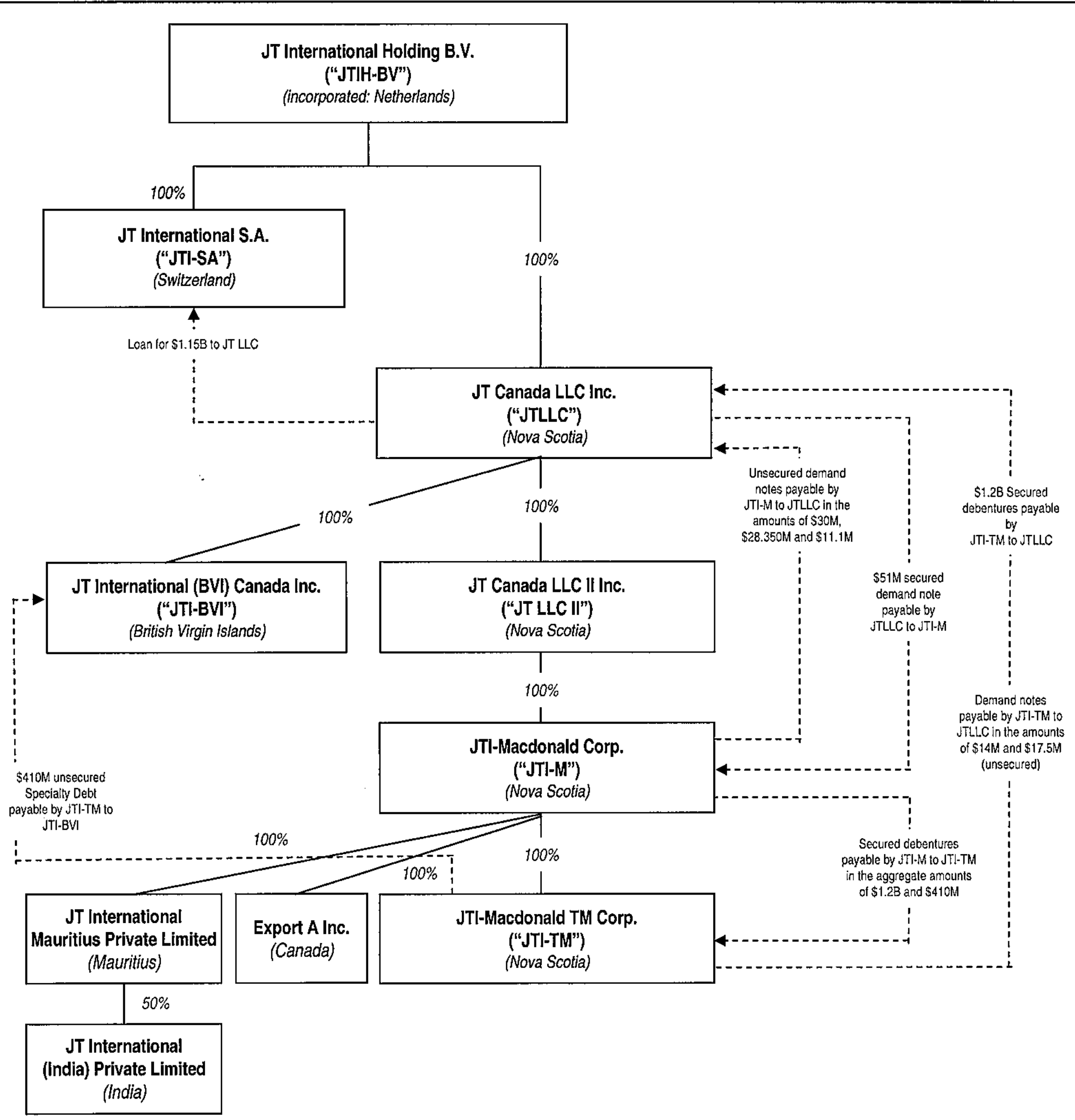
ERNST & YOUNG INC.
In its capacity as Court Appointed
Monitor of JTI-Macdonald Corp.

Per: Mike P. Dean
Senior Vice President

JT Canada Group Corporate Structure

Corporate Structure as of August 24, 2004

Appendix A



APPENDIX B

JTI-MACDONALD CORP.

PRINCIPAL, INTEREST AND ROYALTY PAYMENTS DUE TO JTI-MACDONALD TM CORP. AS AT DECEMBER 31, 2005

Owed to JTI-TM re $1.2 billion secured debentures				
Date Due	Principal	Interest	Default Interest	Default Interest Rate
Nov. 18, 2004	$ 307,128.60	$46,416,489.90	$4,062,829.86	7.76%
May 18, 2005	$ 319,045.20	$46,404,573.30	$2,264,853.81	7.76%
Nov. 18, 2005	$ 331,424.10	$46,392,194.40	$ 437,077.05	7.76%
Owed to JTI-TM re $410 million secured debentures				
Date Due	Principal	Interest	Default Interest	Default Interest Rate
Dec. 13, 2004	$0	$ 5,832,250.00	$ 175,992.46	2.84500%
June 13, 2005	$0	$ 6,518,169.44	$ 115,186.06	3.18833%
Dec. 13, 2005	$0	$ 6,557,416.44	$ 10,888.90	3.19000%
Owed to JTI-TM re royalty agreement				
Date Due	Royalty		Default Interest	Default Interest Rate
Jan. 31, 2005	$9,844,654.44		$ 594,896.12	Prime rate + 2%, ranging between 6.25% and 7%
July 31, 2005	$9,118,081.96		$ 255,936.73	

APPENDIX C

JTI-MACDONALD CORP.

PRINCIPAL, INTEREST AND ROYALTY PAYMENTS OWED BY JTI-MACDONALD TM CORP. AND JT INTERNATIONAL S.A. TO AFFILIATED COMPANIES AS AT DECEMBER 31, 2005

Owed by JTI-TM to JTLLC re $1.2 billion secured debentures				
Date Due	Principal	Interest	Default Interest	Default Interest Rate
Nov. 18, 2004	$6,134,127.80	$43,858,336.30	$4,277,047.04	7.635%
May 18, 2005	$6,368,298.10	$43,624,166.00	$2,384,270.72	7.635%
Nov. 18, 2005	$6,611,407.90	$43,381,056.20	$ 460,122.42	7.635%
Owed by JTI-TM to JTI-BVI re $410 million unsecured specialty debt				
Date Due	Principal	Interest	Default Interest	Default Interest Rate
Dec. 13, 2004	$0	$ 5,576,000.00	$ 160,809.73	2.72000%
June 13, 2005	$0	$ 6,262,621.50	$ 106,325.00	3.06333%
Dec. 13, 2005	$0	$ 6,300,464.38	$ 10,052.26	3.06500%
Owed by JTLLC to JTI-SA re $1.15 billion loan				
Date Due	Principal	Interest	Default Interest	Default Interest Rate
Nov. 18, 2004	$5,876,504.58	$42,316,250.89	$3,614,644.93	Prime rate + 2%, ranging between 6.25% and 7%
May 18, 2005	$6,550,611.22	$41,404,423.37	$2,006,159.22	
Nov. 18, 2005	$6,353,615.94	$41,839,242.96	$ 407,041.46	

EXHIBIT “K”

This is Exhibit "K" referred to in the
affidavit of Robert McMaster
sworn before me, this 1st
day of April, 2019

A COMMISSIONER FOR TAKING AFFIDAVITS

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Class Action)

presided by: THE HON. BRIAN RIORDAN, J.S.C.

N°: 500-06-000076-980

CONSEIL QUEBECOIS SUR LE TABAC
ET LA SANTE,

Plaintiff

- and -

JEAN-YVES BLAIS,

Designated Member

- vs -

JTI-MACDONALD CORP.,
IMPERIAL TOBACCO CANADA LTD.,
ROTHMANS, BENSON & HEDGES INC.,

Defendants

N°: 500-06-000070-983

CECILIA LETOURNEAU,

Plaintiff

- vs -

JTI-MACDONALD CORP.,
IMPERIAL TOBACCO CANADA LTD.,
ROTHMANS, BENSON & HEDGES INC.,

Defendants

Volume 237

Christiane Charette, s.o.
September 29th, 2014.

CH140929

N°: 500-06-000076-980

N°: 500-06-000070-983

APPEARANCES:

Me ANDRE LESPERANCE, Me MICHEL BELANGER,
Me MARC BEAUCHEMIN,
on behalf of Le Conseil québécois sur le tabac et la santé
and Jean-Yves Blais.

Me PHILIPPE H. TRUDEL, Me BRUCE JOHNSTON,
Me PIERRE BOIVIN, Me GABRIELLE GAGNE,
Me ANDREW CLELAND,
on behalf of Cécilia Létourneau.

Me GUY PRATTE, Me PATRICK PLANTE,
on behalf of JTI-MacDonald Corp.

Me SUZANNE COTE, Me CRAIG LOCKWOOD, Me DEBORAH A. GLENDINNING,
Me NATHALIE GRAND'PIERRE,
on behalf of Imperial Tobacco Canada Limited.

Me SIMON V. POTTER, Me PIERRE-JEROME BOUCHARD,
Me MICHAEL FEDER,
on behalf of Rothmans, Benson & Hedges Inc.

Christiane Charette, s.o.
September 29th, 2014.

CH140929

INDEX

PAGE

CONTINUED FROM SEPTEMBER 25th, 2014

JUDGEMENT 4

REPRESENTATIONS 5

PLAIDOIRIE DE MAITRE JOHNSTON (SUITE) 9

CONTINUED ON SEPTEMBER 30th, 2014

----

1 L'an deux mille quatorze (2014), ce vingt-neuvième (29e)
2 jour du mois de septembre,
3
4 *** 09h32 ***
5
6 Me BRUCE JOHNSTON,
7 on behalf of Cécilia Létourneau:
8 Good morning.
9 LA COUR (L'HON. BRIAN RIORDAN, J.C.S.):
10 Good morning. Just before we start, I want to
11 clarify my position on ITL's motion to strike
12 paragraphs of Plaintiffs' notes. And just to be
13 clear, for the eloquent reasons I gave the other
14 day, the Court:
15 DISMISSES the conclusion of the motion on
16 striking paragraphs 2190 to 2322 of Plaintiffs'
17 notes and authorities;
18 GRANTS, in part, the subsidiary conclusions;
19 SUSPENDS argument on Plaintiffs' allegation of
20 abuse of procedure until after it has rendered
21 judgment on the merits; and
22 DECLARES that should Plaintiffs wish to
23 proceed on that issue, the Court will convene a
24 case management conference at the appropriate time
25 and after judgment on the merits to establish a

1 schedule for that purpose;

2 WITHOUT costs.

3 Me BRUCE JOHNSTON:

4 Your Lordship, anticipating somewhat that

5 result, we looked at those allegations and found

6 that they remain quite relevant for our argument in

7 many ways, going to credibility, going to the

8 merits of the case, in fact and in terms of

9 assessing the positions of both parties.

10 So I will be referring to some of those

11 paragraphs, but not in the context...

12 LA COUR:

13 Oh, they're in there, still in your notes and

14 authorities.

15 Me BRUCE JOHNSTON:

16 Right. Right.

17 LA COUR:

18 And if they're relevant to other questions,

19 then...

20 Me BRUCE JOHNSTON:

21 That's the context.

22 LA COUR:

23 ... if you think they are, you'll make your

24 arguments and I'll assess them.

25

EXHIBIT “L”

This is Exhibit "L" referred to in the affidavit of Robert McMaster sworn before me, this 1st day of April 2019

A COMMISSIONER FOR TAKING AFFIDAVITS

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
NO.: **500-06-000076-980**

(CLASS ACTION)
SUPERIOR COURT

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ, and JEAN-YVES BLAIS
PLAINTIFFS

v.

JTI-MACDONALD CORP., and
IMPERIAL TOBACCO CANADA LTÉE, and
ROTHMANS, BENSON & HEDGES INC.
DEFENDANTS

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
NO.: **500-06-000070-983**

(CLASS ACTION)

SUPERIOR COURT

CÉCILIA LÉTOURNEAU,
PLAINTIFF

v.

JTI-MACDONALD CORP., and
IMPERIAL TOBACCO CANADA LTÉE, and
ROTHMANS, BENSON & HEDGES INC.
DEFENDANTS

JTIM's ARGUMENT PLAN

XI. COST – ABUSE – PROVISIONAL EXECUTION – INDIVIDUAL CLAIMS PROCESS

Overview

3003. Plaintiffs' submissions on the alleged abuse of process should be dismissed out of hand. Such serious charges cannot be made after the evidence has closed and without any allegations to be found in either of the *Blais* and *Létourneau* proceedings.

3004. Without prejudice to JTIM's position that this Court should not even entertain Plaintiffs' arguments on abuse in support of provisional execution and costs, a review of Plaintiffs' allegations set againt the record in these proceedings demonstrates that they are not only distorting reality, but ignoring positive findings of this Court and the Court of Appeal that JTIM's conduct was *not* abusive.

3005. Moreover, to the extent that JTIM cooperated with its co-Defendants, it did so with the encouragement of this Court and to fulfill JTIM's counsel commitment to act in as efficient a manner as possible, without prejudicing JTIM's rights to a full defense. JTIM believes is has fulfilled this commitment.

3006. Plaintiffs' argument in this section is but another example of their determination to treat every person who has ever worked or is working for a tobacco as disreputable, as their expert Dr. Proctor does. Such vitriol does not belong in any Canadian court.

A. Plaintiffs' claim for a finding of abuse of process is irregular and ill-founded on its face

A.1 This Court should refuse to even consider Plaintiffs' claim for a finding of abuse of process

3007. Plaintiffs refer to various events, none of which was ever alleged in their proceedings, which, they argue, should lead to a finding of abuse of process against the Defendants.[2984]

3008. Purporting to rely on Article 547 (1) j) CCP, Plaintiffs argue that a finding of abuse of process woudld support their demand for provisional execution notwithstanding appeal for a portion of both their claim for moral and punitive damages, again a request not contained in their proceedings.[2985]

[2984] Plaintiffs' Notes and Authorities contains a Section XI-A entitled "*Abuse of process as strategy*" where, for 127 paragraphs.
[2985] Plaintiffs' Notes and Authorities, paras. 2318-2322.

3009. Plaintiffs also rely on the alleged abuse of process to ask for costs to be paid on a solicitor-client basis, a claim that is also not alleged in their proceedings.

3010. These claims should be summarily dismissed on their face as they are not supported by any allegations in the proceedings, nor are they substantiated by facts or evidence.

3011. It is, furthermore, wrong in law to argue that even if there should be a finding of abuse of process - which is emphatically denied - it could form the basis of any order for provisional execution, as it would clearly not be the type of situation contemplated under Article 547 (1) j) CCP. It also could not lead to an award for costs on a solicitor-client basis.

3012. In any event, without prejudice to its argument that these claims are belatedly and improperly made, it can readily be demonstrated that JTIM committed no abuse of process and did not participate in any global abuse allegedly committed by the Defendants together.

3013. Plaintiffs' position amounts to a denial of the right of a defendant to make a full defense in the context of two of the most complex trials in Canadian judicial history, thus it also undermines the adversarial process itself.

3014. Plaintiffs seek to weave together a myriad of unconnected attacks on various grounds, which amount to nothing more than a "*procès d'intention*", consisting of bald assertions unsupported by any evidence, or in some cases, directly contrary to the evidence.

3015. Plaintiffs submit that the alleged abuse of process was part of an intentional strategy that the three Defendants all adhered to. This assertion is unsupported by any evidence, contrary to the reality, and plainly wrong.

3016. Furthermore, the same assertion makes no allowance for the fact that it was Plaintiffs who sued the Defendants in the same proceedings, alleging collusive behavior and making the same allegations against each Defendant, without any differentiation. Of necessity, in such proceedings, a certain degree of cooperation among defendants on certain issues is required, desirable, and in fact <u>was repeatedly requested by this Court</u>. This cannot evidence an agreement or an intention to act abusively.

3017. JTIM adopted its own positions and presented its own evidence throughout these proceedings. In order to avoid duplication, it was the same, at times, or similar to those of the other Defendants. But JTIM also called its own expert and fact evidence when necessary. There is absolutely no evidence that JTIM and its counsel ever acted for any

other purpose than to ensure that it was afforded a full, yet responsible ability to make its defense, in accordance with the law, in these unique, legally and factually challenging cases.

3018. Article 54.4 CCP is not a stand-alone provision. It is part of a series of provisions added to the CCP in 2009 as a new Section III, entitled "*Power to Impose Sanctions for Improper Use of Procedure*", to Chapter III on the Powers of Courts and Judges:

> ***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.*
>
> **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.

3019. Plaintiffs filed no motion seeking a declaration that any particular "pleading" ("*acte de procédure*") from JTIM was improper.

3020. Furthermore, Plaintiffs' demand for extrajudicial costs is akin to the traditional right of action for damages for abuse of process, for which the landmark precedent remains the Court of Appeal's decision in *Viel* v. *Les entreprises immobilières du Terroir Ltée*[2986]. Again, however, Plaintiffs' pleadings in these class actions, despite numerous amendments, do not contain any allegations in this regard.

3021. Consequently, the Defendants did not have the opportunity to defend against these belated allegations. Neither does the Court have before it any proper allegations, let alone any evidence, of the damages sought and the extent to which extrajudicial costs might have been a direct and immediate consequence of a fault by Defendants.

3022. JTIM submits that the above paragraphs are sufficient to dispose of this last-minute tactical strategy by Plaintiffs.

3023. As appears from the sections below, JTIM did not commit or participate in any abuse of process. The representations made hereinafter are pleaded on an alternative basis only, to dispel any doubt that there was any abuse on JTIM's part.

[2986] *Viel* v. *Les entreprises immobilières du Terroir Ltée* [2002] R.J.Q 1262 (C.A.).

3024. Suffice it to say, at this stage, that the notion of abuse is a stringent one which must be applied with great prudence, the Court of Appeal noted in the present matters, when dismissing Defendants' actions in warranty against the Federal Government.

3025. In fact, Plaintiffs devote nearly two pages to support their claim that the actions in warranty against the Government of Canada were abusive.[2987] They allege "*Even if the proceeding itself was not abusive at the outset, the evidence shows that the defendants had not genuine intention to make any claim against the Federal government and in fact used it mainly to delay and complicate the proceedings.*"[2988]

3026. Plaintiffs fail to mention that this Court dismissed this Motion on February 14, 2012. Plaintiffs also fail to mention that the AGC argued, at that time, that the actions in warranty were, among other grounds of dismissal then raised, an "*improper use of procedure*", under 54.1 CCP.

3027. Plaintiffs are also silent about the Court of Appeal's decision, rendered on November 14, 2012, on the very same issue. In this decision, Justice Gascon, J.C.A., as he then was, clearly and expressly dismissed this same argument, thereby also confirming that the notion of abuse was not one that should be used lightly:

> *[146] Vu la conclusion qui précède, il n'est pas nécessaire de traiter longuement des arguments additionnels que présente le PGC sur l'abus de procédure dont il taxe les Fabricants en raison de leur insistance à vouloir procéder sur les actions en garantie malgré l'arrêt Imperial, de même que sur sa demande de rejeter partiellement ces actions en garantie pour ce qui est des dommages punitifs qui lui sont réclamés.*
>
> *[147] Qu'il suffise de dire que si la position des Fabricants est, à mon avis, mal fondée, il m'apparaît clair qu'elle ne saurait être qualifiée d'abusive, de déraisonnable ou d'excessive. Au premier chef, le juge d'instance leur a donné raison, ce qui rend particulièrement ardu tout argument voulant qu'il s'agisse là d'un acte qui apparaît sommairement abusif. En outre, le sérieux du débat fait échec à la qualification d'abus dont le PGC voudrait coiffer la situation sous l'égide des articles 54.1 et suivants C.p.c.*
>
> *[148] Dans l'arrêt Acadia Subaru c. Michaud, le juge Kasirer rappelle la prudence qui doit guider l'analyse avant de conclure à l'application des articles 54.1 et suivants C.p.c. à une situation dite d'abus. À ce chapitre, je constate que les arguments avancés par les Fabricants n'étaient ni frivoles ni dilatoire.*
>
> *[149] Quant à la demande du PGC voulant qu'il puisse être décidé immédiatement que les actions en garantie sont mal fondées en ce qui touche la demande de dommages punitifs, il n'y a pas lieu de s'y attarder. Sans compter*

[2987] Plaintiffs' Notes and Authorities, paras. 2215-2219.
[2988] Plaintiffs' Notes and Authorities, para. 2217.

> *qu'il s'agit là de questions qui soulèvent des controverses que la jurisprudence ne semble pas avoir réglées de façon définitive, il est reconnu depuis longtemps que l'irrecevabilité partielle n'est pas ouverte, particulièrement dans une situation où la réclamation en dommages punitifs reste accessoire à la réclamation globale présentée.*[2989] [Our emphasis]

3028. JTIM reserves all its rights to adduce evidence and make additional representations, should this Court agree to even consider these belated demands by Plaintiffs. .

[2989] *Canada (Procureur général) v. Imperial Tobacco Ltd.*, 2012 QCCA 2034 (CanLII), paras. 146-149.

