SUPERIOR COURT
(Class Action Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

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

DATE : June 9, 2015

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

N° 500-06-000070-983

CÉCILIA LÉTOURNEAU
Plaintiff

v.

JTI-MACDONALD CORP. ("**JTM**")
and
IMPERIAL TOBACCO CANADA LIMITED. ("**ITL**")
and
ROTHMANS, BENSON & HEDGES INC. ("**RBH**")
Defendants (collectively: the "**Companies**")

AND

N° 500-06-000076-980

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ
and
JEAN-YVES BLAIS
Plaintiffs

v.

JTI-MACDONALD CORP.
and
IMPERIAL TOBACCO CANADA LIMITED.
and
ROTHMANS, BENSON & HEDGES INC.
Defendants

JUDGMENT CORRECTING CLERICAL ERRORS IN PARAGRAPHS 1114 and 1209 through 1213

JR1353

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RÉSUMÉ DU JUGEMENT

Les deux recours collectifs contre les compagnies canadiennes de cigarettes sont accueillis en partie.

Dans les deux dossiers, la réclamation pour dommages sur une base collective est limitée aux dommages moraux et punitifs. Les deux groupes de demandeurs renoncent à leur possible droit à des réclamations individuelles pour dommages compensatoires, tels la perte de revenus.

Dans le dossier Blais, intenté au nom d'un groupe de personnes ayant été diagnostiquées d'un cancer du poumon ou de la gorge ou d'emphysème, le Tribunal déclare les défenderesses responsables et octroie des dommages moraux et punitifs. Il statue qu'elles ont commis quatre fautes, soit en vertu du devoir général de ne pas causer un préjudice à d'autres, du devoir du manufacturier d'informer ses clients des risques et des dangers de ses produits, de la Charte des droits et libertés de la personne et de la Loi sur la protection du consommateur.

Dans le dossier Blais, le Tribunal octroie des dommages moraux au montant de 6 858 864 000 $ sur une base solidaire entre les défenderesses. Puisque l'action débute en 1998, cette somme s'accroit à approximativement 15 500 000 000 $ avec les intérêts et l'indemnité additionnelle. La responsabilité de chacune des défenderesses entre elles est comme suit:

ITL - 67%, RBH - 20% et JTM - 13%.

Puisqu'il est peu probable que les défenderesses puissent s'acquitter d'une telle somme d'un seul coup, le Tribunal exerce sa discrétion en ce qui concerne l'exécution du jugement. Ainsi, il ordonne un dépôt total initial de 1 000 000 000 $ à être partagé entre les défenderesses selon leur pourcentage de responsabilité et réserve le droit des demandeurs de demander d'autres dépôts, si nécessaire.

Dans le dossier Létourneau, intenté au nom d'un groupe de personnes devenues dépendantes de la nicotine, le Tribunal trouve les défenderesses responsables sous les deux chefs de dommages en ce qui concerne les quatre mêmes fautes. Malgré cette conclusion, le Tribunal refuse d'ordonner le paiement des dommages moraux puisque la preuve ne permet pas d'établir d'une façon suffisamment exacte le montant total des réclamations des membres.

Les fautes en vertu de la *Charte* québécoise et de la *Loi sur la protection du consommateur* permettent l'octroi de dommages punitifs. Comme base pour l'évaluation de ces dommages, le Tribunal choisit le profit annuel avant impôts de chaque défenderesse. Ce montant couvre les deux dossiers. Considérant le comportement particulièrement inacceptable de ITL durant la période ainsi que celui de JTM, mais à un degré moindre, le Tribunal augmente les montants pour lesquels elles sont responsables au dessus du montant de base. Pour l'ensemble, les dommages punitifs se chiffrent à 1 310 000 000 $, partagé entre les défenderesses comme suit:

ITL – 725 000 000 $, RBH – 460 000 000 $ et JTM – 125 000 000 $.

