IADC COMMITTEE NEWSLETTER

PRODUCT LIABILITY

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IN THIS ISSUE

In this article, the authors comment on an appellate decision rendered in the context of mammoth tobacco class actions which resulted in an award of approximately $CAN 15 billion. Among other things, this decision weighed in on the rules governing product liability in Québec, Canada's only civil law province, and remains a leading case in the area of dangerous products.

Unlimited Liability?
Québec Tobacco Litigation and Its Ramifications For Product Liability Class Actions

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I. INTRODUCTION

Product liability class actions can be big. In some cases, very big. One notable example is *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*,[1] a decision rendered by the Court of Appeal of Québec in 2019. In addition to the fact that more than 20 long years separated the filing of the "applications for authorization to institute a class action" (certification motions) and their epic dénouement, the amounts awarded for moral and punitive damages – approximately $CAN 15 billion – make it one of the largest civil judgments in Canadian history.

II. PROCEDURAL CONTEXT

(i) Authorization Stage of the Class Action

On September 30, 1998, Ms. Céclia Létourneau filed an application for authorization to institute a class action against Imperial Tobacco Canada Ltd., JTI-Macdonald Corp. and Rothmans, Benson and Hedges Inc., the three large cigarette manufacturers that dominated the Québec tobacco market ("**the appellants**").[2] The application was brought on behalf of "all persons residing in Québec who are or have been [addicted to] the nicotine contained in cigarettes manufactured by the [appellants] and the legal heirs of the deceased persons comprised within the class" ("***Létourneau* Case**").

On November 20, 1998, the *Centre québécois sur le tabac et la santé* ("**Québec Centre on Tobacco and Health**") and Mr. Jean-Yves Blais filed an application for authorization against the appellants on behalf of:

> all persons residing in Quebec who are or have been victims of cancer of the lungs, larynx, or throat or who suffer from emphysema, after having directly inhaled cigarette smoke for a prolonged period of time in Québec, and the successors and heirs of deceased persons who otherwise would have been part of the class. ("***Blais* Case**")

On November 3, 2000, the Court of Appeal ordered the joinder of the two class actions for the purposes of proof and hearing at the "authorization" (certification) stage.

Just over four years later, on February 21, 2005, the Superior Court of Québec authorized the class actions. On September 30, 2005, Ms. Létourneau, Mr. Blais and the Québec Centre on Tobacco and Health (the "**respondents**") filed "originating applications" (statements of claim). These originating applications were amended several times thereafter.

From a substantive product liability and misrepresentation standpoint, the appellants based themselves, in part, on the following provisions:

***Civil Code of Québec* ("CCQ")**[3]

[1] 2019 QCCA 358 ("***Imperial Tobacco***").
[2] Note that author Finn acted for one of the three respondents as junior external counsel.
[3] CQLR c CCQ-1991.

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.

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Québec *Consumer Protection Act* ("CPA")[4]

219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

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.

(ii) Trial Stage of the Class Actions

The trial on the merits took place before the Honorable Brian Riordan for a total of 241 days between March 12, 2012, and December 11, 2014. Over the course of this trial, the parties produced more than 20,000 exhibits and examined more than 70 witnesses, including over 20 experts. The appeal record contains approximately 265,000 pages of evidence. Unsurprisingly, the trial judge rendered numerous interlocutory judgments, including several that were appealed.

On May 27, 2015, the Superior Court rendered a judgement ordering the collective recovery of $6,858,864,000 in compensatory damages for the injuries caused to the class members in the *Blais* Case and the collective recovery of a total of $131,090,000 in punitive damages in both class actions. In the *Blais* Case, the appellants were condemned to indemnify the victims of the aforementioned diseases by paying moral damages ($6,858,864,000) and a symbolic amount of punitive damages ($90,000). Since this class action was instituted in 1998, the award was for

[4] CQLR c P-40.1.

approximately $15,500,000,000 once interest and the additional indemnity were factored in. In the *Létourneau* Case, the trial judge found the appellants liable but refused to award compensation to the class members. He nevertheless condemned the appellants to pay substantial punitive damages totaling $131,000,000.