A.2 JTIM did not commit or participate in any abuse of process

A.2.a The Unprecedented Nature of the Case

3029. These class actions threaten the very existence of the Defendants. JTIM is, accordingly, entitled to fully defend its positions and it is not surprising that it has done so. Moreover, these cases, characterized by this Court at times as "*gargantuan*" and "*historical*", involved legal and factual issues and procedural problems that few lawyers and judges had ever faced before in Canada.

3030. The allegations cover some fifty years of history, and involve two class actions allegedly comprising 919,218 and 162,168 class members respectively, who allege that their prejudice was caused by a multitude of faults, although none of them testified. On any view, these are not standard cases.

3031. This Court itself, in an early ruling in this case, recognized the importance of what is at stake in these matters for Defendants, when it remarked: "*Cependant, dans un dossier avec de tels enjeux, on ne peut blâmer les parties à vouloir retourner chaque pierre du jardin.*"[2990]

3032. In another ruling in which Plaintiffs were asking for an order to force Defendants to file their expert reports, this Court rightly recognized the unusual "*burden*" that Plaintiffs had put on Defendants, while dismissing the motion: "*S'il est vrai qu'elles ont bénéficié de certains droits procéduraux plus larges que de coutume, c'est surtout dû au fait que la cause des demandeurs fait en sorte de leur imposer un fardeau inhabituel.*"[2991]

3033. This Court further recognized, in its November 10, 2009 judgment dismissing a Motion for a stay, that this matter represented a "*massive undertaking*"[2992], that it involved a "*mammoth volume of documents to be reviewed*"[2993] for the parties and that the importance of the amounts at stake was out of the ordinary:

> [24] The only downside that the Court can see to proceeding this way is a possible additional financial cost to the parties. Should the Act be upheld, some proof might have been made and some court and preparation time might have been used unnecessarily. It is obvious that, by waiting for the result of the Challenge before going further, one avoids this risk.
>
> [25] <u>That is true, but let U.S. not lose sight of the fact that the amount in play in these files is in the neighbourhood of twenty-five billion dollars</u>

[2990] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2008 QCCS 500 (CanLII), para. 10.
[2991] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2009 QCCS 2096 (CanLII), para. 4.
[2992] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2009 QCCS 5157 (CanLII), para. 48.
[2993] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2009 QCCS 5157 (CanLII), footnote 2.

> ($25,000,000,000)! While the Court is a fervent supporter of proportionality as a guiding light for the management of files, the numbers here tend to rule out that consideration as a source of irreparable harm to the Companies in the present cases.[2994] [Our emphasis]

3034. JTIM has never hidden the fact that it believed from the outset that a class proceeding was an entirely inappropriate way to handle these proceedings. In its submissions above, JTIM has sought to demonstrate that Plaintiffs - having invoked unprecedented legal theories unknown in law and novel approaches unknown to epidemiology - have totally failed to discharge their burden and have thus shown that these class actions must be dismissed.

3035. But it is the Plaintiffs who chose and insisted on this battleground, and they cannot complain now that it was not simply abandoned by JTIM, nor complain, for the first time, about events that go back some 16 years.

A.2.b This Court Should Refuse to Visit Past Events, Particularly Those Prior to Authorization

3036. Plaintiffs are asking for a ruling that violates the most basic principles of fairness.

3037. Whenever a party thinks a procedure is abusive on its face, basic fairness requires that the party ask the Court at that time to declare the proceeding abusive. This would then give the other side the opportunity to react contemporaneously to justify its position. With the exception of the "May 2nd Judgment", Plaintiffs only plead the abuse in their written argument, long after the fact. This delay must be fatal to any allegation of abuse of process.

3038. JTIM submits that this Court should refuse to reconsider past events, particularly those which occurred before other judges, or other Courts, such as the Court of Appeal. There should be no retrospective second guessing of decisions made in other contexts.

3039. JTIM submits that the same logic should also apply to the reproaches pertaining to events which occurred at a time where this Court was managing these cases.

3040. This is especially true considering that this Court has referred to potential abuse only twice in its management of these cases over six years, both in specific circumstances.

[2994] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2009 QCCS 5157 (CanLII), paras. 24 and 25.

3041. In that vein, it is disturbing to see that Plaintiffs are now asking this Court to do the exact opposite of what it had stated, very early on, would be this Court's general philosophy in the treatment of these matters:

> *[10] Les Demandeurs ciblent aussi le manque de diligence de la part des Défenderesses dans le fait d'avoir attendu avant de déposer les actions en garantie quelques deux ans du premier instant où elles auraient pu le faire, et cela, dix ans après la signification des requêtes en autorisation de ces recours collectifs. Ils soulignent de plus l'importance d'obtenir un jugement rapidement dans ces dossiers où bon nombre des Demandeurs sont atteints de maladies fatales.*
>
> *[11] Le Tribunal est sensible au second volet de ces arguments, même s'il rejette comme non pertinent le premier. Dans la gestion de ces dossiers, le Tribunal doit regarder vers l'avant, sans tenter de pénaliser ce qui est advenu par le passé.*[2995] [Our emphasis]

A.2.c Conduct leading up to trial

3042. On November 10, 2009, this Court, while dismissing the Motion seeking a stay, nonetheless underlined that Plaintiffs themselves were not yet ready for trial, and added that it was relying on the "*excellent assistance of the parties' attorneys*"[2996] to ensure that this trial could begin as early as possible:

> [29] On the state of the Plaintiffs' files, although it is true that the trial could not start tomorrow, it is not relevant. The Court has already stated that it would not contemplate a trial date before next September (2010), some ten months from now. Plaintiffs indicate that they are comfortable with that schedule and undertake to be ready by then. Their readiness, therefore, does not appear to be an obstacle.
>
> [...]
>
> [62] [...] The Court, with the excellent assistance of the parties' attorneys, must find creative yet equitable ways to accommodate the Companies' desire to present full and proper defences, while refusing their wish to put the files into suspension. We are willing and anxious to do that, and, in this spirit, dismiss the Companies' Motion to Stay, with costs to follow suit.[2997] [Our emphasis]

[2995] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2008 QCCS 2481 (CanLII), paras 10, 11.
[2996] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2009 QCCS 5157 (CanLII), para. 62.
[2997] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2009 QCCS 5157 (CanLII), paras. 29 and 62.

3043. Plaintiffs complain about the delays. However, they seem to have forgotten that they themselves took a long time before filing both their declaration of readiness and their inscription, which they only did on January 25, 2010.

3044. Incidentally, if one compares the content of Plaintiffs' declaration of readiness with the evidence that they eventually presented, and the issues that were actually presented during their proof, it is difficult to find much resemblance. Numerous witnesses were added and moved. Extensive document disclosures (including hundreds, if not thousands, of documents) were added after the trial began, and Plaintiffs often took far longer in examination in chief and cross-examination than predicted (e.g. Mr. Descôteaux, Mr. Larivière, etc.).

3045. On April 14, 2010, the parties agreed to a Timetable, which was approved by the Court, and which had the effect of hastening the preparation of the file towards trial and eliminating the need for several preliminary motions. At that a date, none of the parties was ready to start the trial.

3046. Aa result of this Timetable agreed on by all parties, many incidental proceedings and preliminary exceptions motions no longer needed to be heard, as appears from the Timetable.

3047. This Court, in its August 10, 2011 judgment granting a postponement of the beginning of the trial, initially scheduled to begin on October 17, 2011, recognized the "*great good faith*" of all the parties involved, noting that: "*[...] the parties demonstrated great good faith and dare we say it, optimism, in agreeing to the Timetable and, with one major exception, valiantly attempted to respect it.*"[2998]

A.2.d The conduct of the trial was reasonable

3048. The trial started on March 12, 2012. The Court did dismiss another motion from the Defendants, which would have resulted in postponing the beginning of the trial, a decision from which JTIM did not seek leave to appeal. Despite dismissing the Motion, this Court nonetheless expressed, yet again, that it understood the parties' situation and remarked on their genuine efforts to get the cases ready for trial, considering the challenge that these class actions represented:

> [27] In an ideal world, the parties to a case, <u>even one as gargantuan as this one</u>, would have all relevant documents neatly bound, carefully read and colourfully

[2998] See para. 7 of the Judgment *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2011 QCCS 4084 (CanLII). - the exception mentioned being the failure of the Federal Government to comply with certain delays for document production.

> highlighted before walking into the courtroom on the first day of trial. Alas, modern-day litigation, especially in class actions of this nature, hijacks jurists into a parallel world to the ideal one, but it is a world where we have to find a way to survive. If one is ever to hope to get to - and through - a trial of this sort, it is essential to forsake the ideal for the "reasonably possible". Failing that, justice could never be rendered.
>
> [...]
>
> [28] The Court understands that, to date, tens of millions of pages of documents - and that is not a typographical error — have been exchanged among the parties in these files. No human or even team of humans, could ever read all of them, so it was ordered that all document communications in these files be done electronically, to allow for computer searches to identify the key pages. Some will inevitably be missed. It cannot be helped. This is all that is reasonably possible.
>
> [32] The parties showed great ingenuity and flexibility in coming to that Timetable and in accepting that the trial in the main action must begin before the Actions in Warranty will be fully ready. They must continue in the same spirit.[2999] [Our emphasis]

3049. Nothing is ever perfect in life, but when one looks back objectively at it all, one should acknowledge that JTIM complied with its time assessments for its cross-examinations, that arrangements were made to move its witnesses who attended at Plaintiffs' request, and that genuine efforts were made by JTIM to ensure that this trial would eventually come to an end.

3050. As a mere illustration, JTIM arranged for former JTIM employees who Plaintiffs wanted to examine to be present in Court, when it could,, arrangements were made with Plaintiffs to avoid the need to argue some objections pertaining to professional secrecy, agreements were arrived at both with respect to the confidentiality of some documents and testimony, and with respect to Exhibit 1702-R, involving a discontinuance from an appeal as of right, to ensure that this appeal would not delay the conclusion of the trial. This is hardly the typical behaviour of an abusive party.[3000]

3051. The fact is that the presentation of Plaintiffs' evidence took longer than that of the three separate Defendants collectively. Plaintiffs' counsel criticizes the conduct of the Defendants on lengthening the trial, as if the filing of cross-appearances on the eve of the trial, and having two lawyers (sometimes from the same firm) cross-examine the same

---

[2999] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2012 QCCS 515 (CanLII).

[3000] JTIM's attorneys also sought to facilitate the presentation of its documentary evidence at trial by arriving at agreements with Plaintiffs before a witness came to testify to spead up the introduction of the evidence. See for example, during the testimony of Mary Trudelle, March 27, 2014, pp. 181-185. See also: during the testimony of Mr. Choinière, June 10, 2013, pp. 13-14;

witness, often repeating the same questions, had nothing to do with the length and difficulty of managing the hearing.

3052. The trial was not at all like what is depicted in Plaintiffs' incomplete and biased selection of alleged abuses and it reflects negatively and unfairly on this Court's case management.

A.2.e The May 15, 2013 Ruling

3053. It is also important to emphasize that only once through this trial was there any semblance of a finding against JTIM for any form of abuse.

3054. This concerned the Court's May 15, 2013 "*Case management ruling on the Companies' proposed trial schedule*", concerning the very same schedule this Court had ordered the Defendants to prepare on a joint basis, that qualified the draft schedule as being excessive and unreasonable.

3055. On May 27, 2013, this Court, while responding to representations made by Defendants' attorneys concerning the May 15, 2013 ruling, confirmed that the term abusive had only been used with respect to the joint trial schedule and that it had only been used on one other occasion, i.e. in the May 2, 2012 judgment, concerning only ITL:

> I have reflected on your complaints concerning my case management ruling. My use of the word "abusive" in that document is in relation to what I characterize as an excessive and unreasonable trial schedule.
>
> This reflects the language of article 54.1 of the Code of Civil Procedure and it is not the first time that I've made this type of holding in these files. In fact, my May second (2nd), two thousand and twelve (2012) judgment goes even further in that regard, with respect to ITL.
>
> Nevertheless, the present ruling makes no allusion to bad faith or to a breach of any ethical or professional standard and you should not read more into it than what is actually there.[3001] [Our emphasis]

3056. It is apparent that if this Court considered conduct to be abusive, it felt it had the power and inclination to intervene and used that power at the time of the apparent abuse.

3057. While JTIM was called abusive for its joint submission of this collective draft schedule – one where JTIM had scheduled only 21 days for its ten witnesses (see para. 21) – its reaction shows that the Courts' complaint did not fall on deaf ears. The Defendants' reaction was to submit a greatly reduced schedule, which this Court accepted and clearly

[3001] Transcript of May 27, 2013, p. 6.

indicated that it no longer considered it to be abusive. In fact, the original schedule had no impact whatsoever on how the trial actually ended up proceeding, and it cannot therefore be used in support of their argument that JTIM was abusive.

3058. JTIM even elected not to call some of its experts (Dr. Rice, Dr. Goumaniouk) to avoid unnecessary repetition.

3059. Ironically, in a perfect illustration of the "*damned if you do, damned if you don't*" saying, Plaintiffs found a way to complain about the shortness of the presentation of the defense, when it stated that Defendants "*took only 94 days*".[3002]

A.2.f The Defendants are three separate entities and the object of separate trials, in a joint hearing

3060. Plaintiffs' claim also ignores another reality that this Court has constantly reminded the parties of, i.e. that these are two separate class actions against three separate and distinct Defendants, amounting to six separate cases. The Defendants are not, in any sense, interchangeable, nor can they be treated as one single entity. They are fierce competitors with different histories, different products, different styles, different consumers and different lawyers.

3061. This Court made this clear, and rightly so, on more than one occasion. For instance, on April 30, 2012, this Court stated:

> *LA COUR:*
>
> *Non. Non, je veux que ça soit compagnie par compagnie, j'ai trois (3) jugements à écrire, il faut... c'est comme si j'écoutais trois (3) personnes, il faut que je divise dans ma tête et dans mon jugement les trois (3) compagnies. Alors, aidez-moi à faire ça. La question de la policy n'est pas la même chose pour chaque compagnie, il va falloir que j'analyse cet aspect-là...*
>
> *Me ANDRE LESPERANCE:*
>
> *Oui.*
>
> *LA COUR:*
>
> *... pour chacune des compagnies.*
>
> *Me ANDRE LESPERANCE:*
>
> *Mais il y a une zone commune des trois (3) compagnies au niveau du CTMC.*

[3002] Plaintiffs' Notes and Authorities, para. 2264.

LA COUR:

Inévitablement. Mais je ne vais pas écrire mon jugement par thème, je vais l'écrire par compagnie; avec les mêmes thèmes, probablement.[3003]

3062. Plaintiffs try to circumvent the reality and justify their lack of diligence in targeting every Defendant indiscriminately on the basis of flimsy logic, which is not only wrong but inappropriate. They state: "*Although many examples were spearheaded by ITL, all three Defendants stood to benefit from the abuse of any of them and RBH and JTI often allowed ITL to assume de facto control of their litigation agenda.*"[3004]

3063. This is a preposterous assertion. Firstly, it cannot be that if JTIM stands to benefit from the position adopted by another Defendant, that necessarily it implies the proceeding or position was adopted or approved by JTIM. This similar faulty logic underlies the Plaintiffs' entire conspiracy theory.

3064. Secondly, there are numerous occasions where the Defendants took different positions, for example, the issue of calling class members to testify, that of conducting a survey of class members, that of seeking to obtain medical records, the responses under Article 403 CCP and the confidentiality of documents, to name only a few.

3065. The record also shows that, on several occasions, JTIM did not seek leave to appeal interlocutory decisions when other Defendants did.

3066. Finally, as mentioned above, there were many occasions when this Court specifically asked the Defendants to coordinate their efforts, such as the joint schedule, the AGC's discoveries, etc. JTIM always strove to avoid duplication (e.g. in cross-examination of Plaintiffs' expert witnesses, when it examined AGC witnesses on discovery) to be efficient and it maintained, at all times throughout these cases, a spirit of collaboration with the Court, Plaintiffs and Defendants.

3067. JTIM has never allowed ITL or RBH to assume its defense, *de facto* or otherwise. The other Defendants have acted in their sole and best interests. JTIM has acted in its sole and best interests, as was its absolute right to do.

3068. Plaintiffs also confuse the role of the Defendants. They suggest at times that there would have been an obligation for the Defendants to denounce one another, to comment on each

---

[3003] Transcript of April 30, 2012, pp. 39-40.
[3004] Plaintiffs' Notes and Authorities, para. 2196.

others actions and motions, or to make it expressly clear whether they supported, were ambivalent or against every motion.

3069. It would have been completely inappropriate for JTIM to try to seek to impose its views on the other Defendants. No Defendant had any control over the other and to suggest otherwise is not only contrary to the facts, but is frankly insulting. Plaintiffs blame the Defendants for cooperating where they could, but would undoubtedly complain of abuse had the Defendants not cooperated and insisted on duplicative evidence and cross-examinations.

3070. As Mtre. Pratte told this Court on May 27, 2013, the most that JTIM could do in any given situation would be to voice its position or comment, internally.

3071. After all, it is Plaintiffs who decided to sue three Defendants in the same class actions. This decision, just like any other, provokes consequences, some good, and some bad, depending on where one stands. Any trial against three Defendants is necessarily more complex than against only one.

3072. One assumes that before making serious accusations attacking the reputation of both JTIM and its attorneys, Plaintiffs would at least strive to be as accurate as possible and would have erred on the side of caution. But as we show below, they have not.

A.3 Response to Specific Allegations

A.3.a JTIM's motion to dismiss was not abusive

3073. In their Notes and Authorities, Plaintiffs refer to the Defendants' "*Motion to dismiss*" presented after the close of Plaintiffs' evidence as an illustration of "*an all-out procedural blitz*"[3005] and qualify the latter as being "*groundless and abusive*".[3006]

3074. Again, Plaintiffs fail to mention that this Court first asked Defendants to justify why these motions should be heard. Following the production of short plans outlining the reasons why such motions should be heard, this Court specifically authorized their presentation. This, in and of itself, should suffice to dismiss Plaintiffs' characterization out of hand.[3007]

3075. Furthermore, while this Court dismissed the Motions, it nonetheless underlined the seriousness of some of Defendants' arguments, including that with respect to causation:

[3005] Plaintiffs' Notes and Authorities, para. 2193.
[3006] Plaintiffs' Notes and Authorities, para. 2272.
[3007] See transcript of February 13, 2013, pp. 382-384.

> [16] Let U.S. be clear. We are not deciding the issue at this time. On the merits we might well end up accepting the Companies' arguments on causality, for they merit serious consideration. All that we are saying is that enough evidence has been adduced through the Plaintiffs' experts to refrain from cutting the trial off now.[3008] [Our emphasis]

3076. This Court also dismissed the motion without any award as to costs "*since some of the companies' arguments might end up carrying the day at a later time*".[3009] These motions were clearly not abusive.

A.3.b The Motion to Disqualify

3077. In that vein, the only point made by the Plaintiffs aimed at a specific proceeding emanating from JTIM goes back to 1998, when it unsuccessfully sought the disqualification of Ms. Létourneau's attorneys.[3010] A court ruled on this matter 16 years ago. It is not relevant to any issue now and this Court should not to make any findings in respect of it.

3078. The authorization process is a separate instance, which was completed by the authorization judgment issued by Jasmin J. in 2005, which was a final judgment, which, as Plaintiffs point out, was not subject to appeal. The present instance commenced with the filing of the Motion to Institute Proceedings in 2005.

3079. If Plaintiffs considered Defendants' conduct during those proceedings abusive, they could have made the appropriate allegations and sought relief for that behaviour before Justice Jasmin. They did not. In any event, Plaintiffs' claims in this regard are long prescribed.[3011]

A.3.c The Discoveries

3080. The same is true of the discoveries at authorization, all of which were authorized by Justice Jasmin. If Plaintiffs thought their duration or content was abusive, the appropriate time to bring this up was then, before that Court.

3081. In fact, at paragraph 2204, Plaintiffs allude to a motion that they brought in 2002 "*detailing in 19 pages the abusive tactics employed by defendants.*" What they fail to

---

[3008] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2013 QCCS 1924 (CanLII), para. 16.
[3009] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2013 QCCS 1924 (CanLII), para. 62.
[3010] Plaintiffs' Notes and Authorities, paras. 2199-2203.
[3011] In fact, the three year prescription has long been acquired on this and many other claimed rights of action.

mention was the outcome of this motion: there was no finding of abuse, nor any award for costs.[3012]

3082. Plaintiffs allege that the discoveries (both before and after authorization) were abusive, both in their length and because they were not filed.[3013]

3083. With respect to their length, Defendants undertook not to repeat questions that were asked at authorization. In fact, Plaintiffs failed to mention that there was an agreement reached between the parties whereby the discoveries held at the authorization stage could be used in the class actions – despite these two being separate and distinct instances – in order to avoid unnecessary duplication.

3084. However, since so many of the allegations and issues changed from authorization to when the actions were filed, Defendants had no choice but to ask extensive questions of the Representative Plaintiffs, who were, after all, advancing claims for billions of dollars, and supporting proceedings that contained hundreds of allegations by individuals claiming to be representative of millions of others.

3085. Plaintiffs were also perfectly free to ask, at any time, for those discoveries to be suspended if they found them to be repetitive or abusive. The time to complain about those discoveries has long passed.