Il faut partager cette somme entre les deux dossiers. Pour ce faire, le Tribunal tient compte de l'impact beaucoup plus grand des fautes des défenderesses relativement au groupe Blais comparé au groupe Létourneau. Ainsi, il attribue 90% du total au groupe Blais et 10% au groupe Létourneau.

Cependant, compte tenu de l'importance des dommages moraux accordés dans Blais, le Tribunal limite les dommages punitifs dans ce dossier. Ainsi, il condamne chaque défenderesse à une somme symbolique de 30 000 $. Cela représente un dollar pour la mort de chaque Canadien causée par l'industrie du tabac chaque année, tel que constaté dans un jugement de la Cour suprême du Canada en 1995.

Il s'ensuit que pour le dossier Létourneau, la condamnation totale pour dommages punitifs se chiffre à 131 000 000 $, soit 10% de l'ensemble. Le partage entre les défenderesses se fait comme suit:

ITL – 72 500 000 $, RBH – 46 000 000 $ et JTM – 12 500 000 $

Puisque le nombre de personnes dans le groupe Létourneau totalise près d'un million, cette somme ne représente que quelque 130 $ par membre. De plus, compte tenu du fait que le Tribunal n'octroie pas de dommages moraux dans ce dossier, il refuse de procéder à la distribution d'un montant à chacun des membres pour le motif que cela serait impraticable ou trop onéreux.

Enfin, le Tribunal ordonne l'exécution provisoire nonobstant appel en ce qui concerne le dépôt initial de un milliard de dollars en guise de dommages moraux, plus tous les dommages punitifs accordés. Les défenderesses devront déposer ces sommes en fiducie avec leurs procureurs respectifs dans les soixante jours de la date du présent jugement. Le Tribunal statuera sur la manière de les débourser lors d'une audition subséquente.

SUMMARY OF THE JUDGMENT

The two class actions against the Canadian cigarette companies are maintained in part.

In both actions, the claim for common or collective damages was limited to moral damages and punitive damages, with both classes of plaintiffs renouncing their potential right to make individual claims for compensatory damages, such as loss of income.

In the Blais File, taken in the name of a class of persons with lung cancer, throat cancer or emphysema, the Court finds the defendants liable for both moral and punitive damages. It holds that they committed four separate faults, including under the general duty not to cause injury to another person, under the duty of a manufacturer to inform its customers of the risks and dangers of its products, under the Quebec Charter of Human Rights and Freedoms and under the Quebec Consumer Protection Act.

In Blais, the Court awards moral damages in the amount of $6,858,864,000 solidarily among the defendants. Since this action was instituted in 1998, this sum translates to approximately $15,500,000,000 once interest and the additional indemnity are added. The respective liability of the defendants among themselves is as follows:

ITL - 67%, RBH - 20% and JTM - 13%.

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*

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1 September 30, 1998 in the Létourneau File and November 20, 1998 in the Blais File.

2 Schedule "A" to the present judgment provides a glossary of most of the defined terms used in the present judgment.

3 In general, reference to the singular, as in "the action" or "this file", encompasses both files.

4 A "pack year" is the equivalent of smoking 7,300 cigarettes, as follows: 1 pack of 20 cigarettes a day over one year: 365 x 20 = 7,300. It is also attained by 10 cigarettes a day for two years, two cigarettes a day for 10 years etc. Given Dr. Siemiatycki's Critical Amount of five pack years, this equates to having smoked 36,500 cigarettes over a person's lifetime.

5 cigarettes per day for 20 years (5 X 365 x 20 = 36,500) or

50 cigarettes per day for 2 years (50 X 365 X 2 = 36,500);

2) To have been diagnosed before March 12, 2012 with:

a) Lung cancer or

b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx or

c) Emphysema.

The group also includes the heirs of the persons deceased after November 20, 1998 who satisfied the criteria mentioned herein.