(iii) Appeal Stage of the Class Actions

On March 1, 2019, the Court of Appeal largely upheld the decision of the Superior Court. The Court of Appeal's intervention was limited to resituating the starting point for calculating interest on compensatory damages based on the dates of the class members' diagnoses. It also adjusted the class description in the *Blais* Case. Lastly, the Court of Appeal corrected an error in the trial judge's calculation of the number of diagnoses which reduced the compensatory damages granted in the *Blais* Case from $6,858,864,000 to $6,857,854,080.

III. ANALYSIS

(i) Lessons to be Drawn from the Court of Appeal

The sheer enormity of these awards should not obscure the fact that there are several lessons to be drawn from the Court of Appeal's reasons that are relevant to manufacturers in various fields. Here are a just few of them:

- The duty to inform incumbent upon them pursuant to article 1469 of the CCQ "increases in intensity with the danger and risk inherent in the product and with the seriousness of the possible consequences of the lack of safety."[5] Furthermore, "the information provided by the manufacturer must be accurate (i.e., true), exact, understandable and complete and accurately reflect the nature and seriousness of the danger, the risk of its materialization and the significance of the harm that may result."[6] This will especially be the case if the product is one that is introduced into the body. Apart from medications, pharmaceutical products, and medical devices, cannabis-based products and, more specifically, electronic cigarettes (which are designed for inhaling and exhaling an aerosol generated by a vaping product and are marketed mainly for recreational purposes) could also find themselves on the firing line, despite the current legislative framework.[7] These vaping products arguably present significant health risks, including addiction and lung disease. But are the warnings provided by manufacturers and the State sufficient given the dangers associated with this complex substance and the various methods - including vaping, which is already the subject of medical studies - by which it is consumed?

[5] *Imperial* Tobacco, para. 289.
[6] *Ibid*.
[7] *Tobacco and Vaping Products Act* (S.C. 1997, c. 13); *Cannabis Act* (S.C. 2018, c. 16).

- Despite the existence of explicit, specific warnings about the dangers associated with a product, these dangers will not be considered of public knowledge if the manufacturer is found to have sown public confusion.[8] To return to the example of cannabis, growers, processors, and sellers who tout its benefits in public statements, on their websites, or through social media could expose themselves to potential liability. The same reasoning applies to manufacturers and sellers in the vaping industry. The allegations made against them would likely be much the same as those made by the class representatives in *Imperial Tobacco*; that is, though knowing they market products that are dangerous to consumers, merchants of vaping products nonetheless allegedly deny or minimize these dangers by promoting a harmful product. Warnings by manufacturers and sellers, no matter how clear they may be, can thus be neutralized by a misinformation campaign, notably by assertions to the effect that vaping products are a useful tool in fighting smoking and less harmful than cigarettes.

- To obtain a statutory remedy for a false or misleading representation under articles 219 and 272 of the CPA, it is not necessary for the consumer to have relied on, or even seen, the representation. According to the Court of Appeal, "the sufficient nexus must be analyzed on the objective basis of *ability* – i.e., the possibility of influence by the representation on the consumer – and not materiality – i.e., the fact that the representation did in fact have an impact on the consumer."[9] Accordingly, even if it can be proven that no one had access to an unlawful representation, the consumer will be able to obtain punitive damages if the purchase occurred as a result of the representation, even in the absence of compensatory damages. The concept of "reliance" - the very *sine qua non* of advertising and public relations, which are used to influence consumers - is therefore of no legal relevance whatsoever.

(ii) Québec Smokers' Awareness of the True Harmfulness of Cigarettes

Moreover, *Imperial Tobacco* contains a finding that may well astonish lawyer and layperson alike: Québec smokers were not aware of the true harmfulness of cigarettes until March 1, 1996. Without calling into question all the legal reasoning that leads to this conclusion, some might say that it simply fails to pass the "snuff test." Indeed, there is plenty of evidence that people have known for a very long time that smoking is harmful, even deadly.

[8] *Imperial Tobacco*, para. 646.

[9] *Imperial Tobacco*, para. 932.