3086. Plaintiffs also consider it abusive that Defendants failed to file any of these discoveries at trial.[3014] It is a parties' absolute right under Section 398.2 CCP to choose to file discoveries or not. If this Court were to find that this failure constituted an abuse, this would flatly contradict a long-standing legislative choice in this regard, and would have consequences far beyond the present instance. There is no judicial support for such a finding.

3087. Additionally, Plaintiffs conveniently fail to mention that it was they themselves who changed their minds, during trial, and finally decided not to call the class representatives to testify, after putting them on their list of witnesses and making broad allegations about their personal claims in the proceedings filed in both the *Blais* and *Létourneau* matters.

3088. Plaintiffs even went so far as to try to remove Mr. Blais' personal claim from their proceedings – a request which this Court refused – and now contend they never included a personal claim for Ms. Letourneau despite having in their proceedings a section entitled

[3012] Procès-verbal of hearing before Mr. Justice Lagacé, March 26, 2002.
[3013] Plaintiffs' Notes and Authorities, para. 2204-2206.
[3014] Plaintiffs' Notes and Authorities, para. 2206.

"*Le cas de Mme Cécilia Létourneau*", which contains 19 allegations – a position which was only made clear during the debate concerning redefining the class. If Defendants had to provide an explanation for not filing the transcripts – which they do not – this alone would suffice to explain it.

A.3.d The Experts

3089. At paragraphs 2209 and ff., Plaintiffs outline a series of complaints and allegations including that Defendants were involved in the "*heavy lawyering of expert reports*"[3015] and that Defendants "*sheltered the defendants' experts from being exposed to evidence or opinions that would render it impossible for them to render the type of opinions the defendants wanted.*"[3016]

3090. These unfounded allegations will be dealt with below to the extent that they deal directly with JTIM's experts. However, JTIM notes that these allegations are clearly made, not with a view to substantiating abuse, but more to bolster Plaintiffs' *ad hominem* attacks on the credibility of Defendants' experts.

3091. JTIM notes as well that it is ironic that such allegations are made from a party who withdrew an expert at the last minute (Professor Slovic); withdrew 75-pages from another (Dr. Proctor) once his inability to testify about the Canadian situation was made clear in cross-examination during his *voir dire*; who presented an expert (Professor Pollay) who did not re-review any documents that had been cited in his previous reports although they were readily available; and who represented to its expert (Mr. Bourque) that the 7,000 documents he reviewed represented the entirety of the hundreds of thousands documents actually provided by the Defendants.

3092. Finally, at paragraph 2214, Plaintiffs make the unsubstantiated assertion that "*virtually none of [the Defendants' experts] depended on information that was to come from the AGC.*" For JTIM's part, this completely ignores the extensive use of those documents made by Professor Perrins in his three expert reports (the second two of which relied exclusively on that documentation).

[3015] Plaintiffs' Notes and Authorities, para. 2209.
[3016] Plaintiffs' Notes and Authorities, para. 2210.

A.3.e The Calling of the Federal Government In Warranty

3093. As previously mentioned, one of Plaintiffs key illustrations of the alleged abuse of process pertains to the actions in warranty against the Federal Government.[3017]

3094. Plaintiffs' silence regarding this Court's decision and the Court of Appeal's decision, both confirming that these actions were not abusive is, to say the least, surprising. There is clearly *res judicata* on this issue.

3095. Plaintiffs also refer to this Court's pre-trial decision on a Motion to Strike to suggest that this Court determined that what took place at Delhi was "*completely irrelevant to the case*".[3018]

3096. Once again, Plaintiffs omit to mention that leave to appeal this decision was granted[3019], and that they entered into an agreement with Defendants, approved by this Court, whereby they abandoned all their rights under that judgment:

> The Defendants will discontinue their appeal of Justice Riordan's interlocutory judgment on Plaintiffs' Motion to strike (the "Judgment on Motion to strike"), subject to the following conditions being complied with and approved by the Court:
>
> > In exchange for Defendants' discontinuance of their appeal, Plaintiffs will renounce to the rights arising from the Judgment on Motion to strike. Plaintiffs recognize that all the allegations of Defendants' Pleas, which were struck following the Judgment on Motion to strike, are therefore restored for the purpose of allowing all evidence relating to the allegations struck following the Judgment on Motion to strike to be filed in the main actions, subject to the right to object to same as et out in paragraph b below;

3097. Plaintiffs also failed to refer to this Court's more recent ruling of May 15, 2013, where this Court confirmed that these issues were in fact relevant:

> [23] It is not that the role of the federal government is irrelevant to these cases. Although the Companies' action in warranty has now been dismissed, the Court recognizes that the activities of Health and Agriculture Canada ("Canada") in the areas, inter alia, of advertising restrictions, notices to the public, light and mild cigarettes and new tobacco strains have pertinence to at least the question

[3017] Plaintiffs' Notes and Authorities, paras. 2215-2219.
[3018] Plaintiffs' Notes and Authorities, para. 2219.
[3019] *JTI-MacDonald Corp. v. Conseil québécois sur le tabac et la santé*, 2010 QCCA 177 (CanLII).

> of punitive damages. The problem lies in the amount and type of evidence that the Companies appear intent on adducing.[3020] [Our emphasis]

3098. Furthermore, any argument that the role of the Federal Government over tobacco in these cases would not be relevant is just not credible. It is one thing to argue that its role is irrelevant, but it is another matter entirely to argue that it would be abusive to refer to make evidence about it as part of its defence.

3099. It is also surprising to see Plaintiffs arguing that the whole issue of the Federal Government's role has absolutely no relevance to these cases, whereas they fought for the right to have their own consultant present, Mr. Collishaw, as early as possible in Defendants' evidence. As the saying goes, actions speak louder than words.

3100. The fact that the action in warranty was dismissed means only that there was no legal foundation for a claim against the government; not that its actions were irrelevant to the issues to be decided by this Court.

3101. Plaintiffs then state at paragraph 2219 that Defendants' discovery of the AGC was "*virtually useless*". In fact, at least 2,380 Exhibits in the Court record come from that discovery. Plaintiffs also themselves asked to have access to that discovery. Why would they have done this if it was abusive and unnecessary? Why would they agree that this discovery could continue, as appears from the Timetable, even if the AGC was removed from the cases?

3102. Finally, Plaintiffs fail to mention that the trial started even though the case against the Federal Government was not yet ready for trial. There is simply no evidence that the calling in warranty of the Federal Government was abusive, useless or a delaying tactic. In fact, it clearly was not, as recognized by this Court and the Court of Appeal.

A.3.f JTIM's 403 CCP Responses

3103. Plaintiffs also seriously mischaracterize this Court's May 2, 2012 judgment and make unwarranted accusations against JTIM when they allege:

> 2232. The defendants, ITL in particular, denied the authenticity of virtually every document which formed part of their corporate records [...]. This gave rise to the May 2, 2012 judgment which concluded that this practice was abusive.

[3020] *Conseil québécois sur le tabac et la santé c. JTI-Macdonald*, 2013 QCCS 1993 (CanLII), para. 23.

> 2244. As mentioned, this Court declared on May 2, 2012 that the systematic denial of authenticity of corporate record documentation was abusive.

3104. In fact, JTIM recognized the authenticity of all of its own documents found in its records.

3105. Furthermore, the May 2, 2012 judgment had nothing to do with JTIM, a fact Plaintiffs acknowledged in open court, but seem to have forgotten now.

3106. Plaintiffs' motion leading to that judgment made it crystal clear that it was only dealing with ITL's *"avis de dénégation"* and a few of ITL's documents:

> *DECLARER que les avis de dénégation d'ITL produits sous les cotes R-1et R-2 en vertu de l'article 403 C.p.c. sont abusifs et dilatoires en vertu des articles 54.1 C.p.c. et suivants, relativement aux documents suivants: PAS1624, PAS1634, CAS1627, MRPF3804, MRPF3784;*
>
> *RADIER les avis de dénégation en vertu de l'article 403 C.p.c. des défenderesses en ce qui concerne ces derniers documents;*
>
> *AUTORISER la production en preuve au dossier de la Cour pour faire preuve de leur authenticité (véracité) les documents divulgues par ITL et portant les numéros de contrôle suivants: ES20453, PAS1624, PAS1634, CAS1627, MRPF3804, MRPF3784, CL12556 et CL10174;*

3107. At the hearing of the Motion, Plaintiffs confirmed twice that they were not seeking any finding of abuse against JTIM (despite the manner in which their motion was framed) which led this Court to say that the latter could therefore sleep *"sur ses deux oreilles"*:

> *Me PHILIPPE H. TRUDEL:*
>
> *Oui, j'ai été tranquille ces derniers jours, très sage. Aujourd'hui, Monsieur le Juge, c'est une requête qui a deux volets. Le premier volet, c'est pour faire déclarer abusif le refus par ITL de reconnaître l'exactitude de certaines pièces qui ont été jointes à notre requête, puis le deuxième volet, c'est pour que certaines autres pièces qui n'ont pas fait l'objet d'un 403 soient admises en preuve. On va faire des distinctions qui s'imposent au fur et à mesure qu'on regardera les documents, mais essentiellement, ce que je vous dirais, c'est que c'est vraiment une requête qui découle du refus systématique par ITL d'admettre des pièces qui ont été dénoncées en vertu de 403.*
>
> *[...]*
>
> *Me DOUGLAS MITCHELL:*
>
> *but there's an accusation that our denials...*

Me PHILIPPE H. TRUDEL:

There's no accusation.

Me DOUGLAS MITCHELL:

... are abusive. Bien oui.

Me PHILIPPE H. TRUDEL:

There's no accusation. [...]

Me DOUGLAS MITCHELL:

Bien oui.

Me PHILIPPE H. TRUDEL:

No no, we just mentioned "radier les avis de dénégations" with respect to you. The declaration is only for ITL. So don't worry about that.

Me DOUGLAS MITCHELL:

Paragraph 5 looks to me like an accusation.

LA COUR:

Vous pourrez dormir sur vos deux oreilles.

Me DOUGLAS MITCHELL:

Sorry?

LA COUR:

Vous pourrez dormir sur vos deux oreilles. Thank you, Mr. Mitchell." [Our emphasis]

3108. This explains why the May 2 judgment's conclusions only dealt with ITL's documents and ITL's notices of denial:

> *[53] DÉCLARE abusifs en vertu des articles 54.1 et suivants du Code de procédure civile les avis de dénégation signifiés par ITL en vertu de l'article 403 C.p.c. en ce qui concerne les documents portant les numéros de contrôle PA51624, PAS1634, CAS1627, MRPF3804 et MRPF3784;*

> *[54] RADIE les avis de dénégation en vertu de l'article 403 C.p.c. d'ITL en ce qui concerne les documents divulgués par ITL et portant les numéros de contrôle suivants: PAS1624, PAS1634, CAS1627, MRPF3804 et MRPF3784;*
>
> *[55] AUTORISE la production en preuve au dossier de la Cour pour faire preuve de leur authenticité (véracité) les documents divulgués par ITL et portant les numéros de contrôle suivants: PAS1624, PAS1634, CAS1627, MRPF3804 et MRPF3784.*

3109. That Plaintiffs now seek to raise this issue as an example of abuse by JTIM is, once again, entirely misleading and inappropriate. They never made any claim of abuse relating to JTIM's 403 responses in that motion or in any other, for that matter.

A.3.g Evidence Presented At Trial

3110. Plaintiffs also insist, in one long section, on what they refer to as a "*double standard for proof at trial*".[3021]

3111. Once again, this section contains many factual errors and inaccuracies, but what is most striking is its underlying message, namely that Defendants should be labeled as abusive for objecting on the basis of the hearsay rule and requiring that evidence that was being adduced for the truth of its contents be only admitted through a witness who was able to answer questions regarding the content of the document.

3112. While JTIM respectfully still holds the view that this Court went too far in its rulings relating to arts. 403 CCP and 2870 CCQ, it is plainly wrong and simply untrue to assert that JTIM refused to follow those rulings.

3113. Plaintiffs allege the following: "*[...] which [the two judgments pertaining to section 2870 C.C.Q.] the Defendants refused to follow, even without prejudice to their right of appeal on the merits in that regard.*"[3022]

3114. The record shows that JTIM did just the opposite, on numerous occasions.[3023] The following excerpt is a good example of the kind of standard position adopted by JTIM's attorneys, not to "retry" this Court's 2870 decisions:

> Me CATHERINE McKENZIE:
> Correct. So we consent to remove the R. And I just want to note it in the record that we consent on the basis that we accept that it would meet the criteria that you

---

[3021] Plaintiffs' Notes and Authorities, paras. 2231-2253.
[3022] Plaintiffs' Notes and Authorities, para. 2234.
[3023] See transcript of May 14, 2014, pp. 165-166. See also transcripts of March 7, 2013, pp. 216, l. 7-11; 224-225; 233-234; 246, l. 2-15; 250 l. 5-22; and March 11, 2013, p. 309, l. 11-17.

> have laid out in your previous 2870 judgments, but want to reserve our rights with respect to appeal, should we appeal those aspects of your judgment.[3024]

3115. Plaintiffs even go so far as to allege that "*hardly ever in the entire trial, did an author or a document contradict its content. It was clear very early on in the process that the Defendants' own records, reflected the knowledge and attitudes of the Defendants at the time*".[3025]

3116. First of all, witnesses were often questioned on documents they had not authored or in many cases that they had never even seen. There are so many types of documents, so many different contexts in which statements can be made, so many reasons that can explain what was said at different times, that JTIM has always felt that such an approach is wrong in law. The mere fact that it was seen as necessary to have a "2M" on many documents highlights that these concerns were, at the very least, worthy of consideration by the Court.

3117. When witnesses were questioned about documents they had authored or had knowledge about their contents, they often were able to explain what the document actually meant and added context and content. Should we be surprised by this? Our entire law, whether it be in respect of statutory construction or the interpretation of documents, revolves around the self-evident principle that context matters.

3118. In fact, this whole section has nothing to do with any abuse. It is instead an indirect attempt by Plaintiffs to bolster and give credit to most of their evidence which is mainly based on hearsay.

A.4 JTIM's Positions Were Not Abusive

3119. Plaintiffs also try to portray a few selected answers from Mr. Michel Poirier's discovery as being part of an abusive position by JTIM.[3026] This is not only unrelated to any possibility of alleged abuse of process, but it also mischaracterizes, yet again, the essence of this witness' testimony.

3120. In fact, Plaintiffs once again fail to present this Court with a fair account of the situation.

3121. Plaintiffs only refer to an excerpt of Mr. Poirier's discovery without referring to others, which are an integral part of the witness' broader explanation and answer about the issue of causation.

[3024] See transcript of May 14, 2014, pp. 87-88.
[3025] Plaintiffs' Notes and Authorities, para. 2243.
[3026] Plaintiffs' Notes and Authorities, para. 2287.

3122. In the excerpt of Mr. Poirier's discovery that Plaintiffs failed to refer to, Mr. Poirier explained what he meant by "likely cause", which is an indissociable component of the witness' answer on causation, given at his discovery:

> Q. Now, in the case of the three diseases that you have mentioned, which is it? Are these diseases caused by smoking or are – is smoking a risk factor in these diseases?
>
> A. Smoking is a risk factor in these diseases.
>
> Q. Does it cause any of them?
>
> A. To be able to determine if there was a likely cause, if smoking was a likely cause of the disease, I believe there would have to be a full evaluation of the particulars of the individual, from a medical and scientific perspective, to understand the history, background, lifestyle, et cetera, and at that point it might be determined that smoking was likely a cause of that disease.[3027]

3123. In fact, Mr. Pratte had to intervene at trial to ensure that the witness be referred to that part of his discovery too, so that the witness would not be misled:

> Me GUY PRATTE:
>
> Just in fairness, Maitre Trudel...
>
> Me PHILIPPE H. TRUDEL:
>
> Oui?
>
> Me GUY PRATTE:
>
> ... just in reference to the witness'... and I'm not going to put anything in his mouth, but refer you to page 37. So, in fairness to him, if you're going to put statements such as the one you put on page 41, you might invite him to look at question 16, page 37, "Does it cause any of them?", and the answer.
>
> Me PHILIPPE H. TRUDEL:
> 220Q-Yes, you do mention... you did say that you have to conduct a full investigation to decide if it was the likely cause and it was only possible to decide that on a case-by-case basis at the time.
>
> A- That's correct.
>
> 221Q-But now, I understand that the position of the company is wider than that; it affirms that smoking causes lung cancer.
>
> Me GUY PRATTE:

[3027] Examination After Plea of Mr. Poirier, June 26, 2008, p. 37.

In some people.[3028]

3124. More importantly, Plaintiffs fail to mention that during his testimony at trial, Mr. Poirier was confronted with the excerpts from his discovery dealing with causation, and that he then clearly explained that he never meant to say that smoking does not cause any diseases:

> Q-Before going to that, Mr. Poirier, when did you acquire the knowledge that smoking causes lung cancer?
>
> A- We always said that smoking incurs risks, including risk of lung cancer. And the fact that we say that smoking incurs risk means that some people will get the disease. So that has been our position as long as I know.
>
> […]
>
> Q- "Because..." Maitre Johnston asks you, "Because you don't believe that it does? It hasn't been established?" And your answer is, "I said we don't have that established relationship."
>
> A- Right.
>
> Q-And he asked you, "So that is the position of not only your company, but JTI as a whole?" And you say, "That's right."
>
> A- Right.
>
> Q-Okay. So, at the time, you did not agree that smoking causes lung cancer; right?
>
> A- At the time, during this examination I was very specific, in the sense that a doctor, after a full examination...
>
> Q-M'hm.
>
> A- ... can determine that this particular smoker in this case, that his lung cancer or disease... and I said... and I chose the words "likely cause" the disease, and I accepted that. And I said it's the same as when we say there's risk; the fact that there is a risk, some people will get the disease. Now, I understand that "likely cause," for all intents and purposes, is the same as "cause." So I... still today, "cause" is "likely cause" in determination of individuals.[3029] [Our emphasis]

3125. Once again, this whole subsection has nothing to do with a potential abuse of process. It is merely an attempt to attack the credibility of Mr. Poirier.

[3028] Testimony of Mr. Poirier, September 18, 2012, pp. 73-74.
[3029] Testimony of Mr. Poirier, September 18, 2012, pp. 70-73.

A.4.a Defendants did not abusively ignore previous findings "*on virtually identical issues*"

3126. It is also preposterous to argue that it was abusive to present evidence and defend against these class actions because the Supreme Court has previously made certain findings, rendered in two decisions in constitutional cases, in a different context and with a different evidentiary standards.

3127. Incidentally, Plaintiffs never made any objection to any evidence on that basis during the whole trial.

3128. This Court does not even know what evidence was filed in the two constitutional challenges. Although some of the issues addressed in those two cases might overlap with some of the issues raised in the current class actions, no one can seriously question that these are two very different recourses, between different parties, seeking a different object.

A.4.b JTIM did not contest Plaintiffs' motion for a rogatory commission

3129. Plaintiffs accuse JTIM of having contested their motion for a rogatory commission: "In a proceeding that could obviate the need to call Me Potter as a witness, the Plaintiffs made a Motion for Rogatory Commission which this Court granted. All three defendants, including RBH, contested that Motion."[3030]

3130. Once again, as the saying goes, why should one let facts get in the way of a good story?

3131. JTIM in fact took no position on this Motion.

3132. In a letter to this Court sent on May 30, 2011 by JTIM's attorneys, this factual inaccuracy was brought up to this Court's and to Plaintiffs' attention:

> *Nous aimerions respectueusement porter à votre attention une inexactitude contenue au paragraphe 3 de votre jugement du 16 mai 2011 intitulé «Judgment on Plaintiffs' Motion for Rogatory Commission and further relief ».*
>
> *Il y est en effet mentionné que JTI-Macdonald Corp. aurait contesté la requête des demandeurs ayant mené à ce jugement interlocutoire, ce qui est factuellement inexact. En effet, puisque cette requête n'impliquait pas notre cliente, nous n'avons fait aucune représentation lors de sa présentation ni avons-nous pris quelque position que ce soit quant à celle-ci.*

[3030] Plaintiffs' Notes and Authorities, para. 2223.

3133. This Court's response to JTIM's attorneys, which was also addressed to Plaintiffs, set the record straight:

> *Me Grondin,*
>
> *Mes excuses sincères pour ce lapsus. J'espère que vous comprendrez que je ne vois pas la nécessité de rectifier le jugement pour cette raison.*[3031]

3134. However, even this allegation pales in comparison to the assertion that the asking of leading questions by all of Defendants' attorneys was part of a pattern of conduct that could justify a finding of abuse. Really?[3032]

A.4.c The "excessive lawyering of experts"

3135. The Plaintiffs also decry what they refer to as "*the excessive lawyering of experts*". While JTIM recognizes that, in theory, inappropriate involvement of counsel could in some instances affect the credibility of an expert's testimony, it bears no relation to abuse within the meaning of Article 54.1 CCP. It also finds no application with respect to any of JTIM's experts.

3136. Furthermore, Plaintiffs' characterization of this issue, as with virtually every issue raised in this section, is entirely overblown, wrong and inappropriate.