5 cigarettes par jour pendant 20 ans (5 X 365 x 20 = 36 500) ou

50 cigarettes par jour pendant 2 ans (50 X 365 X 2 = 36 500);

2) Avoir été diagnostiquées avant le 12 mars 2012 avec:

a) Un cancer du poumon ou

b) Un cancer (carcinome épidermoïde) de la gorge, à savoir du larynx, de l'oropharynx ou de l'hypopharynx ou

c) de l'emphysème.

Le groupe comprend également les héritiers des personnes décédées après le 20 novembre 1998 qui satisfont aux critères décrits ci-haut.

For the Létourneau File[5]

All persons residing in Quebec who, as of September 30, 1998, were addicted to the nicotine contained in the cigarettes made by the defendants and who otherwise satisfy the following criteria:

1) They started to smoke before September 30, 1994 by smoking the defendants' cigarettes;

2) They smoked the cigarettes made by the defendants on a daily basis on September 30, 1998, that is, at least one cigarette a day during the 30 days preceding that date; and

3) They were still smoking the defendants' cigarettes on February 21, 2005, or until their death, if it occurred before that date.

The group also includes the heirs of the members who satisfy the criteria described herein.

Toutes les personnes résidant au Québec qui, en date du 30 septembre 1998, étaient dépendantes à la nicotine contenue dans les cigarettes fabriquées par les défenderesses et qui satisfont par ailleurs aux trois critères suivants:

1) Elles ont commencé à fumer avant le 30 septembre 1994 en fumant les cigarettes fabriquées par les défenderesses;

2) Elles fumaient les cigarettes fabriquées par les défenderesses de façon quotidienne au 30 septembre 1998, soit au moins une cigarette par jour pendant les 30 jours précédant cette date; et

3) Elles fumaient toujours les cigarettes fabriquées par les défenderesses en date du 21 février 2005, ou jusqu'à leur décès si celui-ci est survenu avant cette date.

Le groupe comprend également les héritiers des membres qui satisfont aux critères décrits ci-haut.

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[5] We note that the representative member of this class, Cécilia Létourneau, lost an action against ITL for $299.97 before the Small Claims Division of the Court of Québec in 1998. In accordance with article 985 of the *Code of Civil Procedure*, this judgment is not relevant to the present cases.

[3] The Authorization Judgment also set out the "eight principal questions of fact and law to be dealt with collectively" (the "**Common Questions**"). We set them out below, along with our unofficial English translation:[6]

A. Did the Defendants manufacture, market and sell a product that was dangerous and harmful to the health of consumers?	*A. Les défenderesses ont-elles fabriqué, mis en marché, commercialisé un produit dangereux, nocif pour la santé des consommateurs?*
B. Did the Defendants know, or were they presumed to know of the risks and dangers associated with the use of their products?	*B. Les défenderesses avaient-elles connaissance et étaient-elles présumées avoir connaissance des risques et des dangers associés à la consommation de leurs produits?*
C. Did the Defendants knowingly put on the market a product that creates dependence and did they choose not to use the parts of the tobacco containing a level of nicotine sufficiently low that it would have had the effect of terminating the dependence of a large part of the smoking population?	*C. Les défenderesses ont-elles sciemment mis sur le marché un produit qui crée une dépendance et ont-elles fait en sorte de ne pas utiliser les parties du tabac comportant un taux de nicotine tellement bas qu'il aurait pour effet de mettre fin à la dépendance d'une bonne partie des fumeurs?*
D. Did the Defendants employ a systematic policy of non-divulgation of such risks and dangers?	*D. Les défenderesses ont-elles mis en œuvre une politique systématique de non-divulgation de ces risques et de ces dangers?*
E. Did the Defendants trivialize or deny such risks and dangers?	*E. Les défenderesses ont-elles banalisé ou nié ces risques et ces dangers?*
F. Did the Defendants employ marketing strategies conveying false information about the characteristics of the items sold?	*F. Les défenderesses ont-elles mis sur pied des stratégies de marketing véhiculant de fausses informations sur les caractéristiques du bien vendu?*
G. Did the Defendants conspire among themselves to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use?	*G. Les défenderesses ont-elles conspiré entre elles pour maintenir un front commun visant à empêcher que les utilisateurs de leurs produits ne soient informés des dangers inhérents à leur consommation?*
H. Did the Defendants intentionally interfere with the right to life, personal security	*H. Les défenderesses ont-elles intentionnellement porté atteinte au droit à la vie,*