As early as 1604, King James I of England wrote a treatise entitled "*A Counterblast to Tobacco*" in which he highlighted the devastating effects of tobacco:

> Have you not reason then to bee ashamed, and to forbeare this filthie noveltie, so basely grounded, so foolishly received and so grossely mistaken in the right use thereof? In your abuse thereof sinning against God, harming yourselves both in persons and goods, and raking also thereby the markes and notes of vanitie upon you: by the custome thereof making yourselves to be wondered at by all forraine civil Nations, and by all strangers that come among you, to be scorned and contemned. A custome lothsome to the eye, hatefull to the Nose, harmefull to the braine, dangerous to the Lungs, and in the blacke stinking fume thereof, neerest resembling the horrible Stigian smoke of the pit that is bottomelesse. (Our emphasis)

Centuries later, in his 1915 poem "*Tobacco*," author Graham Lee Hemminger penned the following lines:

> Tobacco is a dirty weed:
> I like it.
> It satisfies no normal need:
> I like it.
> It makes you thin, it makes you lean,
> It takes the hair right off your bean,
> It's the worst darn stuff I've ever seen:
> I like it.

Obviously, this poem would have had no comical effect whatsoever if people at the time did not already know full well that tobacco, while it can provide pleasure, is nevertheless a noxious "herb."

Almost half a century later, in 1964, the U.S. Surgeon General issued a highly publicized report that left no doubt as to the dangers of tobacco. In "*Smoking and Health: Report of the Advisory Committee of the Surgeon General of the Public Health Service*,"[10] it stated:

> Cigarette smoking is associated with a 70 percent increase in the age-specific death rates of males, and to a lesser extent with increased death rates in females. The total number of excess deaths causally related to cigarette smoking in the U.S. population cannot be accurately estimated. In view of the continuing mounting evidence from many sources, it is the judgment of the Committee that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate.[11] (Our emphasis)

It is thus somewhat counter-intuitive to maintain that it was only 34 years after the publication of this report that Québec smokers became aware of the extent of the risks, they were taking by consuming a product already identified as "loathsome to the eye, hateful to the Nose, harmful to the brain, [and] dangerous to the Lungs" by a contemporary of Shakespeare.

[10] https://www.scribd.com/document/199073624/Smoking-and-Health.

[11] *Ibid.*, p. 40.

In refusing to acknowledge the notoriety of the risks and dangers of tobacco before the fateful date of March 1, 1996, the Court of Appeal also wags a finger at the defendants, who did not call the plaintiffs nor any other class members to testify about their personal awareness. It should be noted, however, that the trial judge and the Court of Appeal refused to allow the pre-trial examination of certain class members since they deemed such an exercise to be pointless:[12]

> [11] Finding that the common issues (or those dealt with collectively) are limited to the actions and state of mind of the applicants, while the questions the applicants seek to ask are essentially either about the actions and knowledge of the class members or about individual claims, [the trial judge] concludes that the examinations sought would be of no assistance in adjudicating the eight main issues identified in the authorization judgment.
>
> [12] Turning to the issue of damages and causation, and after noting that, at this stage, the damages for which collective recovery is sought are limited to exemplary damages and moral damages, he came to the same conclusion, namely that the examinations would not be any more helpful in resolving this issue. On the one hand, he said, exemplary damages require neither damages nor causation, and on the other hand, the testimony sought will not counteract the evidence of moral damages, which can only be done by way of expert testimony, removing, for all intents and purposes, all probative value from the testimony of a few members of classes of such magnitude. (Our emphasis)
>
> [13] With due regards to the applicants' views, I cannot see how these findings could be unreasonable nor how the trial judge could have improperly exercised his discretion. The nature and wording of the issues to be dealt with collectively and the findings identified by the authorization judgment support the trial judge's findings in that there is no reason to believe that the examinations sought could, at this stage of the proceedings, assist in answering those issues. (Emphasis in original)

It is rather paradoxical that the Court of Appeal was of the view that the examinations would be unnecessary at the pre-trial stage given the common issues and the nature of the damages sought, yet useful at the trial stage when the common issues and the damages sought remained essentially the same.

(iii) Tobacco-Related Damages and Health Care Costs Recovery Act

Another surprising aspect of the judgment is the application - and very existence - of the *Tobacco-Related Damages and Health Care Costs Recovery Act* ("**TDHCCRA**"), a tailor-made statute that allows the plaintiff to rely

[12] *Rothmans, Benson & Hedges inc.* c. *Létourneau*, 2009 QCCA 796 (our translation).

solely on epidemiological or statistical studies to meet the civil burden of proof.