A.4.c.1 Dr. Perrins

3137. Plaintiffs allege that "*Part of Perrins' reliance material was selected by JTI counsel*"[3033] and that counsel for JTIM controlled or limited access to relevant information provided to Dr. Perrins.[3034] This is wholly incorrect and a misleading characterization of Dr. Perrins' testimony.[3035]

3138. Dr. Perrins wrote his own reports.[3036] Dr. Perrins himself chose which sources or material to review and which materials to rely on in his reports. In drafting his reports, Dr. Perrins consulted secondary literature[3037] and the primary sources he chose to consult included

[3031] Justice Riordan's email dated Monday, May 30, 2011 at 04:18.
[3032] Plaintiffs' Notes and Authorities, para. 2251.
[3033] Plaintiffs' Notes and Authorities, para 2247.
[3034] Plaintiffs' Notes and Authorities, para 2263.
[3035] Is is noteworthy that even Plaintiffs' expert, Dr. Proctor, conceded that Dr. Perrins "*did a good job of chronicling Government's understanding archival work*". See testimony of Dr. Proctor, November 27, 2012, p. 31, p. 5 to 14.
[3036] Testimony of Dr. Perrins, August 19, 2013, p. 69.
[3037] Testimony of Dr. Perrins, August 19, 2013, p. 54.

the national archives in Ottawa,[3038] Washington D.C[3039] and London, England[3040] and the Attorney General Database[3041].

3139. Plaintiffs contend that Dr. Perrins relied on "*materials provided by the Federal Government*" but, as noted above, Dr. Perrins did not rely solely on the documents provided by the Federal Government. He spent a lot of time consulting the documents in the national archives and, in particular, spent approximately forty days in the Ottawa archives.[3042]

3140. Dr. Perrins testified that counsel for JTIM did not control or limit access to the sources relied on by the latter. Dr. Perrins requested, and was granted full, unlimited access to the Attorney General Database.[3043]

3141. Plaintiffs' refer to two instances where counsel for JTIM provided Dr. Perrins with specific documents which he had requested. These documents were not selected by counsel for JTIM.

3142. During cross-examination, Plaintiffs asked whether Dr. Perrins received "*help in researching the topics*" he was researching.[3044] Dr. Perrins explained that there were two scenarios when he requested assistances from counsel:

3143. The first was when he asked JTIM's counsel for some specific documents which he knew existed but which he could not find in the National Archives in Ottawa. Dr. Perrins testified: "*So, in the first report, when I was looking for some of the press releases and the publication of league tables, I couldn't find them in the archives, but I knew that they were coming every six (6) months, so I asked if they could help find them, if they had copies or if they could find them, I mean, in the AG material.*"[3045]

3144. The second was when Dr. Perrins provided JTIM's counsel with specific search terms which he had chosen himself to use in the AGC database and JTIM's counsel supplied him with the documents responsive to those search terms. Dr. Perrins testified:

> I also asked for some assistance in the AG, using the AG. So I was doing searches, but I also supplied counsel with a list of some terms and people's names because they said they were also reviewing, so I

[3038] Testimony of Dr. Perrins, August 19, 2013, p. 55.
[3039] Testimony of Dr. Perrins, August 19, 2013, p. 56.
[3040] Testimony of Dr. Perrins, August 19, 2013, pp. 56-57.
[3041] Testimony of Dr. Perrins, August 19, 2013, p. 56.
[3042] Testimony of Dr. Perrins, August 19, 2013, p. 55.
[3043] Testimony of Dr. Perrins, August 19, 2013, pp. 59, 97, 106 and ff.
[3044] Testimony of Dr. Perrins, August 19, 2013, p. 69.
[3045] Testimony of Dr. Perrins, August 19, 2013, pp. 69-70.

> asked them, "As you're going through, if you could find... especially about Delhi and people like Pandeya and Zilkey, some of these figures that I was examining. I just didn't want... just to make sure I hadn't missed something during my searches, so I asked them for those as well.[3046]

3145. It is therefore incorrect to suggest, as the Plaintiffs have done, that part of Dr. Perrins' reliance material was selected by JTIM counsel. Dr. Perrins selected all his own reliance materials. The instances where counsel for JTIM assisted Dr. Perrins was at Dr. Perrins' instruction to provide specific documents or documents responsive to specific search terms which Dr. Perrins had chosen.

A.4.c.2 Professor Soberman

3146. Plaintiffs allege that "*Professor Soberman allowed two English tobacco lawyers, whom he trusted implicitly, to decide which JTI marketing documents he would be allowed to look at [...] he was not given a key to the documents of the company on whose marketing practices he was opining*"[3047].

3147. Plaintiffs' allegation willfully misinterprets and distorts the substantial amount of testimony which Professor Soberman gave to explain the methodology behind his review of relevant materials (including JTIM marketing materials). Professor Soberman's evidence showed that he conducted a systematic, efficient and effective review of relevant marketing materials, as set out in more detail below.

3148. When preparing his report between 2007 and 2010, Professor Soberman began by reviewing the introductory motions[3048] and Professor Pollay's report[3049]. Professor Soberman then reviewed the JTIM documents referenced in, or referenced in exhibits to, Professor Pollay's report (along with other documents referenced in Pollay's report) and the JTIM marketing documents included in the Plaintiffs' Reliance documents at the time (in lists 1 – 5).[3050]

3149. This meant that Professor Soberman had reviewed as a priority all the JTIM marketing documents which Professor Pollay cited in support of his opinion and which had been identified as potentially supporting the Plaintiffs' marketing allegations. Professor Soberman also testified that, following his review of Professor Pollay's report, he requested from JTIM "*between two hundred and fifty/three hundred (250 - 300)*

[3046] Testimony of Dr. Perrins, August 19, 2013, p. 70.
[3047] Plaintiffs' Notes and Authorities para. 2261, within Section XI A.2.b.6: "*The 'development'/manipulation of expert witnesses*"
[3048] Testimony of Prof. Soberman, April 16, 2014, p. 156.
[3049] Testimony of Prof. Soberman, April 16, 2014, p. 156.
[3050] Testimony of Prof. Soberman, April 16, 2014, p. 165.

documents" so that he could *"investigate various issues that were raised in Professor Pollay's report"*[3051].

3150. In addition to these documents, Professor Soberman also reviewed Dr. Perrins' expert report and Dr. Duch's expert report, for further information on issues which affected the marketing of Canadian cigarettes during the class period. Professor Soberman also conducted independent searches (including in the university library) for publically available documents giving background information on the Canadian tobacco industry and specific marketing issues (such as government reports, Health Canada reports and Gallup polls).[3052]

3151. Having already read a number of JTIM marketing documents, Professor Soberman then sought a full set of JTIM marketing plans to confirm his understanding of the marketing strategies of JTIM:

> As of two thousand and nine (2009), we then set out to say, "Okay, what I really need to do is understand, to the best degree possible, basically: the marketing strategies of JTI, their intent, the actions that were taken, and the effects of those marketing strategies, and also, documents related to the development of those plans." And that was the process which led to the identification of nine hundred and ninety-six (996) documents.[3053]

3152. The 996 marketing plans (and related documents) identified covered every year from 1977 – 1999 (inclusive), and constituted an extremely large volume of material. Professor Soberman explained that he directed a review of these documents in which key information was picked out on his instructions for all the JTIM marketing planning documents, using a template he provided[3054].

3153. Professor Soberman then selected a range of documents across the time period which he read in full. There is no evidence to support the Plaintiffs' assertion that lawyers decided which JTIM marketing documents Professor Soberman was allowed to look at. In fact, Professor Soberman testified that he chose the documents that were reviewed, what they were reviewed for and which ones he looked at himself:

> I had a couple of people at Freshfields office in London who were conducting a search for me, based on the things that I wanted to see, and also... I also gave them a template of the specific pieces of information that were important to me... in all the documents that were identified as planning documents. So I read these... what I would call directed summaries of these reports and, based on

[3051] Testimony of Prof. Soberman, April 22, 2014, pp. 85-86.
[3052] Testimony of Prof. Soberman, April 16, 2014, p. 167.
[3053] Testimony of Prof. Soberman, April 22, 2014, p. 87.
[3054] The resulting document was filed as Exhibit 1742.

> that, I selected a significant number of those plans for myself to read, such that I think I read anywhere from fifty (50) to a hundred (100) of them. And, you know, if you actually now think of the length of time, it was like some twenty-three (23) years that we actually had marketing plans for. And so what I did is, I read probably two (2) or three (3) of these plans from each of the years in the period where documents existed, right from beginning to end.

3154. Professor Soberman's access to documents was not limited by lawyers for JTIM. He was never denied access to any document that he asked to see.

3155. Professor Soberman also testified that reviewing a selection of documents which he had chosen helped ensure that he was satisfied that the "directed summaries" prepared for him were accurate. When discussing the selection of documents that he read in their entirety, he said:

> [...] it was also very useful because it allowed me to cross-check and ensure that the directed summaries that I prepared were consistent with the documents, because when I actually took the document, I read everything. And I found that the research work had been done very carefully.[3055]

3156. Professor Soberman testified that he did not request access to the JTIM database because, given the scale of the documents contained within the database, this would not have been an efficient use of time: "*obviously, the documentary task for what I was doing was rather large and I had to adopt strategies that would allow me to achieve my objective.*"[3056] The directed summary review document itself ran to almost 700 pages.[3057]

3157. After Professor Soberman's report was filed, but before he gave testimony he also reviewed all the exhibits relating to JTIM's marketing activities which had been filed during the trial, further marketing documents from the Plaintiff Reliance (lists 5-8), the transcripts of the testimony of JTIM marketing witnesses and of Professor Pollay, and the Expert reports of Professors Viscusi, Slovic, Lacoursière and Heckman.[3058]

3158. The review of the JTIM material was only one aspect of Professor Soberman's opinion. It should also be noted that the main aspect of Professor Soberman's report and testimony relate to principles of marketing theory, which are supported by academic literature and research. Professor Soberman's expertise in this area is beyond question, and his review of the relevant literature also formed a crucial part of his research and informed his expert opinion.

[3055] Testimony of Prof. Soberman, April 16, 2014, p. 164.
[3056] Testimony of Prof. Soberman, April 23, 2014, p. 213.
[3057] Exhibit 1742.
[3058] Testimony of Prof. Soberman, April 16, 2014, pp. 165-166.

3159. Ultimately, Professor Soberman chose a methodology for his review of material which was both reasonable and pragmatic, and which enabled him to positively testify that he was comfortable that he reviewed enough documents to complete his opinion and offer his expert view to the Court.[3059]

3160. It is also alleged in paragraph 2262 that Professor Soberman should have been told of prior Courts' findings with respect to marketing issues, which are said to contradict his own. Professor Soberman is a highly qualified and credible marketing expert. While prior findings of courts could have been of interest, the fact remains that his opinion is based on his own academic view (informed by research and analysis) and highly relevant first-hand marketing experience, which would not have been affected by a prior Court judgment.

A.4.c.3 Professor Duch

3161. At paragraph 2245, Plaintiffs state that:

> Professor Duch relied on public surveys all of which were filed without their authors. Duch testified at length on the CMA surveys which were denied as being non authentic. ITL had previously claimed that the CMA surveys ought to remain confidential as they provided useful information for competitors. It was abusive for ITL to deny the authenticity and truth of the surveys conducted under its direction, in particular when its ex-head of marketing division Mr. Kalhok had testified that they were a very reliable source of information.

3162. While it is not for JTIM to respond to Plaintiffs comments regarding the disclosure of the CMA surveys by ITL, it would submit that:

a. Whatever the reported view of ITL/ Mr. Kalhok as to the CMA surveys, Professor Duch, who <u>was not retained by ITL</u>, did not initially review the CMA surveys as:

> [...] while in the early exploratory stages of preparing his expert report, Professor Duch confirmed he had asked JTIM (as the Defendant that he primarily dealt with) what relevant internal survey evidence it might have, he did not consider it necessary to ask the same question of ITL.[3060]

This was because at the outset he did feel the legitimacy of his report would be affected by including internal company data in it – hence his exclusive focus was on publicly available materials. Professor Duch testified that he, "*decided not to include survey data that was generated by what I would call interested parties, for*

[3059] <u>Testimony of Prof. Soberman, April 16, 2014</u>, p. 167.
[3060] <u>Testimony of Prof. Duch, May 28, 2013</u>, p. 62.

example, data that was generated by... the defendants... I felt that the authority and legitimacy of my report would be enhanced if I restricted my attention to publicly available data," and that "*the attraction of publicly available data is that all of the supporting material is very transparent.*"[3061]

b. Professor Duch further justified his decision not to include the Defendants' surveys by commenting that "*if you... include their material in a report like this... if the results are too optimistic from some perspective, you're going to be criticised... if they're too pessimistic, people would question the results with a sort of authority of the report, if there was a lot of company data in the report*"[3062]; and

c. Separately from the issue of what he felt he could legitimately include in his expert report, it should also be noted that as Professor Duch was not instructed by ITL, he did not have direct access to its studies (he only gained such access once Mr. Bourque's report was filed[3063]).

3163. More generally, Professor Duch's mandate was to review the published public opinion data whose provenance could therefore be reviewed and established. As such it is entirely justified that he did not conduct a full review of internal company documents.

3164. Professor Duch's retrospective consideration of the CMA studies did lead him to conclude that there were serious sampling/question wording issues associated with these studies – this was his independent expert opinion.

3165. In any case, Professor Duch concluded, during his testimony, having reviewed the CMA materials later on, that "*the results from the CMA data do not, in any way change my conclusions... I think the data are pretty consistent with the conclusions that I draw in the report*"[3064].

3166. At paragraph 2248, Plaintiffs state:

> ITL systematically denied the authenticity of documents emanating from legacy or other depositories of documents, including some created by from their parent companies. Yet ITL actually used the legacy library or other such depositories to replace some documents it had destroyed. ITL also filed legacy documents to support its case. In many cases, their experts relied on documents they had

---

[3061] Testimony of Prof. Duch, May 28, 2013, p. 42.
[3062] Testimony of Prof. Duch, May 27, 2013, p. 43.
[3063] Testimony of Prof. Duch, May 28, 2013, p. 62.
[3064] Testimony of Prof. Duch, May 27, 2013, pp. 44-45.

found on legacy, such as the Roper public opinion relied upon by Professor Duch.

3167. JTIM reiterates that contrary to the confused picture painted by Plaintiffs, Professor Duch was not retained by ITL – the argument above is therefore misguided.

3168. In any case, Professor Duch's approach to gathering data for his report was both comprehensive and entirely appropriate given his mandate. Specifically, as confirmed in his report,[3065] he sought to conduct an exhaustive effort to identify all relevant published opinion data, with none of the data gathering techniques he used relying on any way on the input of JTIM or RBH (the Defendants that actually did instruct him).[3066]

3169. At paragraph 2255 of their Notes and Authorities, Plaintiffs state:

> Several of the defendants' experts were intentionally denied access to relevant documents in order to allow them to arrive at the opinions the defendants needed. Many others were mandated not to look at the entire Industry documents. This is inconsistent with the role of an expert and with that of the attorneys involved.

3170. In support of this statement, Plaintiffs make reference to a section of Professor Duch's testimony where he confirmed, as above, that he only received access to the CMA studies after Mr. Bourque's report had been filed, and that he had never gained access to the micro-data associated with the CMA studies.

3171. JTIM repeats the points made above regarding the validity of Professor Duch's decision not to review the CMA studies initially. Professor Duch was not denied access to any materials (i) that he felt were appropriate to his mandate; and/or (ii) that were in the possession of the Defendants that instructed him.

3172. With regard to the micro-data point, JTIM submits that Professor Duch's review of the CMA data was essentially a reactive move to the content of Mr. Bourque's report – as he was not including the results of the CMA studies in his formal report (rather just conducting an analysis so as to draw general conclusions) there was no obligation on him to keep to the strict methodological approach that he normally took.

3173. Professor Duch was not limited/controlled in any way. It was entirely ***his*** decision to exclude internal company data from his report and he was responsible for the gathering of the information he relied on. There is no evidence to the contrary. He did not receive nor review the ITL CMA studies prior to filing his report but ITL did not instruct Professor

---

[3065] Exhibit 40062.1, PDF 76.
[3066] Exhibit 40062.1, PDF 78.

Duch and in any event such internal studies were not, in his opinion, the best evidence on which to base his report.

A.4.c.4 Mr. Lacoursière: The defense of "connaissance populaire" is not abusive

3174. Plaintiffs suggest that invoking, as a ground of defense, the notion of "common knowledge" or "*connaissance populaire*" of the health risks associated with smoking would be abusive.[3067]

3175. This expert evidence was made necessary to contradict the preposterous claim that Quebecers would not have been sufficiently informed about the fact that smoking is harmful to health, that it can cause cancer and lead to death, over a period of fifty years. Whether it is referred to as "common knowledge" or an other designation is used, the incontrovertible reality remains the same: people were aware of the health risks associated with smoking and it was not abusive to make this evidence.

J. The Remedy

B.1 Provisional Execution

3176. Plaintiffs ask that provisional execution be ordered to the extent of 25% of any damage award in favour of the class members, with respect to their claims for moral and punitive damages, relying solely on Article 547 (1) j) CCP, by virtue of which, as a matter of general rule, *judgments with regard to improper use of procedure* are subject to provisional execution.[3068]

3177. As previously mentioned, paragraph j) was added to article 547 by the 2009 amendments to the CCP, at the same time as the new provisions of articles 54.1 and following came into force. It was meant to be a complement to these provisions.

3178. It is plain and obvious that Plaintiffs' claims for moral and punitive damages in these class actions are made in relation to the various faults alleged against Defendants, with respect to their manufacturing and marketing activities.

3179. The judgment that will eventually be rendered on the merits will therefore address the potential liability of the three Defendants and any condemnation, as the case may be, would be in relation to the various allegations of fault.

[3067] Plaintiffs' Notes and Authorities, para. 2256.
[3068] Plaintiffs' Notes and Authorities, para. 2322.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

AFFIDAVIT OF ROBERT MCMASTER
Sworn April 1, 2019

Thornton Grout Finnigan LLP
100 Wellington Street West
Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Robert I. Thornton (LSO# 24266B)
Email: rthornton@tgf.ca

Leanne M. Williams (LSO# 41877E)
Email: lwilliams@tgf.ca

Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Applicant

TAB 2

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

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.**

Applicant

AFFIDAVIT OF WILLIAM E. AZIZ
(sworn April 1, 2019)

I, **WILLIAM E. AZIZ**, of the Town of Oakville, in the Province of Ontario, MAKE OATH AND SAY:

INTRODUCTION

1. Pursuant to the Initial Order (the "**Initial Order**") granted by the Ontario Superior Court of Justice (Commercial List) (the "**Court**") on March 8, 2019 pursuant to the *Companies' Creditors Arrangement Act* ("**CCAA**") in the proceedings initiated by JTI-Macdonald Corp. (the "**Applicant**" or "**JTIM**"), the Court approved my appointment as the Chief Restructuring Officer ("**CRO**") of JTIM.

2. Imperial Tobacco Canada Limited, Imperial Tobacco Company Limited (together, "**ITL**") and Rothmans, Benson & Hedges Inc. ("**RBH**") have also each filed for CCAA protection. ITL, RBH and JTIM are collectively referred to herein as the "**Co-Defendants**".

3. I am an experienced CRO with extensive finance, accounting and corporate taxation experience. I have acted as the principal financial officer and president of numerous private and

public companies. My recent CRO mandates include Walter Energy Canada, U.S. Steel Canada, The Cash Store Financial Services, Mobilicity and Hollinger, among others. My curriculum vitae was attached to the affidavit of Robert McMaster sworn March 8, 2019 (the "**Initial Affidavit**") and I attach it here also for ease of reference as **Exhibit "A"**.

4. Over the course of my career, I have dealt with many seemingly intractable situations and many different stakeholders, including secured creditors, unsecured creditors, litigation claimants, pensioners, unions and, of particular relevance here, the federal and many provincial governments.

5. Resolving complex issues requires break-through thinking. In my experience, restructuring negotiations benefit from fresh faces and new ideas. This is especially true when stakeholders have been engaged in protracted hard-fought litigation spanning decades, as in this case.

6. In addition to a change of personnel, there must also be a change of approach for the restructuring to succeed. Now that each of the Co-Defendants, being the three largest tobacco product suppliers in the tax-paid Canadian market, have initiated CCAA proceedings, the emphasis should turn to claim identification and resolution, as opposed to litigation. In my role as CRO, I will be leading those negotiations on behalf of JTIM.

7. There are several unique features of this restructuring that make it unlike any prior restructuring in Canada, including:

(a) none of the Co-Defendants require an operational restructuring. They are all stable and cash flow positive;

(b) for the first time, as far as I am aware, all major participants in an industry in Canada have filed for CCAA protection more or less simultaneously; and

(c) resolution of the many claims against the Co-Defendants will require the participation of, and negotiations with, every provincial government, the federal government, and possibly the governments of all three territories, in addition to the many class action claimants that are affected by the filing.

8. For those reasons, I expect the negotiations to be complex and difficult. I have experience in negotiations where complex, multi-party dispute resolution is required.

9. This case, and the corresponding applications brought by the other Co-Defendants, require a collective solution and the CCAA provides the best platform upon which to do that.