[6] We have modified the order in which the questions were stated in the Authorization Judgment to be more in accordance with the sequence in which we prefer to examine them.

and inviolability of the class members?	*à la sécurité, à l'intégrité des membres du groupe?*

[4] Our review of the Common Questions leads us to conclude that questions "D" and "E" are very similar and should probably be combined. While "F" is not much different from them, the specific accent on marketing there justifies its being treated separately. Therefore, marketing aspects will not be analyzed in the new combined question that will replace "D" and "E" and be stated as follows:

D. Did the Defendants trivialize or deny or employ a systematic policy of non-divulgation of such risks and dangers?	*D. Les défenderesses ont-elles banalisé ou nié ou mis en œuvre une politique systématique de non-divulgation de ces risques et de ces dangers?*

[5] Accordingly, the Court will analyze seven principal questions of fact and law in these files: original questions A, B, C, new question D, and original questions F, G, H, which now become E, F and G (the "**Common Questions**")[7]. Moreover, as required in the Authorization Judgment, this analysis will cover the period from 1950 until the motions for authorization were served in 1998 (the "Class Period").

[6] We should make it clear at the outset that a positive response to a Common Question does not automatically translate into a fault by a Company. Other factors can come into play.

[7] A case in point is the first Common Question. It is not really contested that, during the Class Period, the Companies manufactured, marketed and sold products that were dangerous and harmful to the health of consumers. Before holding that to be a fault, however, we have to consider other issues, such as, when the Companies discovered that their products were dangerous, what steps they took to inform their customers of that and how informed were smokers from other sources. Assessment of fault can only be done in light of all relevant aspects.

[8] In interpreting the Common Questions, it is important to note that the word "product" is limited to machine-produced ("tailor-made") cigarettes and does not include any of the Companies' other products, such as cigars, pipe tobacco, loose or "roll-your-own" ("fine-cut") tobacco, chewing tobacco, cigarette substitutes, etc. Nor does it include any issues relating to second-hand or environmental smoke. Accordingly, unless otherwise noted, when this judgment speaks of the Companies' "products" or of "cigarettes", it is referring only to commercially-sold, tailor-made cigarettes produced by the Companies during the Class Period.

[9] The conclusions of each action are similar, although the amounts claimed vary.

[10] In the Blais File, the claim for non-pecuniary (moral) damages cites loss of enjoyment of life, physical and moral pain and suffering, loss of life expectancy, troubles,

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[7] Given the different make-up of the classes and the different nature of the claims between the files, not all the Common Questions will necessary apply in both files. For example, question "C", dealing with dependence/addiction appears relevant only to the Létourneau file. To the extent that this becomes an issue, the Court will attempt to point out any difference in treatment between the files.

worries and inconveniences arising after having been diagnosed with one of the diseases named in the class description (the "**Diseases**"). After amendment, it seeks an amount of $100,000 for each Member with lung cancer or throat cancer and $30,000 for those with emphysema.

[11] In the Létourneau file, the moral damages are described as an increased risk of contracting a fatal disease, reduced life expectancy, social reprobation, loss of self esteem and humiliation[8]. It seeks an amount of $5,000 for each Member under that head.

[12] The amounts claimed for punitive damages were originally the same in both files: $5,000 a Member. That claim was amended during final argument to seek a global award of between $2,000 and $3,000 a Member, which the Plaintiffs calculate would total approximately $3,000,000,000.