In the first place, it is important to note that the tobacco industry (just like the cannabis or vaping industries) is highly regulated and provides the State with significant tax revenues. It is perplexing that provinces, including Québec, are now adopting health care cost recovery legislation after having tolerated tobacco use for decades.

Moreover, the TDHCCRA is retroactive, thus changing the rules mid-game. Yet, according to the Roman adage *nulla poena sine lege praevia*, there can be no crime or punishment without a previous law. While the Supreme Court of Canada has confirmed that retroactive legislation such as the TDHCCRA does not violate the constitutional principle of the rule of law,[13] it remains true that justice must not only be done but seen to be done. As Chief Justice Lord Hewart stated in *R. v. Sussex Justices, ex parte McCarthy*, "[i]t is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[14] Thus, "[n]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."[15] This rule is particularly relevant in the criminal context, but is also relevant in the civil context when, through a new statute, a defendant is exposed to enormous liability vis-à-vis the State that is the author and principal beneficiary of that statute.

(iv) A Few Words on Class Actions

Insofar as class actions are concerned, the Court of Appeal's decision demonstrates both their usefulness and their limits. On the one hand, class actions ensure judicial economy for class members "by avoiding unnecessary duplication in fact-finding and legal analysis."[16] On the other hand, the size of an award can mean that access to justice - the goal of any class action - will ultimately be frustrated. Indeed, at the time of writing, the defendants enjoy protection under the *Companies' Creditors Arrangement Act*,[17] such that the Court of Appeal's decision remains unenforceable.

By placing as much emphasis on deterring - even punishing - defendants as they do on compensating class members, courts can sometimes forget the principle of proportionality that underlies the Québec procedural regime. According to article 18 of the *Code of Civil Procedure* ("**CCP**"),[18] "[t]he parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings [...] and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application". Article 18 *CCP* also specifies that "[j]udges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while

[13] *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, para. 69 and ff.
[14] [1924] 1 K.B. 256, [1923] All E.R. Rep. 233.
[15] *Ibid*.
[16] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, para. 27.
[17] R.S.C. (1985), c. C-36.
[18] CQLR c C-25.01.

having regard to the proper administration of justice."

The judiciary is therefore called upon to play a proactive role throughout the litigation. As much of the Supreme Court of Canada observed in *Marcotte v. Longueuil (City)*, "the requirement of proportionality in the conduct of proceedings reflects the nature of the civil justice system, which, while frequently called on to settle private disputes, discharges state functions and constitutes a public service. This principle means that litigation must be consistent with the principles of good faith and of balance between litigants and must not result in an abuse of the public service provided by the institutions of the civil justice system."[19] It is therefore incumbent upon all officers of the court to ensure procedural balance. Article 1621 CCQ also provides that in assessing punitive damages, the courts must consider the patrimonial situation of the debtor and "the extent of the reparation for which he is already liable to the creditor."

It follows that the second paragraph of article 18 CCP should be used to temper and more strictly manage claims where the amounts sought are Brobdingnagian, but the results could turn out to be Lilliputian (or even nonexistent) because of this disproportion.

IV. CONCLUSION

Québec defendants – whether they are headquartered there, have a place of business in the province, or simply engage in commercial activities with Québec residents - can glean various teachings from *Imperial Tobacco*, including that: (i) the duty to inform incumbent upon manufacturers pursuant to article 1469 CCQ increases in intensity with the inherent danger and risk of the product and with the seriousness of the possible consequences stemming from a safety defect; (ii) despite the existence of explicit and specific warnings about the dangers associated with a product, these dangers will not be considered of public knowledge as long as the manufacturer fosters public confusion through misinformation; and (iii) to obtain a statutory remedy for a false or misleading representation under sections 219 and 272 CPA, it is not necessary for the consumer to have relied on, or even seen, the representation. In other words, when it comes to dangerous products, liability can seem as expansive and amorphous as a puff of smoke.

[19] [2009] 3 S.C.R. 65, para. 43.

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