STATUS OF SECURED CLAIM

10. One of the preliminary issues that has arisen in this proceeding relates to the Applicant's plan to continue to pay interest to JTI-Macdonald TM Corp. ("**JTI-TM**"), a related party, on a secured loan in the amount of approximately $1.2 billion (the "**Secured Loan**"). I have reviewed documents and reports in respect of the manner in which the Secured Loan was advanced, including the Fourth Report of the monitor dated February 16, 2005 (the "**Fourth Report**") filed in JTIM's previous proceedings under the CCAA. Based on that review, the Secured Loan appears to me to be as a result of a leveraged buy-out ("**LBO**") structure put in place around the time of Japan Tobacco Inc.'s acquisition of the international (non-U.S.) tobacco assets of RJR Nabisco, Inc., R. J. Reynolds Tobacco Company and their affiliates in 1999. I am familiar with these types of structures and believe that LBO structures were in common use at the time the transaction

occurred. The interest payments on the Secured Loan are currently approximately $7.6 million per month.

11. According to the Fourth Report at the time of the transaction, Canada was considered a high tax jurisdiction, with which I agree. The net effect of the LBO was to reduce JTIM's taxable income in Canada by virtue of an interest deduction.

12. It is not unconscionable or illegal for a company or group of companies to avail themselves of the legitimate provisions of commercial and tax law. It is also permissible, legitimate and common for organizations to develop strategies for lowering taxes in accordance with the law.

13. I have been informed by the Applicant's counsel and believe that the secured creditor, JTI-TM, is not a party to any outstanding proceedings that challenge its debt or security from JTIM and no judgment has ever been issued against JTI-TM in relation to such issue.

14. I have read the judgment of Justice Riordan dated May 27, 2015, as subsequently amended on June 9, 2015, in the Quebec Class Actions (as such term is defined in the Initial Order). Justice Riordan characterized the transactions that gave rise to the debt and security as "a sham" and "artificial". However, Justice Riordan also acknowledged that "no one has attacked the validity or the legality" of the transactions and the Court was not being asked "to pronounce on their legality, nor to annul them". I understand from counsel to the Applicant that such comments were in the context of Justice Riordan's analysis of whether the Applicant could and should be ordered to pay punitive damages.

15. I am informed by counsel to the Applicant that Justice Riordan did not set aside or declare invalid the security of JTI-TM and that JTI-TM was never added or sought to be added to the proceedings by the plaintiffs in the Quebec Class Actions.

16. I am informed by counsel to the Applicant that in 2013 the plaintiffs in the Quebec Class Actions attempted to obtain an order in Quebec seeking to stop the Applicant from paying principal, interest and royalties to JTI-TM (the "**Safeguard Motion**"), but that motion was denied and leave to appeal such decision was also denied by the Quebec Court of Appeal.

17. I refer to these judgments not to comment on their legal effect, but to describe the background facts from a commercial perspective.

18. Having made inquiry among the Applicant's counsel, I believe there are no outstanding orders against JTI-TM and JTI-TM is not currently the subject of any claims or proceedings that seek to challenge its debt and security from JTIM. Further, the amounts owing by the Applicant to JTI-TM are not under any current legal challenge from any plaintiffs in the Quebec Class Actions or any other proceedings.

19. I further understand from counsel to the Applicant that:

(a) the transactions that led to the Secured Loan occurred almost 20 years ago;

(b) the various governments, and possibly the class action plaintiffs, have known about the transactions since 2005 when the monitor in the Applicant's prior CCAA proceeding filed the Fourth Report explaining the transactions in detail, which report was served on the federal and all provincial governments and was made public on the Applicant's counsel's website. I am informed by counsel to the

Applicant that this website was drawn to the attention of counsel to the plaintiffs in the Quebec Class Actions by letter dated May 16, 2005, a copy of which is attached hereto as **Exhibit "B"** (along with an unofficial English translation); and

(c) the plaintiffs in the Quebec Class Actions confirmed their knowledge of the transactions by no later than 2012, as evidenced by their unsuccessful Safeguard Motion.

20. Lastly, I note from the Report of the Proposed Monitor dated March 8, 2019, that counsel to Deloitte Restructuring Inc. (the "**Monitor**") has provided an opinion that, subject to the usual assumptions and qualifications contained in such opinion, JTI-TM holds a valid security interest in the personal property of JTIM located in Nova Scotia, Ontario, Alberta and British Columbia and in the personal and real property of JTIM located in Quebec.

21. For all of the above reasons, from a commercial perspective, I view the debt and security of JTI-TM as being binding commercial obligations. If a party wishes to attack the debt and security before a court, then JTI-TM should be named as a party and have a chance to address squarely all claims being made against it, something that I understand from counsel to the Applicants has not happened to date.

STATUS OF ROYALTY STRUCTURE

22. As with the debt and security of JTI-TM, the transactions of 1999 by which some of the trademarks used by the Applicant were transferred to JTI-TM are also not subject to any outstanding court challenge.

23. For a number of different reasons, a separate company may be created for the sole purpose of managing intangible property, including trademarks. In my experience, placing trademarks in an affiliate as an alternative to an operating entity is common practice. By way of example, I note that both ITL and RBH employ similar structures.

24. A holding company for trademarks may, for example, help value the market price for a trademark. A holding company's purpose would be to license the trademark to the operating company. If the money gained from licensing that trademark is going through the holding company, it is easier to show third-parties how much a brand is worth for purposes of valuation and sales.

25. I have read the affidavit of Robert McMaster sworn April 1, 2019 in connection with the comeback motion (the "**McMaster Comeback Affidavit**"). I agree with his observations that, by moving trademarks into a wholly-owned subsidiary, the Applicant reduced its capital tax payments by a significant amount each year, estimated by Mr. McMaster to be approximately $3.6 million annually commencing in 1999. I also understand this tax advantage was eliminated at the end of 2010 by a change in legislation.

26. I am also advised by Mr. McMaster that, pursuant to the Trademark Agreement (as defined in the Initial Affidavit), the amount of the royalties payable were set by the parties to the Trademark Agreement and were compared to a transfer pricing trademark royalty study that confirmed these rates were within an arm's length range. Also, I am advised by Mr. McMaster that Canada Revenue Agency ("**CRA**") has, in the normal course, completed audits of the royalty payments by JTIM to JTI-TM up to the 2013 taxation year (and is in the process of auditing the 2014-2016 taxation years) and that CRA has not raised any proposed adjustments to the royalty payments.

SHARED SERVICES AND OTHER RELATED PARTY TRANSACTIONS

27. The motion brought by the plaintiffs in the Quebec Class Action seeks a prohibition on JTIM making any payments to affiliates save and except for the payment of physical inventory actually supplied by such parties at the fair market value thereof. Based on my discussions with senior management of the Applicant and the Monitor, who has reviewed and reported in detail on all material related party transactions in its Pre-Filing Report dated March 8, 2019, there are three broad categories of related party transactions pursuant to which money flows out of JTIM:

(a) those where JTIM pays for services provided by other entities related to or affiliated with the Applicant, whether such entities are stand-alone service providers (such as JTI Services Switzerland SA, which employs certain JTIM personnel and JT International Business Services Limited, which provides services in respect of various day-to-day finance activities such as payments, collections and general ledger postings) or simply other companies in the group that have a particular capability (such as JT International Holding B.V. ("**JTIH-BV**") and JTI (US) Holding Inc., which provide research and development services and JT International SA ("**JTI-SA**"), which provides certain services including IT support to JTIM);

(b) those where JTIM pays for raw material goods such as expanded tobacco from Cres Neva LLC, reconstituted tobacco from Petro LLC and tobacco leaf, glue and filter materials from JTI-SA; and

(c) those where JTIM pays for sales of finished products distributed by it with trademarks owned by a related party other than JTI-TM under limited risk distribution arrangements (the "**LRD Agreements**").

Shared Services

28. In my experience, "shared services" is the term used to describe a platform that allows a corporate group to consolidate support functions (such as human resources, finance, information technology and procurement) from several departments into an organizational entity or functional group whose mission is to provide services as efficiently and effectively as possible.

29. Traditionally the development of a shared-service operating model within an organization is an attempt to reduce costs (often attempted through economies of scale), standardize processes (through centralization) and performance results that can be compared across different operating entities and geographies. However, shared services are more than just centralization or consolidation of similar activities. Shared services can also mean running these service activities like a business and delivering services to internal customers at a cost, quality, and with timeliness that is competitive with alternatives.

30. Transfer pricing is the price set between companies in the same group when exchanging goods and services or sharing resources. The term covers all aspects of inter-company pricing arrangements, including transfers of tangible and intangible property, services, loans and other financial transactions, such as treasury functions. It is broadly applicable to centralized purchasing that will allow for best pricing solutions.

31. Goods and services purchased and sold within a corporate group are typically done on arm's length terms. This is important as transfer prices need to be set on such terms to satisfy taxing authorities that corporate groups are not manipulating internal transfer prices to reduce taxable profits in a certain jurisdiction.

32. Conformity with the principle of arm's length pricing is generally judged by comparing the price of a transaction between related parties with that in similar transactions between unrelated parties. Failure to manage global transfer pricing in a multi-jurisdictional organization can result in protracted disputes with taxing authorities, double taxation (where the same income is taxed in two or more countries) and tax-related penalties.

33. Centralized or pooled services are common in international groups and the cost controls and efficiencies make a compelling commercial case for using them. Specifically, in the case of the Applicant, this is not a case of stripping profits, which taxing authorities, including the CRA, are wary of, rather, it is just good business.

34. I note from the McMaster Comeback Affidavit that, as stated above, CRA has completed audits of shared service payments of JTIM for many years (and others are ongoing) and has not required any adjustment to any related company payments.

Related Party Raw Materials and Finished Products

35. Based on my discussions with senior management of the Applicant, in addition to purchasing tobacco leaf and other raw materials from related parties on arm's length terms, a significant portion of JTIM's business in terms of cigarette sales volumes (approximately 37%) comes from the distribution of products under distribution agreements related to brands owned by

a related party, specifically JTI-SA under the JTI-SA LRD Agreement (as defined below). These include international brands such as Winston, Camel and LD.

36. In the ordinary course, JTIM distributes such products in Canada and remits the revenue generated to JTI-SA less a fee for distribution of a fixed percent at 2.00% of the budgeted Net Sales (as such term is defined in the LRD Agreement between JTIM and JTI-SA effective January 1, 2014, as amended (the "**JTI-SA LRD Agreement**")), or as determined from time to time by JTIM and JTI-SA within the arm's length range.

37. In all large international company restructurings in which I have been involved, and to the best of my recollection, CCAA related party transactions made in the ordinary course of business have not been disrupted during the CCAA proceeding.

EFFECTS OF NON-PAYMENT

Interest

38. Non-payment of interest on the Secured Loan will cause further interest to accrue on overdue interest. If the Applicant's CCAA proceedings take years to resolve, that compounding effect could be significant. As noted by Justice Mongeon in paragraph 92 of His Lordship's decision dated December 4, 2013 in respect of the Safeguard Motion, the non-payment of interest on the secured loans would not increase amounts available to the Applicant's other stakeholders since the compounding interest would still be due and owing to JTI-TM.

39. Secondly, I agree with the statements made in the McMaster Comeback Affidavit to the effect that the Applicant and its affiliates will face increased tax obligations commencing in 2022 and thereafter if the related party payments are not made, including withholding tax liability for

LLC. The increase in the tax liability of the Applicant is estimated to be approximately $27 million per year.

40. Although a tax election may be filed to ameliorate this tax effect on JTIM, such a course of action would cause withholding taxes to be paid by affiliates making it tax inefficient to do so. The more likely result would be an increased tax liability for JTIM.

41. An increased tax bill simply depletes the money available to settle with creditors or to fund a plan of compromise or arrangement. Any additional and avoidable taxes paid by the estate are not recoverable, generally speaking, and represent a permanent loss of value otherwise available to stakeholders.

42. Furthermore, in my view, one should look at what is being proposed in the broad context of the pending negotiations with the stakeholders. The Applicant is the only one of the three Co-Defendants that has a related party secured debt structure. If interest payments are indefinitely suspended, then JTIM will be disadvantaged *vis-a-vis* the other Co-Defendants because JTIM will be facing a tax liability deadline that would not apply to the other Co-Defendants. Further, and as mentioned above, this would not increase the funds available to JTIM as the suspended interest payments would still be due and owing to JTI-TM at the end of the day.

43. In other words, suspending interest payments changes the negotiating dynamic in a way that is prejudicial solely to JTIM.

44. Lastly, in my experience, it is not unusual to pay secured creditors in a restructuring if there is adequate cash flow to do so, as there is here. Paying secured creditors avoids digging the debt hole deeper through compounding interest.

45. Most importantly, the Applicant and its affiliates have recognized that the related party debt and security could be put in issue in this proceeding and they have taken steps to mitigate any adverse consequences to JTIM's stakeholders that would flow should the debt and security be successfully attacked.

46. The Repayment Agreement signed by JTIH-BV, was attached to the Initial Affidavit but is also annexed as **Exhibit "C"** for convenience. I also annex as **Exhibit "D"** the financial statements of JTIH-BV for 2017 (being the most recent ones available) that were annexed to the Initial Affidavit but which are also included here for convenience.

47. JTIH-BV is a credit worthy counterparty who has agreed to repay any interest paid by JTIM to JTI-TM over the course of this proceeding if it is finally determined that such interest should not have been paid.

Royalties

48. In the event that royalties are not paid, interest accrues at JTI-TM's lender's rate of interest plus 2.00%. I am advised by Mr. McMaster that this interest rate would currently total 5.85%. This is an avoidable expense of JTIM and paying it would be a detriment to JTIM's stakeholders.

49. It is my understanding from counsel to the Applicant that the CCAA requires payment by a CCAA applicant for the use of licensed property post-filing.

50. I note that all three Co-Defendants propose to continue to pay royalties post-filing to their related trademark-owning entities. Further, all three Court-appointed monitors supported that position on the respective initial hearings. Such payments are reasonable and appropriate in my view pending any adverse ruling of the Court.

51. Failure to pay royalties would, in effect, force JTI-TM to be an involuntary financier of JTIM. Such is contrary to my understanding of a foundational principle of restructuring under CCAA in Canada, namely, that no person should be forced to advance further money or credit to a company that has obtained protection under supervision of the Court.

Other Related Party Payments

52. I am advised by management of the Applicant that JTIM is getting fair value for the goods and services provided by related and trusted parties. Such goods and services are integrated into JTIM's business platform and the cessation of such supply and services because of non-payment would be disruptive to JTIM. Replacing such supply and services would be very difficult and disruptive for management and doing so while in CCAA protection is likely to increase JTIM's costs.

53. The effect on JTIM in respect of the LRD Agreements will likely be more dramatic if JTIM is directed to stop remitting payments to JTI-SA for the sale of its branded products. Each of the counterparties to the LRD Agreements or other agreements for the supply of goods and services would have to choose to either accept, in effect, forced financing of JTIM or to stop supply, which would be destabilizing and disruptive to JTIM.

54. In such circumstances it is likely that JTI-SA would seek an alternate manufacturer and distributor of its products in Canada meaning that JTIM would lose significant revenue. I am advised by Mr. McMaster that, in 2018, the manufacture and sale of products relating to the manufacturing agreements and LRD Agreements generated approximately $35 million in revenue for JTIM. The loss of this source of revenue is not in the interests of JTIM or any of its stakeholders.

55. Driving a company toward reduced profitability is not a sound business practice and is not in the interests of JTIM or any of its stakeholders.

CONCLUSION

56. Based on my restructuring experience, the CCAA is meant to provide a platform where a debtor and its stakeholders can negotiate a path forward while maintaining the *status quo* as it existed as of the date of filing. Often, the supervising Court is called upon to determine issues along the way and, in my experience, looks to balance the interests of the stakeholders and the debtor.

57. The continuation of interest payments, backstopped by the Repayment Agreement of JTIH-BV, is, in my business judgment, a better balance of interests than putting the Applicant under unnecessary pressure and a time limit whereby its estate would be burdened by increased debt and permanently depleted by paying avoidable taxes, which would be contrary to the interests of all stakeholders.

58. To carry on its business operations in the ordinary course, JTIM also requires continued use of the licensed trademarks from JTI-TM and continued use of goods and services from multiple integrated related party suppliers. Non-payment of these amounts would force related parties to choose between being involuntary financiers of an insolvent company or seriously disrupting the operations of JTIM, which is not in the best interest of any stakeholder.

integrated related party suppliers. Non-payment of these amounts would force related parties to choose between being involuntary financiers of an insolvent company or seriously disrupting the operations of JTIM, which is not in the best interest of any stakeholder.

SWORN BEFORE ME at the City of Toronto, Province of Ontario, on April 1st, 2019. Commissioner for Taking Affidavits Rachel Bengino	William E. Aziz

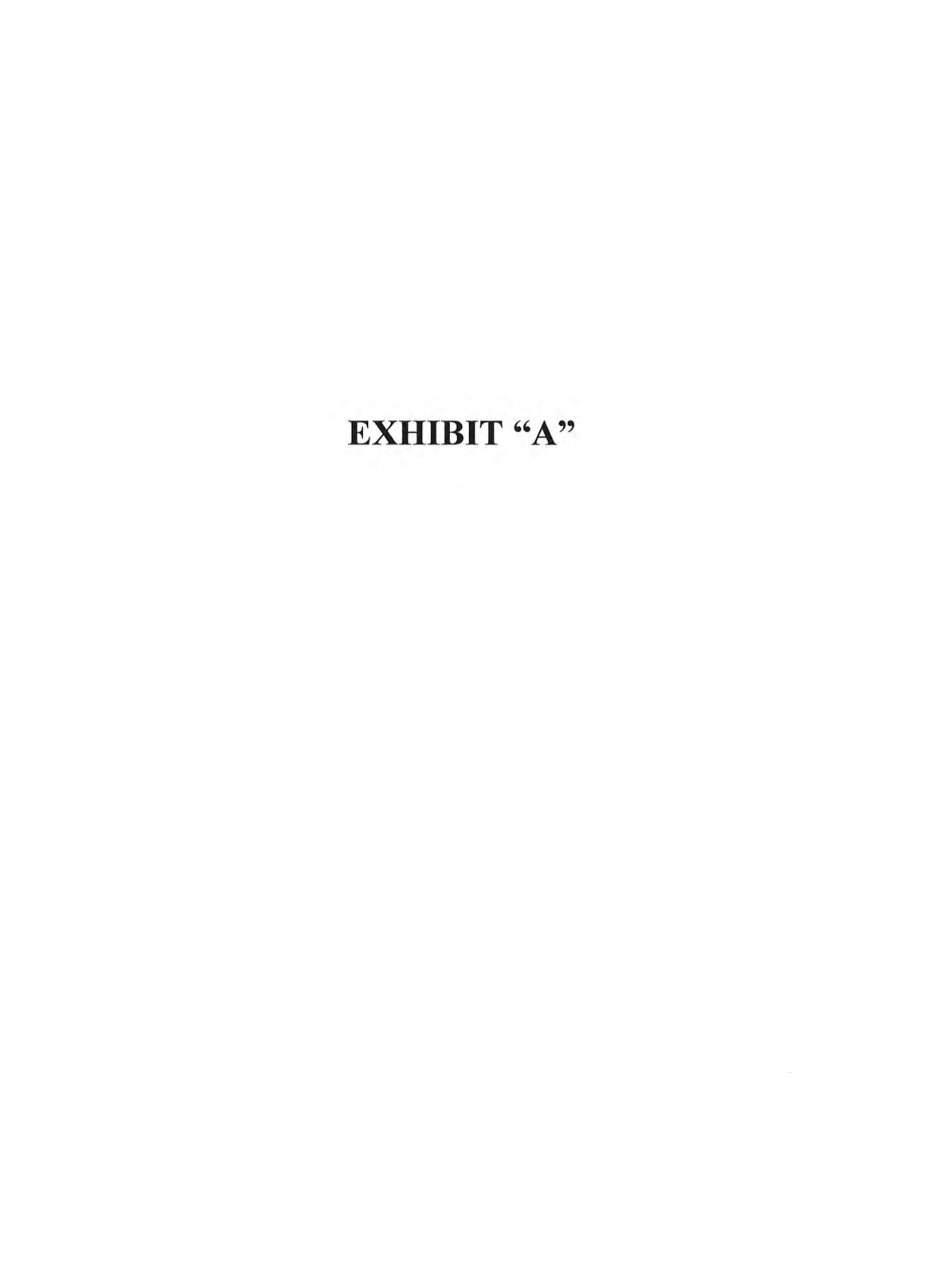


EXHIBIT "A"

This is Exhibit "A" referred to in the affidavit of William E. Aziz sworn before me, this 1st day of April, 2019

[signature]

A COMMISSIONER FOR TAKING AFFIDAVITS

WILLIAM E. AZIZ

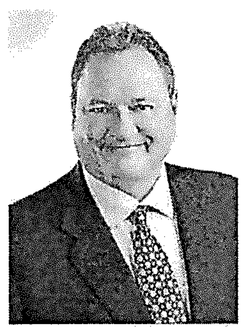
32 Shorewood Place
Oakville, Ontario
Canada
L6K 3Y4

Bus: (905) 849-4332
Bus: (416) 640-7122
Cell: (416) 575-2200
Fax : (905) 849-4248

E-Mail: baziz@bluetreeadvisors.com

PROFILE

I am a senior executive and experienced director. I am a value-oriented executive with the experience to enhance profitability. I lead by building strong management teams focused on profitability, while promoting strong and flexible strategic thinking to create solutions. I have extensive, domestic and international experience in multi-party negotiations, strategic partnerships, mergers, acquisitions and divestitures. I have experience with all aspects of balance sheet and operational restructurings, in environments with and without unions.