[13] With respect to the manner of proceeding in the present judgment, the Court must examine the Common Questions separately for each of the Companies and each of the files. Although there will inevitably be overlap of the factual and, in particular, the expert proof, during the Class Period the Companies were acting independently of and, indeed, in fierce competition with each other in most aspects of their business. As a result, there must be separate conclusions for each of the Companies on each of the Common Questions in each file.

[14] Organisationally, we provide a glossary of the defined terms in Schedule A to this judgment. As well, we list in the schedules the witnesses according to the party to whom their testimony related. For example, Schedule D identifies the witnesses called by any of the parties who testified concerning matters relating to ITL. Witnesses from the Canadian Tobacco Manufacturers Council (the "**CTMC**") were initially called by the Plaintiffs and they are identified in Schedule C as "Non-Party, Non-Government Witnesses". The schedules also list the experts called by each party and, finally, reproduce extracts of relevant external documents[9].

I.B. THE ALLEGED BASES OF LIABILITY

[15] We are in the collective or common phase of these class actions, as opposed to analyzing individual cases. At this class-wide level, the Plaintiffs are claiming only moral (compensatory) and punitive (exemplary) damages.

[16] Moral damages are claimed under either of the *Civil Codes* in force during the Class Period, as well as under the *Consumer Protection Act*[10] (the "**CPA**") and under the *Québec Charter of Human Rights and Freedoms*[11] (the "**Quebec Charter**). Faults committed prior to January 1, 1994 would be evaluated under the *Civil Code of Lower Canada*, including article 1053, while those committed as of that date would fall under the current *Civil Code of Quebec*, more specifically, under articles 1457 and 1468 and

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8 See paragraphs 182-185 of the Amended Introductory Motion of February 24, 2014 in the Létourneau File.

9 For ease of reference, we attempt to set out all relevant legislation in Schedule H, although we sometimes reproduce legislation in the text.

10 RLRQ, c. P-40.1.

11 RLRQ, c. C-12.

following[12]. In any event, the Plaintiffs see those differences as academic, since the test is essentially the same under both codes.

[17] As for punitive damages, those are claimed under article 272 of the CPA and article 49 of the Quebec Charter.

[18] The Plaintiffs argue that the rules of extracontractual (formerly delictual) liability apply here, and not contractual. Besides the fact that the Class Members have no direct contractual relationship with the Companies, they are alleging a conspiracy to mislead consumers "at large", both of which would lead to extracontractual liability[13].

[19] And even where a contract might exist, they point out that, as a general rule, the duty to inform arises before the contract is formed, thus excluding it from the contractual obligations coming later[14]. Here too, in their view, it makes no difference whether the regime be contractual or extracontractual, since the duty to inform is basically identical under both.

[20] For their part, the Companies agreed that we are in the domain of extracontractual liability as opposed to contractual.

[21] As for the liability of the Companies, the Plaintiffs not surprisingly take the position that all of the Common Questions should be answered in the affirmative and that an affirmative answer to a Common Question results in a civil fault by the Companies. They liken cigarettes to a trap, given their addictive nature, a trap that results in the direst of consequences for the "unwarned" user.

[22] In fact, the Plaintiffs charge the Companies with a fault far graver than failing to inform the public of the risks and dangers of cigarettes. They allege that the Companies conspired to "disinform" the public and government officials of those dangers, i.e., as stated in their Notes[15], "to prevent knowledge of the nature and extent of the dangers inherent in (cigarettes) from being known and understood". The allegation appears to target both efforts to misinform and those to keep people confused and uninformed.

[23] The Plaintiffs see such behaviour as being so egregious and against public order that it should create a *fin de non recevoir*[16] against any attempt by the Companies to defend against these actions, including on the ground of prescription[17].

[24] For similar reasons, the Plaintiffs seek a reversal of the burden of proof. They argue that the onus should shift to the Companies to prove that Class Members, in spite

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12 *An Act Respecting the Implementation of the Reform of the Civil Code*, L.Q. 1992, c. 57, article 65.

13 *Option Consommateurs c. Infineon Technologies*, a.g., 2011 QCCA 2116, para 28.