BUSINESS EXPERIENCE

BLUETREE ADVISORS **2002 to Present**
President and CEO

BlueTree Advisors Inc. is my advisory firm focused on improving the performance of client companies, by providing expertise to manage operational, financial and organizational challenges. I view the principal objective of my work as the restoration and realization of value for stakeholders.

Services include business recovery, strategic planning, operational execution, and financial remediation-including balance sheet transformation. BlueTree is focused on improving stakeholder value in the face of the most significant challenges. My focus is the development of strategic and tactical plans where situations involve uncertainty, rapidly changing dynamics, real option back-up strategies, and negotiation strategies. I work to assist companies in making the changes that are necessary to ensure long-term viability.

As President of BlueTree Advisors I have more than 30 years of advisory, turnaround and corporate restructuring experience. I have extensive domestic and international experience in multi-party negotiations, strategic partnerships, and M+A activities. I have led restructurings as an executive or board member involving all aspects of balance sheet and operational restructurings in diverse industries including financial services, telecom, steel manufacturing, coal mining, professional service firms, alternative financing, softwood lumber, refrigerated warehousing, transportation, retail, manufacturing, and media. I have extensive experience with large unions in collective bargaining situations related to restructurings.

I have recently been the Chief Restructuring Officer of U.S. Steel Canada, Walter Energy Canada Holdings, and Hollinger. I am the Litigation Trustee for The Cash Stores Financial in respect of litigation stemming from the CCAA proceedings of that company.

I have acted as an advisor to Boards of Directors and management in both formal and informal transformations of businesses. I have played significant roles in many major Canadian restructurings. I have become recognized as one of Canada's experts in financial and operational restructurings since leaving Ernst & Young in 1988.

My work encompasses formal proceedings under the CCAA and the Bankruptcy and Insolvency Act but is broader in scope. I have been retained in the course of binding arbitration and mediation processes. I have also been involved in consensual, out-of-court restructurings, advising executive committees, and refinancings of both public and private companies.

I have dealt with all types of commercial disputes and have led complex, multi-party negotiations to resolve labour, litigation, and intellectual property disputes. I have extensive expertise in cost reduction, organizational transformation, mergers & acquisitions, and refinancing initiatives.

OTHER INFORMATION

Director

Current Boards

Ivey's Leadership Council-(September 2012 to present)
Formed to represent and support the Ian O. Ihnatowycz Institute for Leadership at the Ivey School of Business, Western University in leadership thought

OMERS-(January 2014 to Present-see below for prior)
Chair of the Investment Committee ($94 billion capital pool)
Member Human Resources and Compensation Committee

Maple Leaf Foods Inc. – TSE Listed (May 2014 to Present)
Chair of the Audit Committee
Member Human Resources and Compensation Committee

Fengate Real Assets (November 2014 to present)
Member of the Advisory Board for all funds in public private partnerships

Prior Boards

Canada Bread Company Limited – TSE Listed (April 2005 to March 2014)
Chair of the Audit Committee and Member Governance Committee

OMERS-(February 2009 to December 2012)
Chair of the Investment Committee
Member Human Resources and Compensation Committee and Joint Council for Governance

Tecumseh Products Company-NASDAQ Listed (August 2007 to August 2009)
Chair of Governance and Nominating Committee
Chair of Independent Committee for two proxy fights
Member of Audit Committee

Sun-Times Media Group, Inc.-NYSE Listed (August 2007 to July 2008)

Doman Industries Limited -TSE Listed (2003 to 2004)
Member of Restructuring Committee and Chair of Audit and Governance Committees

Algoma Steel Inc.-TSE Listed (2002)

Others-
Co-Chair, Leadership Gifts Critical Support Campaign- Oakville Hospital
White Rose Crafts and Nursery Sales Limited - TSE Listed (1998 and 1999)
Photon Technology International Inc.-NASDAQ Listed (1997 and 1998)
Agnew Group Inc. (1994 to 1996)
Trustee-Sole Trustee of the SkyDome Employees' Trust (1997 to 1999)

Member
Canadian and Ontario Institutes of Chartered Accountants-CPA, CA
Institute of Corporate Directors
Insolvency Institute of Canada
Toronto Club
London Hunt and Country Club
Hamilton Golf and Country Club
Young Presidents Organization, Western Ontario Chapter

Education
Osgoode Hall Pension Law Program
Institute of Corporate Directors ICD.D Certification
Executive Media Training with Jeff Ansell of Siren Communications
Harvard Law School: Program on Negotiation for Senior Executives
Harvard Law School: Dealing with Difficult People and Difficult Situations
Chartered Accountant (Ontario) - 1982
Ivey School of Business at Western University: Honors Business Administration – 1979

Interests
Golf, fly fishing, and skiing.

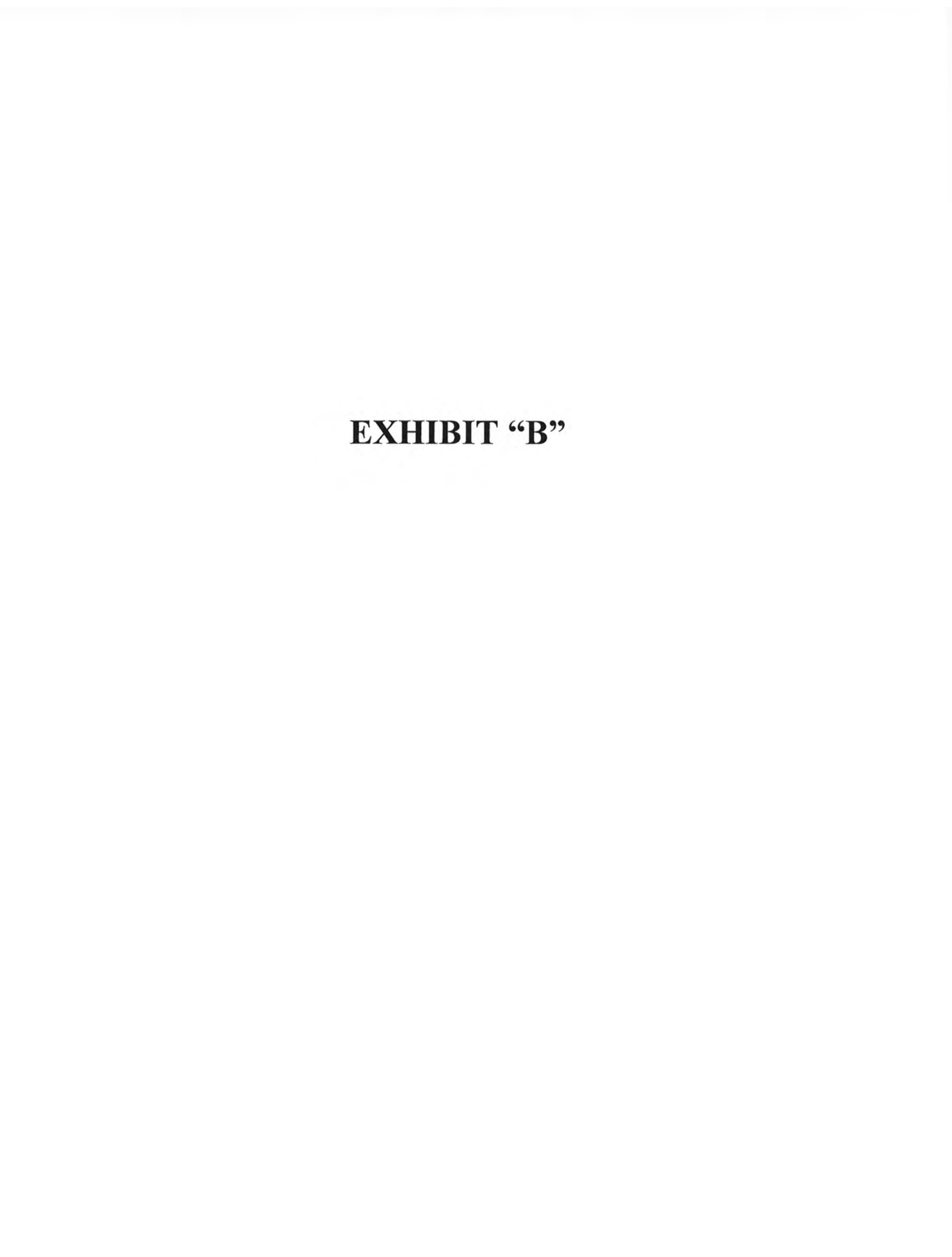
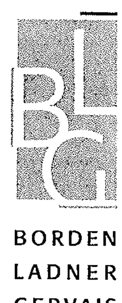


EXHIBIT "B"

This is Exhibit "B" referred to in the affidavit of William E. Aziz sworn before me, this 1st day of April, 2019

A COMMISSIONER FOR TAKING AFFIDAVITS



BORDEN
LADNER
GERVAIS

Borden Ladner Gervais s.r.l.
Avocats • Agents de brevets
et de marques de commerce
1000, rue de La Gauchetière Ouest
Bureau 900, Montréal (Québec) H3B 5H4
tél. : (514) 879-1212 téléc. : (514) 954-1905
www.blgcanada.com

Le 16 mai 2005

PAR TÉLÉCOPIEUR

Peter Richardson
tél. direct : (514) 954-2549
courriel : prichardson@blgcanada.com

L'honorable Juge Carole Julien
Cour supérieure du Québec
Palais de Justice
1, rue Notre-Dame Est
Bureau 12.67
Montréal (Québec) H2Y 1B6

Objet: Conseil québécois sur le tabac et la santé et al
c. JTI-Macdonald Corp. et al
500-06-000072-980
et Cécilia Létourneau
c. JTI-Macdonald Corp. et al
500-06-000070-983

Madame la juge,

Suite à la conférence de gestion d'instance de vendredi dernier dans les dossiers ci-dessus mentionnés et votre demande de vous faire parvenir les Ordonnances pertinentes dans l'affaire de la *Loi sur les arrangements avec les créanciers des compagnies* dans le dossier de JTI-Macdonald Corp., un de mes associés m'a informé que tout le matériel public, y compris les Ordonnances, dont l'Ordonnance Initiale que vous avez demandée, se trouvent sur le site internet suivant : **http://www.blgcanada.com/JTI/documents.asp**. Tant vous que nos collègues en demande peuvent consulter ce site en tout temps pour connaître l'évolution de cette affaire.

Si vous désirez tout de même obtenir, nonobstant ce qui précède, une copie des Ordonnances pertinentes du Juge Farley, veuillez demander à votre secrétaire de m'en informer et je vous en transmettrai une copie.

Veuillez agréer, Madame la Juge, l'expression de mes sentiments les meilleurs.

Peter Richardson

/fb

c.c.: Mes Yves Lauzon et Michel Bélanger - *Lauzon, Bélanger*
Mes Philippe H. Trudel et Bruce Johnston - *Trudel & Johnston*
Mes Gordon Kugler et Pierre Boivin - *Kugler, Kandestin*
Mes Christine Carron et Sylvie Rodrigue - *Ogilvy Renault*
Mes Donald Bisson et Jean-François Lehoux - *McCarthy Tétrault*

VANCOUVER • TORONTO • OTTAWA • MONTRÉAL • CALGARY

*************** -COMM. JOURNAL- ******************* DATE MAY-16-2005 ***** TIME 11:59 ********

MODE = MEMORY TRANSMISSION START=MAY-16 11:59 END=MAY-16 11:59

FILE NO.=932

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
001	OK	☎	#8238732094	002/002	00:00:19

************************************ -BORDEN LADNER - ***** - 514 954 1905- *********

Date	Heure	Nº de dossier
Le 16 mai 2005		200331-000658

Destinataire
Nom : L'honorable Juge Carole Julien — Nº de télécopieur (514) 873-2094
Compagnie :

Copie à
Nom : — Nº de télécopieur
Compagnie :

Copie à
Nom : — Nº de télécopieur
Compagnie :

De : Peter Richardson — Nombre de pages incluant celle-ci

Si vous ne recevez pas toutes les pages, veuillez communiquer aussitôt que possible avec
France Brault (514) 954-2555, poste 3248

L'original
- ☐ vous parviendra par la poste.
- ☐ vous parviendra par messagerie.
- ☒ demeurera dans nos dossiers.

BLG
BORDEN
LADNER
GERVAIS

Borden Ladner Gervais s.r.l.
1000, rue de La Gauchetière Ouest
Bureau 900, Montréal (Québec) H3B 5H4
www.blgcanada.com

tél. : (514) 879-1212
téléc. : (514) 954-1905

Message

NOTE
Cette télécopie s'adresse uniquement à la personne désignée ci-dessus; elle est confidentielle et ne doit pas être remise à une autre personne, ni reproduite et son contenu ne peut être autrement divulgué. Le contenu de la télécopie peut aussi faire l'objet du privilège avocat-client, lequel privilège est expressément revendiqué sans qu'il n'y soit renoncé d'aucune façon. Si la télécopie vous est transmise par erreur, veuillez nous téléphoner immédiatement. Nous vous remercions de votre collaboration.

May 16, 2005

Peter Richardson
DL: (514) 954-2549
Email: prichardson@blgcanada.com

VIA FACSIMILE

Hon. Justice Carole Julien
Quebec Superior Court of Justice
Palais de Justice
1, rue Notre-Dame Est
Suite 12.67
Montreal (Quebec) H2Y 1B6

RE: Quebec Council on Tobacco and Health et al v. JTI-Macdonald Corp. et al
500-06-000072-980
and Cécilia Létourneau v. JTI-Macdonald Corp. et al
500-06-000070-983

Madam Justice,

Following last Friday's case management conference in the above mentioned cases and your request to provide you with the relevant Orders [made] in the *Companies' Creditors Arrangement Act* proceedings of JTI-Macdonald Corp., one of my associates has informed me that all public materials, including the Orders, and the Initial Order you have requested, can be found on the following website: http://www.blgcanada.com/JTI/documents.asp . Both you and our colleagues representing the plaintiffs can refer to this website at any time to follow the evolution of this case.

If notwithstanding the foregoing, you still wish to obtain a copy of the relevant Orders of Justice Farley, please ask your secretary to inform me and I will provide you with a copy.

Please accept, Madam Justice, the expression of my best feelings.

Peter Richardson

/fb

cc: Mes Yves Lauzon and Michael Bélanger – *Lauzon, Bélanger*
Mes Philippe H. Trudel and Bruce Johnston – *Trudel & Johnston*
Mes Gordon Kugler and Pierre Boivin – *Kugler, Kandestin*
Mes Christine Carron and Sylvie Rodrigue – *Ogilvy Renault*
Mes Donald Bisson and Jean-François Lehoux – *McCarthy Tétrault*

EXHIBIT "C"

This is Exhibit "C" referred to in the affidavit of William E. Aziz sworn before me, this 1st day of April, 2019

[signature]
A COMMISSIONER FOR TAKING AFFIDAVITS

REPAYMENT AGREEMENT

THIS AGREEMENT (this "**Agreement**") is made as of the 1st day of March, 2019.

BETWEEN:

JTI-MACDONALD CORP., a corporation existing under the laws of Canada

(hereinafter referred to as "**JTIM**")

-and-

JT INTERNATIONAL HOLDING B.V., an entity existing under the laws of the Netherlands

(hereinafter referred to as "**JTIH**", and together with JTIM, the "**Parties**", and each, a "**Party**")

WHEREAS:

A. As part of the acquisition transactions (the "**Integrated Transactions**") resulting in the purchase of the non-US tobacco assets of RJR Nabisco, Inc., R. J. Reynolds Tobacco Company and their affiliates, JTIM is indebted to JTI-Macdonald TM Corp. ("**TM**") and granted security to TM in respect thereof, including but not limited to the following:

1. Convertible Debenture Subscription Agreement dated November 23, 1999 (as such agreement has been amended from time to time);

2. Debenture Delivery Agreement dated November 23, 1999 (as such agreement has been amended from time to time);

3. Convertible Debenture No. 1 dated November 23, 1999 (as such agreement has been amended from time to time);

4. Convertible Debenture No. 2 dated November 23, 1999 (as such agreement has been amended from time to time);

5. Convertible Debenture No. 3 dated November 23, 1999 (as such agreement has been amended from time to time);

6. Convertible Debenture No. 4 dated November 23, 1999 (as such agreement has been amended from time to time);

7. Convertible Debenture No. 5 dated November 23, 1999 (as such agreement has been amended from time to time);

8. Convertible Debenture No. 6 dated November 23, 1999 (as such agreement has been amended from time to time);

9. Convertible Debenture No. 7 dated November 23, 1999 (as such agreement has been amended from time to time);

10. Convertible Debenture No. 8 dated November 23, 1999 (as such agreement has been amended from time to time);

11. Convertible Debenture No. 9 dated November 23, 1999 (as such agreement has been amended from time to time);

12. Convertible Debenture No. 10 dated November 23, 1999 (as such agreement has been amended from time to time);

13. Convertible Debenture No. 11 dated November 23, 1999 (as such agreement has been amended from time to time);

14. Convertible Debenture No. 12 dated November 23, 1999 (as such agreement has been amended from time to time);

15. Deed of Hypothec dated November 23, 1999;

16. Supplemental Deed of Hypothec dated December 2, 1999;

17. Deed of Movable Hypothec and Pledge of Shares dated December 12, 2000;

18. Deed of Assignment dated March 24, 2004;

19. Deed of Confirmation dated May 14, 2015,

collectively, the "**JTIM Security**".

B. Also as part of the Integrated Transactions, TM granted certain security to JT Canada LLC Inc. ("**JT LLC**") to secure the payment and performance of TM's obligations to LLC under certain loan agreements (the ""**TM Security**").

C. Also as part of the Integrated Transactions, JT LLC granted certain security to JTIH to secure the payment and performance of LLC's obligations to JTIH under certain loan agreements.

D. JTIM may commence proceedings under the *Companies' Creditors Arrangement Act* (the "**Proceedings**") before the Ontario Superior Court of Justice (the "**Court**"). In the event that Proceedings are commenced, JTIM will use its best efforts to seek to continue to make all interest payments due and owing on its secured obligations, including, without limitation, payments to TM for interest on the indebtedness secured by the JTIM Security (the "**TM Secured Payments**"), in such Proceedings for the duration of such Proceedings.

NOW, THEREFORE, for the consideration received and for other good and valuable consideration, the receipt and sufficiency of which hereby are acknowledged, and upon the Court granting JTIM the authority to continue to make the TM Secured Payments, the Parties covenant and agree as follows:

1. The Parties acknowledge and confirm the accuracy and validity of all the above Recitals, and further acknowledge that they are each relying upon same in entering into this Agreement.

2. In the event that the Court makes an order in the Proceedings providing that all of the JTIM Security is invalid and unenforceable such that TM is not entitled to the TM Secured Payments on a priority basis (the "**Order**") and such Order becomes a Final Order, JTIH hereby agrees that it will pay to JTIM, or cause TM and/or JT LLC to pay to JTIM, an amount equal to the aggregate of any TM Secured Payments received by TM from JTIM (the "**Repayment Amount**"), from the date of commencement of the Proceedings until the date on which the Order becomes a Final Order; provided, however, that the Repayment Amount shall only be with respect to amounts paid by JTIM to TM as a result of the Integrated Transactions and the Repayment Amount shall not include any amounts paid by JTIM to TM in relation to the use of any of TM's intellectual property under any royalty or licencing agreements and such amounts shall not be repaid by either the undersigned or TM as part of this agreement. A "Final Order" means an order: (a) as to which no appeal, leave to appeal, notice of appeal, motion to amend or make additional findings of fact, motion to alter or amend judgment, motion for rehearing or reconsideration or motion for new trial has been timely filed (in cases in which there is a date by which such filing is required to occur, it being understood that with respect to an order issued by the Court, the time period for seeking leave to appeal shall be deemed to have elapsed on the date that is 22 days after the rendering of such order unless a motion has been made to extend such time period) or, if any of the foregoing has been timely filed, it has been disposed of in a manner that upholds and affirms the subject order in all material respects without the possibility for further appeal thereon; (b) in respect of which the time period for instituting or filing an appeal, leave to appeal, motion for rehearing or reconsideration or motion for new trial shall have expired (in cases in which such time period is capable of expiring, it being understood that with respect to an order issued by the Court, the time period for seeking leave to appeal shall be deemed to have elapsed on the date that is 22 days after the rendering of such order unless a motion has been made to extend such time period); and (c) as to which no stay is in effect.

3. This Agreement shall terminate upon the termination or conversion of the Proceedings.

4. All dollar amounts payable under this Agreement shall be payable in lawful money of Canada.

5. Neither this Agreement nor the rights, interests or obligations hereunder may be assigned by either Party without the prior written consent of the other Party.

6. This Agreement may be executed by the Parties in separate counterparts which when so executed and delivered will be an original, but all such counterparts will together constitute one and the same instrument. A faxed or electronic copy will be considered an original.

7. This Agreement will be interpreted in accordance with the laws of the Province of Ontario (and the laws of Canada applicable therein).

[*Remainder of page intentionally left blank. Signature pages to follow.*]

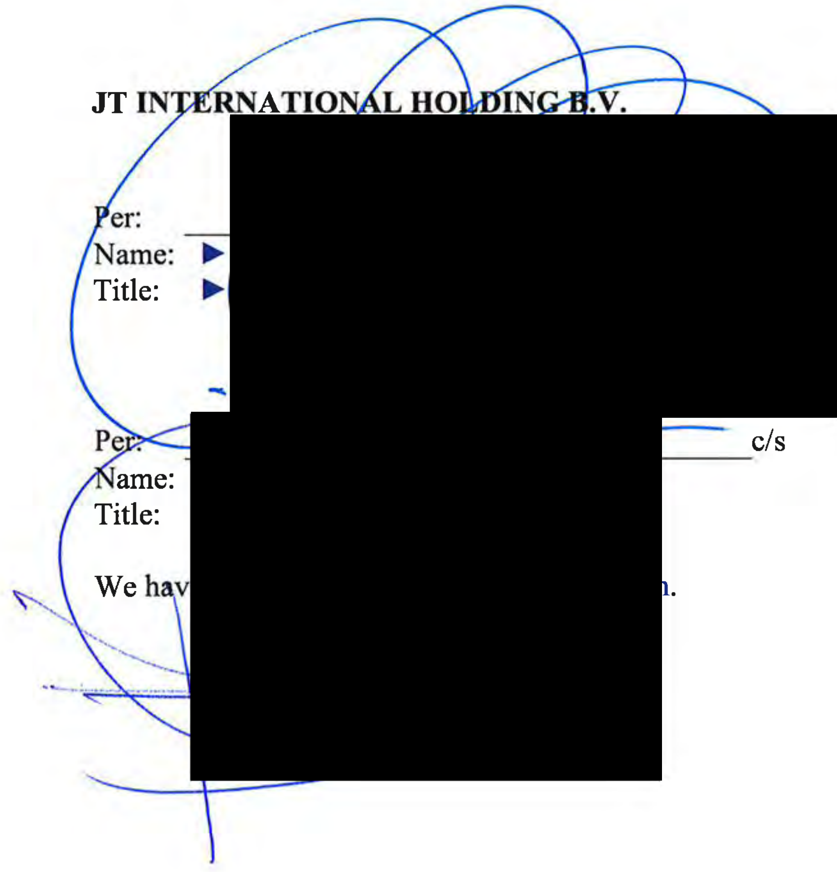
IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed as of the date first set forth above.

JTI-MACDONALD CORP.

Per: ______________________________ c/s
Name: ▶
Title: ▶

Per: ______________________________ c/s
Name: ▶
Title: ▶

We have the authority to bind the Corporation.



JT INTERNATIONAL HOLDING B.V.

Per:
Name: ▶
Title: ▶

Per: c/s
Name:
Title:

We hav n.

IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed as of the date first set forth above.

JTI-MACDONALD CORP.

Per: ____________________ c/s
Name: ▶
Title: ▶ Chief Financial Officer

Per: ____________________ c/s
Name: ▶
Title: ▶ Treasurer

We have the authority to bind the Corporation.

JT INTERNATIONAL HOLDING B.V.

Per: ____________________ c/s
Name: ▶
Title: ▶

Per: ____________________ c/s
Name: ▶
Title: ▶

We have the authority to bind the Corporation.

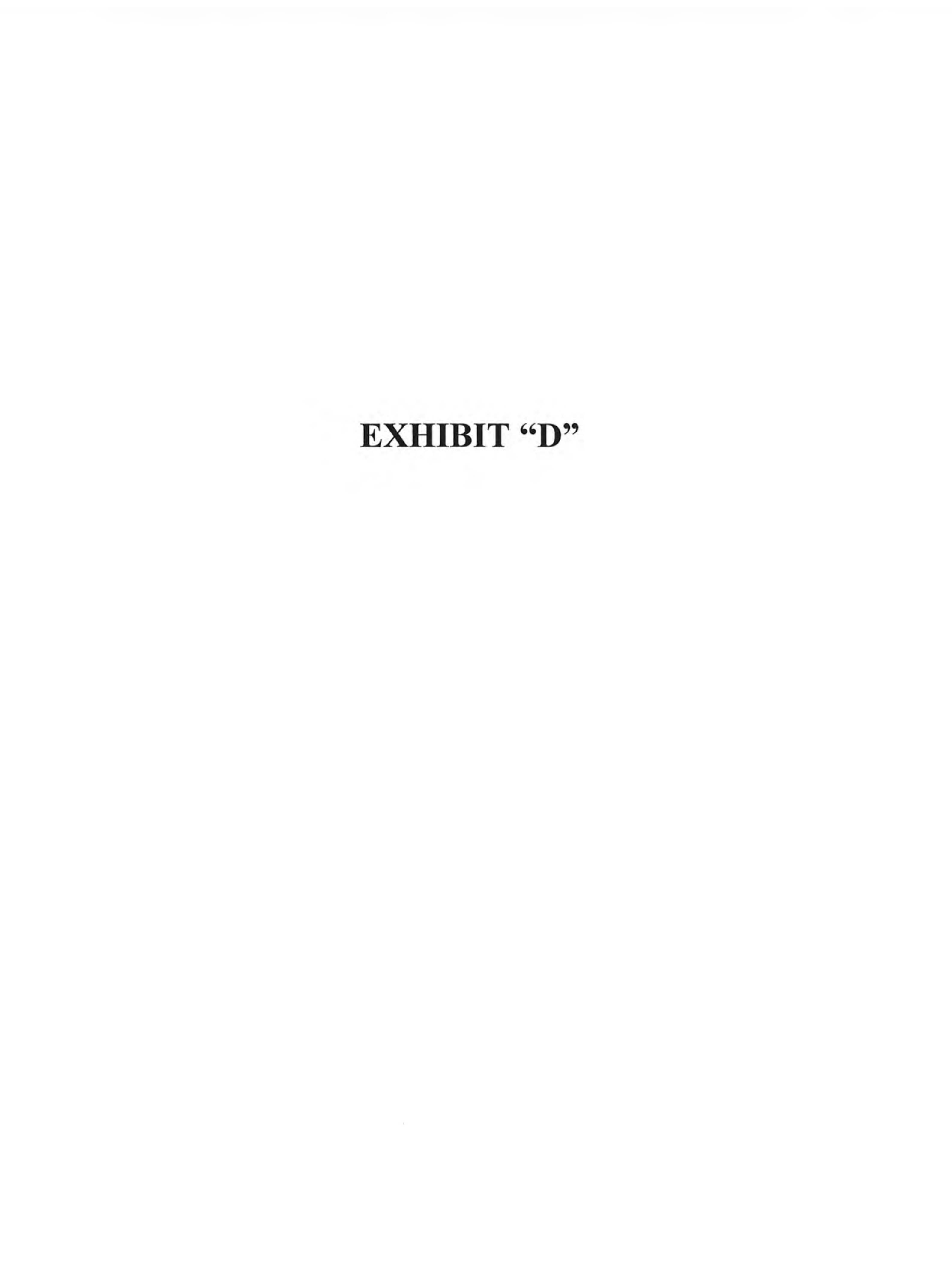


EXHIBIT "D"

This is Exhibit "D" referred to in the
affidavit of William E. Aziz
sworn before me, this 1st
day of April 2019

A COMMISSIONER FOR TAKING AFFIDAVITS

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

JT INTERNATIONAL HOLDING B.V., AMSTERDAM

Annual report 2017

Chamber of Commerce: 32073749
Statutory seat: Amsterdam
Address: Bella Donna 4
1181 RM Amstelveen

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

CONTENTS

Managing Board Report	1
Financial statements	6
Balance sheet as at December 31, 2017	7
Income statement for the year ended December 31, 2017	9
Notes to the balance sheet and income statement	10
Other information	27
Independent auditor's report	27
Statutory rules in respect of result appropriation	27

Total number of pages in this report: 27

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

MANAGING BOARD REPORT

General

JT International Holding B.V. (***Company*** or ***JTIH***) and its subsidiaries (collectively referred to as ***JTI Group*** or ***JTI***) are a leading international tobacco business. JTI manufactures and markets a portfolio of internationally recognized tobacco brands.

JTIH is a wholly-owned subsidiary of Japan Tobacco Inc. (JT). The activities of the Company consist of holding, financing and treasury activities for the JTI Group.

Pursuant to an amendment of Dutch law effective January 1, 2013, the Company shall pursue a policy of having at least 30% of the seats on the Supervisory and Managing Boards held by men and at least 30% of the seats held by women. The Supervisory Board of the Company did not meet the abovementioned gender criterion in 2017. The requirements of the law regarding the Managing Board were fulfilled in 2017. In April 2018, due to the resignation of the female Managing Board member the gender criterion was no longer met. The JTI Group will strive for an adequate and balanced composition of its Supervisory and Managing Boards in future appointments, taking into account all relevant selection criteria, including but not limited to gender balance and executive experience.

1 Developments in the year ended December 31, 2017

The Company continued its holding and financing activities on behalf of the JTI Group.

On October 19, 2017, the Company acquired an additional 3% of the outstanding share capital of Megapolis Distribution B.V. and its subsidiaries (collectively referred to as “Megapolis”). As a result, the Company’s share of ownership in Megapolis increased from 20% (acquired in 2013) to 23%. Megapolis is Russia’s leading tobacco distributor, accounting for approximately 70% of the Russian cigarette distribution market. Additionally, the principal activity of the associate includes distribution of beer and certain other products within the Russian Federation.

On October 31, 2017, the Company acquired 100% ownership of PT Karyadibya Mahardhika (“KDM”) and PT Surya Mustika Nusantara (“SMN”), a group of tobacco companies based in Indonesia.

On December 21, 2017, JTI acquired 30.95% of National Tobacco Enterprise Share Company (“NTE”) from the Ethiopian Government. As a result, JTI’s share of ownership in NTE increased from 40% (acquired in 2016) to 70.95%. NTE is Ethiopia’s leading tobacco manufacturer, with NTE brands accounting for approximately 98% of the Ethiopian duty paid market. The principal activity of the entity is the manufacturing and distribution of cigarettes within Ethiopia. Acquisition of a controlling stake in NTE will enable JTI to invest in the promising Ethiopian market and take NTE to a new level of growth. In addition to enhancing equity of NTE's local brand, Nyala, and further strengthening the overall manufacturing and distribution capabilities, the Company plans to explore opportunities for JTI brands in this vibrant market.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

2 Financial position at year end 2017

The balance sheet includes participations in group companies for an amount of USD 27.3 billion (2016: USD 25.3 billion). Total assets amount to USD 31.5 billion (2016: USD 29.9 billion). Total equity of the Company amounts to USD 28.0 billion (2016: USD 25.8 billion). Current liabilities amount to USD 3.4 billion (2016: USD 4.1 billion).

3 Result analysis

Net dividends increased in 2017 and amounted to USD 3,522 million (2016: USD 2,264 million), an increase of USD 1,258 million in comparison to last year. Net profit for 2017 is USD 3,266 million, in comparison to a net profit of USD 2,113 million in 2016, which is mainly due to variances in dividend income.

4 Risk exposure

Country risks

JTI has consistently expanded its earnings base to secure long term growth by making acquisitions, entering new markets and increasing share in markets where JTI had limited presence. Such a geographical expansion increases the Group's exposure to country risks. In any market where the JTI Group operates, we may face economic, political or social turmoil which may lead to lower volume, revenue and profits in the markets. As such, this may negatively affect the Company's ability to repatriate cash, impacting the dividend income line of our financial statements. Whilst it is not possible to eliminate this risk, the JTI Group aims to avoid overdependence on a small number of markets as sources of profit by expanding the pool of highly profitable markets.

Foreign exchange risk

The Company conducts a significant portion of its business in currencies other than USD, such as the Russian Ruble, Euro, British pound, and several other currencies. Transactions in currencies other than USD are typically related to intercompany financing and cash repatriation from JTI group companies. Currency fluctuations may, therefore, adversely affect the Company's dividend income and operating results.

The Company has a low risk appetite to foreign exchange transaction risk and monitors these risks closely. The Company mitigates foreign exchange transaction risks through hedging activities such as derivative contracts and back-to-back intercompany financing. However, it is not possible to completely eliminate foreign exchange transaction risk.

Interest rate risk

As the Company is engaged in significant intercompany financing transactions across JTI Group companies, the Company is exposed to interest rate risk. A significant portion of the Company's financing transactions are back-to-back with JT International SA, earning a margin which is at arm's length. In addition, the majority of the interest income of the Company results from intercompany financing bearing a fixed interest rate. Hence, the interest rate risk for the Company is limited.

Counterparty risk

The Company is exposed to the risk that financial institutions where cash is deposited will fail to meet their contractual obligations. To mitigate the counterparty credit risk, JTI has a policy of only entering into

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

contracts with carefully selected major financial institutions based upon their credit ratings and other financial indicators, within strict individually allocated limits.

The Company's Corporate Policies and Procedures for mitigating credit risk on principal transactions include reviewing and establishing limits for credit exposure and continually assessing the creditworthiness of counterparties. ISDA agreements with counterparties give JTI the option to net amounts due from JTI to a counterparty with amounts due to JTI from a counterparty reducing the maximum loss from credit risk in the event of counterparty default. At December 31, 2017, there were no significant concentrations of credit risk with any individual counterparty.

Litigation risk

The Company itself is no named party to any litigation as of December 31, 2017. However, certain JTI subsidiaries are defendants in lawsuits filed by plaintiffs seeking damages for harm allegedly caused by smoking. For further information, we refer to the consolidated financial statements of JT Inc. (http://www.jt.com). An unfavorable decision regarding current litigation in Canada could materially affect the valuation of our Canadian subsidiary as well as the recoverability of an intercompany loan provided to this subsidiary. The maximum risk to the financial statements of the Company would be a full write down of our investment in Canada as well as the intercompany loan provided to the Canadian subsidiary (December 31, 2017: USD 1.1 billion).

5 Research and development

As a holding and financing entity, the Company does not carry out any research and development activities.

6 Employee information

The Company employed an average number of 64 employees during 2017 (2016: 58).

7 Distribution of earnings

The distribution of the earnings of the Company is at the disposal of the General Meeting of Shareholders.

The Managing Board proposes to add the result of the year to the retained earnings. The financial statements do not yet reflect this proposal.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

8 Future outlook

The Company intends to continue to provide holding and financing activities on behalf of the JTI Group. The Company's income is mainly driven by the level of financing provided to other group companies, the level of external debt and interest rate developments, as well as by the performance of the JTI Group as a whole.

Management expects that the cash generated by the operating activities of the JTI Group will continue to cover its expenditures and repayment of debt.

In 2018, the Company will continue to support the JTI Group to secure long term growth by making acquisitions, entering new markets and increasing share in markets where JTI had limited presence.

The Company is continuously adapting its resource requirements to future business needs. For 2018, headcount is expected to remain stable.

The Company does not plan to engage in activities in the field of research and development.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

Amsterdam, May 7, 2018

Managing Board

DocuSigned by:
Diederik Ex
00A5E01577834C1...

M.P.M. Ramaekers

D.J. Ex

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

Financial statements

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

Balance sheet as at December 31, 2017

(Before appropriation of result)

Assets		**December 31, 2017**		**December 31, 2016**	
	Note	USD '000	USD '000	USD '000	USD '000
Fixed assets	6.				
Participations in group companies	7.	27,333,699		25,326,859	
Participations in affiliated companies	7.	901,841		855,693	
Loans to group companies	8.	1,214,110		935,403	
Others	9.	88,058		80,139	
			29,537,708		27,198,094
Current assets					
Short term loans to group companies		638,987		2,044,563	
Current portion of loans to group companies		36,677		404,514	
Current portion of other receivables		-		-	
Other receivables from group and affiliated companies		1,171,210		167,887	
Accounts receivable third parties		15		22	
Other receivables and accrued income	10.	20,623		25,290	
			1,867,512		2,642,276
Cash and cash equivalents	11.		96,488		72,969
			31,501,708		29,913,339

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

Balance sheet as at December 31, 2017
(Before appropriation of result)

Equity and Liabilities		**December 31, 2017**		**December 31, 2016**	
	Note	USD '000	USD '000	USD '000	USD '000
Shareholder's equity	12.				
Share capital		1,800,372		1,800,372	
Share premium		10,516,127		11,621,869	
Retained earnings		12,882,425		10,765,410	
Currency translation adjustment		(416,259)		(461,069)	
Unappropriated result		3,265,773		2,113,489	
			28,048,438		25,840,071
Provisions					
Deferred income taxes	13.		613		616
Long term liabilities	14.				
Debts to group companies		-		-	
Other Long term liabilities		65,968		3,780	
			65,968		3,780
Current liabilities	16.				
Short term loans to group and affiliated companies		3,121,154		3,160,204	
Other payables to group companies		240,328		370,093	
Current portion of debts to group companies		-		-	
Current portion of other long term liabilities		-		-	
Current portion of long term liabilities		-		500,198	
Taxes and social security charges		283		223	
Accounts payable and accrued liabilities		24,924		38,154	
			3,386,689		4,068,872
			31,501,708		29,913,339

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

Income statement for the year ended December 31, 2017

	Note	2017		2016	
		USD '000	USD '000	USD '000	USD '000
Dividend income		3,525,561		2,271,600	
Withholding taxes		(3,637)		(7,613)	
Net dividend income			3,521,924		2,263,987
Interest income	19.	84,717		86,372	
Interest expenses	19.	(45,310)		(33,127)	
Net interest			39,407		53,245
General and administrative expenses	20.	(229,196)		(192,145)	
Operating expenses			(229,196)		(192,145)
Result from operations			**3,332,135**		**2,125,087**
Foreign exchange result		(871)		(3,860)	
Other financial (expense)/income	22.	(57,762)		(1,276)	
Total financial income and expense			(58,633)		(5,136)
Result before taxation			**3,273,502**		**2,119,951**
Income taxes	23.		(7,729)		(6,462)
Result after taxation			**3,265,773**		**2,113,489**

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

Notes to the balance sheet and income statement

1. General notes

1.1 Activities and registered office

JT International Holding B.V. (***Company*** or ***JTIH***), having its statutory seat in Amsterdam, the Netherlands and offices in Amstelveen, the Netherlands, is a wholly-owned subsidiary of JT International Group Holding B.V., having its statutory seat in Amsterdam, which in turn is a wholly-owned subsidiary of Japan Tobacco Inc. (***JT***), Japan. The activities of the Company consist of holding, financing and treasury activities for the JTI Group. The latter entail both internal and external financing activities to meet the funding needs for future growth of JTI entities.

1.2 Operations/Group structure

JTIH and its subsidiaries (referred to as JTI Group or JTI) are a leading multinational tobacco business with a strong portfolio of brands deployed across numerous markets around the world. JTI has a license agreement with JT, granting JTI the exclusive rights to use certain JT trademarks outside the United States, Japan and China.

For further information about JTI Group and its operations, we refer to the website of JT Inc. (http://www.jt.com).

The list of directly and indirectly held investments of the Company is filed with the Trade Register in line with article 2:379 sub 5 of the Dutch Civil Code.

1.3 Related parties

All legal entities that can be controlled, jointly controlled or significantly influenced are considered to be a related party. Also, entities which can control the Company are considered to be a related party. In addition, statutory directors, other key management of JTIH or the ultimate parent company and close relatives are regarded as related parties.

Transactions with related parties are disclosed in the notes insofar as they are not transacted under normal market conditions. The nature, extent and other information is disclosed if this is necessary in order to provide the required insight.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

2. General policies

2.1 General

The financial statements are prepared in accordance with accounting principles generally accepted in the Netherlands and with the financial reporting requirements included in Part 9 of Book 2 of the Dutch Civil Code and the firm pronouncements in the Dutch Accounting Standards, as published by the Dutch Accounting Standards Board (‘Raad voor de Jaarverslaggeving’).

Valuation of the assets and liabilities and determination of the result takes place under the historical cost convention, unless stated otherwise. An asset is recognized in the balance sheet when it is probable that the expected future economic benefits that are attributable to the asset will flow to the entity and the cost of the asset can be measured reliably. A liability is recognized in the balance sheet when it is expected to result in an outflow from the entity of resources embodying economic benefits and the amount of the obligation can be measured with sufficient reliability.

Income is recognized in the income statement when an increase in future economic potential related to an increase in an asset or a decrease of a liability has arisen, the size of which can be measured reliably.

Expense is recognized when a decrease in the economic potential related to a decrease in an asset or an increase of a liability has arisen, the size of which can be measured with sufficient reliability. Losses originating before the end of the financial year are taken into account if they have become known before the date of the financial statements.

If a transaction results in a transfer of future economic benefits and/or when all risks relating to assets or liabilities transfer to a third party, the asset or liability is no longer included in the balance sheet. Assets and liabilities are not included in the balance sheet if economic benefits are not probable and/or cannot be measured with sufficient reliability.

In the balance sheet and income statement, references are made to the notes.

2.2 Comparison with previous year

The valuation principles and method of determining the result are the same as those used in the previous year.

2.3 Foreign currency

2.3.1 Functional currency

The Company belongs to a multinational, which operates on a worldwide basis. Therefore, the Company has elected the US dollar as its functional currency. Consequently, in accordance with Article 2:362, Section 7 of the Dutch Civil Code, the financial statements are presented in US dollars.

All amounts have been rounded to the nearest thousand, unless otherwise indicated.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

2.3.2 Transactions, receivables and liabilities

Transactions in foreign currencies are stated in the financial statements at the exchange rate of the functional currency on the transaction date.

Monetary assets and liabilities in foreign currencies are converted at the closing rate of the functional currency on the balance sheet date. The translation differences resulting from settlement and conversion are credited or charged to the income statement, unless hedge accounting is applied.

Non-monetary assets valued at historical cost in a foreign currency are converted at the exchange rate on the transaction date.

Non-monetary assets valued at fair value in a foreign currency are converted at the exchange rate on the date on which the fair value was determined.

Translation differences on intragroup long term loans that effectively constitute an increase or decrease in net investments in a foreign operation are directly recognized in equity as a component of the legal reserve for translation differences.

2.4 Consolidation

As the financial information of the Company and its subsidiary companies is included in the consolidated financial statements of Japan Tobacco Inc. (‘JT’), Tokyo, Japan, the Company has elected to apply Article 2:408, Section 1 of the Dutch Civil Code. As a result, 1) the annual report does not include a consolidated balance sheet nor a consolidated income statement, 2) the Company does not disclose litigation related to participations in group companies in which the Company is no named party, unless an unfavorable decision regarding such litigation could materially affect the valuation of the related participating interest or loan provided to such group company.

We refer to the website of JT (http://www.jt.com) for the consolidated financial statements. Furthermore, the consolidated statements of JT are also available at the Chamber of Commerce.

2.5 Use of estimates

The preparation of the financial statements in conformity with accounting principles generally accepted in the Netherlands requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. Actual results could differ from these estimates. The estimates and the underlying assumptions are constantly assessed. Revisions of estimates are recognized in the period in which the estimate is revised and in future periods for which the revision has consequences.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

3. Accounting policies applied to the valuation of assets and liabilities

3.1 Financial fixed assets

3.1.1 General
Financial fixed assets include participations in group companies and affiliated companies, loans to group companies and deferred tax assets. Following the international structure of the JTI Group and the decision to apply for Article 2:408, the Company elected to apply Article 2:389 Section 9 of the Dutch Civil Code. As such, participations in group companies are valued at the lower of cost and fair market value. Dividends are accounted for in the period in which they are declared.

The Company applies a collective approach to impairment testing of participations in group companies, affiliated companies and loans to group companies. The Company aggregates the underlying assets of the participations in group companies and affiliated companies and loans to group companies into a single cash generating unit, aligned with the highly integrated operating model of the international tobacco business of the JT Group.

3.1.2. Loans to group companies
Upon initial recognition, the loans to group companies are valued at fair value and then valued at amortized cost, which equals the face value, less impairment for doubtful debts. Interest income is recognized in the income statement as it accrues.

3.1.3 Deferred tax assets
Deferred tax assets are reported within financial fixed assets if and to the extent it is probable that the tax claim can be realized in due course. These deferred tax assets are valued at nominal value and have a predominantly long term character.

3.2 Impairment of non-current assets

At each balance sheet date, the Company assesses whether there are any indications that a fixed asset may be subject to impairment. If there are such indications, the realizable value of the asset is determined.

3.3 Receivables

Upon initial recognition receivables on and loans to group companies are valued at fair value, including any directly attributable transaction costs, and then valued at amortized cost, after deduction of any provisions. These provisions are determined by individual assessment of the receivables.

3.4 Cash and cash equivalents

Cash equivalents include all short term, highly liquid investments that are readily convertible to known amounts of cash that have contractual maturities of three months or less at the date of purchase. Cash at banks and in hand is carried at nominal value.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

3.5 Provisions

3.5.1 General

Provisions are valued at the nominal value of the expenses expected to be incurred in settling the liabilities and losses. A provision is recognized if the following applies:

- the Company has a legal or constructive obligation, arising from a past event; and
- the amount can be estimated reliably; and
- it is probable that an outflow of economic benefits will be required to settle the obligation.

3.5.2 Deferred income tax

Provisions consist of deferred income tax liabilities regarding withholding tax on accrued interest, which become due at the moment that the interest is paid in cash.

3.5.3 Retirement benefits

The Company has various pension plans. The Dutch plans are financed through contributions to the pension provider. The foreign pension plans can be compared to how the Dutch pension system has been designed and functions. The pension obligations of both the Dutch and the foreign plans are valued according to the 'valuation to pension fund approach'. This approach accounts for the contribution payable to the pension provider as an expense in the profit and loss account.

Based on the administration agreement it is assessed whether and, if so, which obligations exist in addition to the payment of the annual contribution due to the pension provider as at balance sheet date. These additional obligations, including any obligations from recovery plans of the pension provider, lead to expenses for the Company and are included in a provision on the balance sheet. With final salary pension plans an obligation (provision) for (upcoming) past service is included if future salary increases have already been defined as at balance sheet date. The valuation of the obligation is the best estimate of the amounts required to settle this as at balance sheet date. If the effect of the time value of money is material, the obligation is valued at the present value. Discounting is based on interest rates of high-quality corporate bonds. Additions to and release of the obligations are recognized in the profit and loss account.

A pension receivable is included in the balance sheet when the group has the right of disposal over the pension receivable and it is probable that the future economic benefits which the pension receivable holds will accrue to the group, and the pension receivable can be reliably established.

As of year-end 2017 (and 2016) no pension receivables and no obligations existed for the Company in addition to the payment of the annual contribution due to the pension provider.

3.6 Long term liabilities

Interest-bearing loans and liabilities are valued at fair value upon initial recognition and then valued at amortized cost.

3.7 Taxation

A deferred tax asset is recognized only to the extent that it is probable that future taxable profits will be available against which the temporary difference can be utilized. Deferred tax assets are reviewed at each reporting date and reduced to the extent that it is no longer probable that the related tax benefit will be realized.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

3.8 Cash flow statement

No cash flow statement is presented as this information is included in the consolidated financial statements of Japan Tobacco Inc. ('JT'), Tokyo, Japan.

4. Principles for the determination of the result

4.1 Dividends

Dividends are accounted for in the period in which they are declared.

4.2 Taxation

The corporate income tax is calculated at the applicable tax rate on the result for the financial year, taking into account permanent differences between profit calculated according to the financial statements and profit calculated for taxation purposes.

The nominal tax rate for the Netherlands is 25% for 2017 and for 2016. The tax rate for future years, which is used for the calculation of the deferred tax assets, is 25%.

5. Financial instruments and risk management

5.1 Financial instruments

Financial instruments include investments in shares and bonds, trade and other receivables, cash items, loans and other financing commitments, and trade and other payables. Financial instruments are initially recognized at fair value, including any directly attributable transaction costs.

A significant portion of the Company's financing transactions are back-to-back with the same tenor, earning a margin which is at arm's length. In addition, the majority of the interest income of the Company results from intercompany financing bearing a fixed interest rate. Hence, the interest rate risk for the Company is limited.

After initial recognition, financial instruments are valued in the manner described below.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

5.2 Derivatives

The Company uses derivative and non-derivative financial instruments to mitigate its foreign exchange currency risk and not for speculative or trading purposes. The derivatives might represent assets and liabilities, which are valued at fair value and included in other receivables from and / or payables to group and affiliated companies on the balance sheet. Changes in the fair value are included in the foreign exchange results of the income statement

5.3 Receivables

Accounts receivable are stated at amortized cost less impairment for doubtful debts. The impairment is determined on the basis of individual assessment of the collectability of the receivables.

5.4 Cash and cash equivalents

Cash equivalents include all short term, highly liquid investments that are readily convertible to known amounts of cash that have contractual maturities of three months or less at the date of purchase.

5.5 Long term liabilities

Interest-bearing loans and liabilities are valued at fair value upon initial recognition and then valued at amortized cost.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

6. Financial fixed assets

The movements in financial fixed assets are as follows:

	Participations in group companies	Participations in affiliated companies	Loans to group companies	Other	Total
	USD '000	USD '000	USD '000	USD '000	USD '000
Balance as at December 31, 2015	**24,472,174**	**855,693**	**2,495,811**	**21,052**	**27,844,730**
Additions	871,943	-	-	62,953	934,896
Disposals and repayments	(17,258)	-	(1,084,230)	(3,866)	(1,105,354)
Currency exchange differences	-	-	(52,945)	-	(52,945)
Balance as at December 31, 2016	**25,326,859**	**855,693**	**1,358,636**	**80,139**	**27,621,327**
Additions	2,064,451	46,148	257,077	11,662	2,379,338
Disposals and repayments	(57,611)	-	(525,395)	(3,743)	(586,749)
Currency exchange differences	-	-	160,469	-	160,469
	27,333,699	901,841	1,250,787	88,058	29,574,385
Reclassification of current portion as current assets	-	-	(36,677)	-	(36,677)
Balance as at December 31, 2017	**27,333,699**	**901,841**	**1,214,110**	**88,058**	**29,537,708**

Additions to participations in group companies mainly relate to external acquisitions and capital contributions into group companies.

At balance sheet date, the accumulated amortization and impairments on financial fixed assets amounted to nil (2016: nil).

7. Participations in group and affiliated companies

In accordance with article 2:379 sub 5 of the Dutch Civil Code, the list of directly and indirectly held participations in group companies is filed with the Trade Register.

8. Loans to group companies

A loan receivable from JT Canada LLC, denominated in CAD is classified as 'loans to group companies', bearing a fixed interest rate of 7.51%. Given the maturity date and other conditions to this loan, the currency exchange differences are recorded in the currency translation adjustment account as part of the Company's equity, if and insofar repayment is not expected in the foreseeable future.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

The Company itself is no named party to any litigation as of December 31, 2017. However, certain JTI subsidiaries are defendants in lawsuits filed by plaintiffs seeking damages for harm allegedly caused by smoking. For further information, we refer to the consolidated financial statements of JT Inc. (http://www.jt.com). An unfavorable decision regarding current litigation in Canada could materially affect the valuation of our Canadian subsidiary as well as the recoverability of an intercompany loan provided to this subsidiary. The maximum risk to the financial statements of the Company would be a full write down of our investment in Canada as well as an intercompany loan provided to the Canadian subsidiary (December 31, 2017: USD 1.1 billion).

9. Other financial fixed assets

Other financial fixed assets consist of:

	December 31, 2017	December 31, 2016
	USD '000	USD '000
Third party receivable	74,289	62,942
Loans to affiliated companies	12,875	16,375
Deferred income tax assets	-	-
Other	894	822
	88,058	80,139

The deferred income tax assets are as follows:

	December 31, 2017	December 31, 2016
	USD '000	USD '000
Temporary differences	18,403	12,557
Tax credits and carry forward losses	42,563	39,080
	60,966	51,637
Valuation allowances	(60,966)	(51,637)
	-	-

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

The deferred income tax assets are predominantly of a long term character and are reported at historical cost.

10. Other receivables and accrued income

The other receivables from group and affiliated companies mainly consist of interest bearing current account positions, bearing overnight Libor rates per currency, with a margin which is at arm's length.

11. Cash and cash equivalents

The cash and bank balances are at free disposal of the Company.

12. Shareholder's equity

	Share capital	Share premium	Retained earnings	Currency translation adjustment	Unappro-priated result	Total
	USD '000	USD '000	USD '000	USD '000	USD '000	USD '000
Balance as at December 31, 2015	**1,800,372**	**13,307,869**	**9,684,491**	**(478,696)**	**1,082,885**	**25,396,921**
Appropriation of result	-	-	1,082,885	-	(1,082,885)	-
Result for the year	-	-	-	-	2,113,489	2,113,489
Cash repatriation	-	(1,686,000)	-	-	-	(1,686,000)
Currency translation adjustments	-	-	(1,966)	17,627	-	15,661
Balance as at December 31, 2016	**1,800,372**	**11,621,869**	**10,765,410**	**(461,069)**	**2,113,489**	**25,840,071**
Appropriation of result	-	-	2,113,489	-	(2,113,489)	-
Result for the year	-	-	-	-	3,265,773	3,265,773
Cash repatriation	-	(1,105,742)	-	-	-	(1,105,742)
Currency translation adjustments	-	-	3,526	44,810	-	48,336
Balance as at December 31, 2017	**1,800,372**	**10,516,127**	**12,882,425**	**(416,259)**	**3,265,773**	**28,048,438**

12.1 Share capital issued

As of December 31, 2017, issued share capital amounts to USD 1,800,372,005 and consists of 1,800,372,005 shares of USD 1 each.

12.2 Share premium

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

The share premium of USD 10.5 billion is considered to be capital for tax purposes.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

12.3 Appropriation of result for the financial year 2016

The annual report 2016 was adopted by means of a shareholder's resolution on May 8, 2017. The General Meeting of Shareholders determined the appropriation of the result in accordance with the proposal being made to that end.

12.4 Appropriation of result for the financial year 2017

Pending the decision of the General Meeting of Shareholders, the net result for the year 2017 is presented as unappropriated result in equity. The Managing Board proposes to add the result of the year to the retained earnings.

The financial statements do not yet reflect this proposal.

13. Provisions

The provisions consist of a deferred tax liability. The movements are as follows:

	December 31, 2017	December 31, 2016
	USD '000	USD '000
Opening balance	616	617
Net additions and withdrawals	(3)	(1)
Closing balance	613	616

The deferred tax liability is of a short term nature.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

14. Long term liabilities

The movements are as follows:

	December 31, 2017	December 31, 2016
	USD ‘000	USD ‘000
Opening balance including current liabilities	6,211	24,467
Additions	65,768	3,780
Repayments	(2,431)	(22,036)
	69,548	6,211
Reclassification as current liabilities	(3,580)	(2,431)
Closing balance	65,968	3,780

Long term liabilities mature within five years and bear no interest.

Additions in 2017 represent a long term deferred consideration for an acquisition made in the year with a due date at April 30, 2019.

15. Credit facilities

At December 31, 2017, the Company had access to a committed syndicated credit facility of EUR 1.3 billion (2016: EUR 1 billion). The facility was unused as of year-end 2017. Together with its ultimate parent company Japan Tobacco Inc., the Company also had access to an uncommitted revolving credit facility of USD 3 billion, each draw down to be guaranteed by Japan Tobacco Inc. The facility was also unused as of year-end 2017.

In 2017, the Company entered into a multi-currency credit facility agreement of JPY 700 billion with Japan Tobacco Inc. USD 1.4 billion of the credit facility was used as of year-end 2017 and is due within 12 months after the balance sheet date.

16. Current liabilities

The other payables to group and affiliated companies mainly consist of interest bearing current account positions, bearing overnight Libor rates per currency with a margin, which is at arm’s length.

At December 31, 2017, the Company had a social insurance contributions payable outstanding of USD 283 (2016: USD 223).

Current liabilities do not include pension premiums due (2016: nil).

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

17. Financial instruments

The Company uses derivatives to reduce its foreign exchange balance sheet exposure. At December 31, 2017 the amount outstanding was nil (2016: USD -10).

The fair value of all derivatives contracts as of year-end 2017 amounts to nil (2016: USD -10).

In 2017, the result on currency forward transactions was a loss of USD 2,845 (2016: USD 1,703 loss) and is recorded under foreign exchange result in the income statement.

18. Assets and liabilities not recognized in the balance sheet

18.1 Operational leasing

Annual lease obligations to third parties in respect of vehicles were USD 480 as of year-end 2017 (2016: USD 468). The maximum term of the lease contracts was 4 years.

18.2 Fiscal unity

JT International Holding B.V. is part of a fiscal unity for corporate income tax and VAT. The head of the fiscal unity is its parent company, JT International Group Holding B.V.. Each of the companies in the fiscal unity is severally liable for corporate income tax and VAT to be paid by the fiscal unity.

Up and until 2016, the Company charged the other members in the fiscal unity based on their commercial result. As from the year 2017, the Company bears the tax charges of the entire fiscal unity. This change was made to simplify the corporate income tax reporting in the small holding companies in the fiscal unity for efficiency purposes.

18.3 Commitments

On December 14, 2007, the JTI Group, the European Commission (EC) and 26 of its member states signed a 15-year cooperation agreement (EC agreement) to combat contraband and counterfeit of cigarettes in the European Union. The agreement calls for a payment of USD 400 million over 15 years, which will be used by the EC and the participating Member States to support anti-contraband and anti-counterfeit initiatives. The Group shall pay USD 50 million annually for the first five years and USD 15 million in each of the following ten years. These payments are guaranteed by the Company.

The Company also issued payment guarantees in favor of third parties for the total amount of USD 32,424 (2016: USD 139,777).

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

18.4 Contingent liabilities

The Company provided support letters to the following JTI entities to enable them to meet their obligations:

- Emerging Products Holding B.V., Netherlands
- JTI Hungary Dohányértékesítő Zrt., Hungary
- JTI Leaf Malawi Limited, Malawi
- JT International A.D. Senta, Serbia
- JTI Cigarettes & Tobacco Factory Limited, South Sudan
- BIS Overseas Bolivia S.R.L., Bolivia
- JT International (Thailand) Limited, Thailand
- Japan Tobacco International Bulgaria EOOD, Bulgaria

The support letters were issued in connection with the 2016 statutory audit of these entities and are valid up to 12 months after the approval of the entity's 2016 financial statements by its board of directors. As of December 31, 2017, the financial impact of these support letters cannot be reasonably estimated.

19. Interest income and interest expense

The interest income is as follows:

	2017	2016
	USD '000	USD '000
Interest income from group and affiliated companies	83,028	81,322
Interest income from third parties and other affiliated companies	1,689	5,050
	84,717	86,372

The interest expenses are as follows:

	2017	2016
	USD '000	USD '000
Interest expenses to group and affiliated companies	42,571	28,154
Interest expenses to banks and other third parties	2,739	4,973
	45,310	33,127

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

20. General and administrative expenses

General and administrative expenses consist of:

	2017	2016
	USD ‘000	USD ‘000
Salary and salary related expenses	11,219	10,125
Net charges from / to group and affiliated companies	207,710	167,997
Other expenses	10,267	14,023
	229,196	192,145

Salary and salary related expenses are as follows:

	2017	2016
	USD ‘000	USD ‘000
Salaries	9,036	7,727
Social security charges	1,345	1,384
Pension cost	838	1,014
	11,219	10,125

21. Audit fees

The fees associated with the audit of the 2017 financial statements amounted to USD 90 (2016: USD 80). No other (audit related) services were used from Deloitte Accountants B.V. or their other network.

22. Other financial (expenses)/income

Other financial expenses and income include liquidation losses, bank charges and other items of a financial nature. In 2017, the Company wrote off an intercompany loan of USD 49.7 million based on the assessment of the collectability of the loan.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

23. Income taxes

Income taxes are as follows:

	2017	2016
	USD '000	USD '000
Current income tax	7,729	6,462
Deferred income taxes	-	-
	7,729	6,462

The current income tax primarily relates to withholding tax paid related to foreign interest and services.

The available tax credits, which can be offset against future corporate income tax payables, are estimated at USD 42.6 million as of year-end 2017 (2016: USD 39.1 million).

The nominal tax rate for the Netherlands is 25% for 2017 and for 2016. The tax rate for future years, which is used for the calculation of the deferred tax assets, is 25%. The difference between the nominal and effective tax rate primarily reflects dividend income, which is tax exempted.

24. Employee information

During the 2017 financial year, the average number of staff employed in the group, converted into full-time equivalents, amounted to 64 (2016: 58).

In 2017, the Managing Board of the Company received remuneration for their services to the Company and its subsidiaries amounting to USD 1,355 (2016: USD 1,192). The emoluments charged in the financial year to the Company for the Supervisory Board amounted to nil (2016: nil).

25. Subsequent events

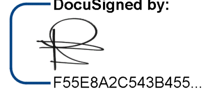
On March 28, 2018, Mrs. M. Franke resigned as statutory director of the Company.

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

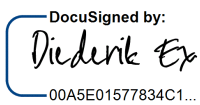
Signing of the annual report

Amsterdam, May 7, 2018

Managing Board

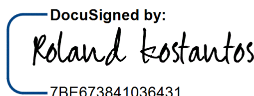


M.P.M. Ramaekers

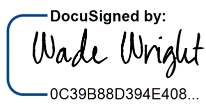


D.J. Ex

Supervisory Board



S.R. Kostantos



W. Wright

N. Minami

DocuSign Envelope ID: 9371FB35-5A21-471A-92D3-0550F3CC91A5

OTHER INFORMATION

Independent auditor's report

Reference is made to the independent auditor's report on the next page.

Statutory rules in respect of result appropriation

In accordance with Article 26 of the Company's statutes, the net result is at the disposal of the General Meeting of Shareholders. Dutch law stipulates that distributions may only be made to the extent the company's equity is in excess of the reserves it is required to maintain by law and its Articles of Association. Moreover, no distributions may be made if the Managing Board is of the opinion that, by such distribution, the Company will not be able to fulfill its financial obligations in the foreseeable future.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

AFFIDAVIT OF WILLIAM E. AZIZ

Thornton Grout Finnigan LLP
100 Wellington Street West
Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Robert I. Thornton (LSO# 24266B)
Email: rthornton@tgf.ca
Leanne M. Williams (LSO# 41877E)
Email: lwilliams@tgf.ca
Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Applicant

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

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

RESPONDING MOTION RECORD
OF THE APPLICANT
Returnable April 4-5, 2019

Thornton Grout Finnigan LLP
100 Wellington Street West
Suite 3200
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

Robert I. Thornton (LSO# 24266B)
Email: rthornton@tgf.ca

Leanne M. Williams (LSO# 41877E)
Email: lwilliams@tgf.ca

Rebecca L. Kennedy (LSO# 61146S)
Email: rkennedy@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Lawyers for the Applicant