14 See Pierre-Gabriel JOBIN, *« Les ramifications de l'interdiction d'opter. Y-a-t-il un contrat ? Où finit-il ? »*, (2009) 88 R. du B. Can 355 at page 363.

15 See paragraph 54 of Plaintiffs' Notes. Mention of the "Notes" of any of the parties refers to their respective "Notes and Authorities" filed in support of their closing arguments.

16 In general terms, a *fin de non recevoir* can be found when a person's conduct is so reprehensible that the courts should refuse to recognize his otherwise valid rights. It is a type of estoppel.

17 See paragraphs 100, 105, 107 and 120 of the Plaintiffs' Notes dealing with the Companies' right to make a defence, and paragraphs 2159 and following on prescription.

of being properly warned, would have voluntarily chosen to begin smoking or would have voluntarily continued smoking once addicted[18].

[25] On the question of the *Consumer Protection Act*, the Plaintiffs argue that the Companies committed the prohibited practices set out in sections 219, 220(a) and 228, the last of which attracting special attention as a type of "legislative enactment of the duty to inform"[19]:

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

[26] They argue that the Companies' disinformation campaign is a clear case of failing to mention an important fact, i.e., that any use of the product harms the consumer's health. They add that the Companies failed to mention these important facts over the entire Class Period, including after the entry into force of the Quebec Charter and the relevant sections of the CPA.

[27] The Plaintiffs note that a court may award punitive damages irrespective of whether compensatory damages are granted[20]. They argue that the CPA introduces considerations for awarding punitive damages in addition to those set out in article 1621 of the Civil Code, since "the public order nature of its Title II provisions means that a court can award punitive damages to prevent not only intentional, malicious, or vexatious behaviour, but also ignorant, careless, or seriously negligent conduct".[21]

[28] The Plaintiffs see this as establishing a lower threshold of wrongful behaviour for the granting of punitive damages than under section 49 of the Quebec Charter, where proof of intentionality is required.

[29] As for the Quebec Charter, the Plaintiffs argue that the Companies intentionally violated the Class Members' right to life, personal inviolability[22], personal freedom and dignity under articles 1 and 4. This would allow them to claim compensatory damages under the first paragraph of article 49 and punitive damages under the second paragraph.

[30] If the claims relating to the right to life and personal inviolability are easily understood, it is helpful to explain the others. For the claim with respect to personal freedom, the Plaintiffs find its source in the addictive nature of tobacco smoke that frustrates a person's right to be able to control important decisions affecting his life.

[31] As for the violation of the Class Members' dignity, the Plaintiffs summarize that argument as follows in their Notes:

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18 See paragraph 96 of Plaintiffs' Notes.

19 Claude MASSE, *Loi sur la protection du consommateur : analyse et commentaires*, Cowansville : Les Éditions Yvon Blais Inc., 1999, page 861.

20 *Richard v. Time Inc.,* [2012] 1 S.C.R. 265 ("***Time***"), at paragraphs 145, 147. See also *de Montigny c. Brossard (succession)*, 2010 SCC 51.

21 *Ibidem, Time*, at paragraphs 175-177.

22 "The common meaning of the word "inviolability" suggests that the interference with that right must leave some marks, some *sequelae*, which, while not necessarily physical or permanent, exceed a certain threshold. The interference must affect the victim's physical, psychological or emotional equilibrium in something more than a fleeting manner": *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand* [1996] 3 SCR 211, at paras. 96-97.

> **191.** A manufacturer mindful of a fellow human being's dignity does not sell them a product that will trap them in an addiction and lead to development of serious health problems or death. Such a manufacturer does not design, sell, and market a useless, toxic product and then hide the true nature of that product. The Defendants committed these acts and omissions over decades. The Defendants thus deliberately committed an egregious and troubling violation of the Plaintiffs' right to dignity.

[32] Of the criteria for assessing the amount of punitive damages set out in article 1621 of the *Civil Code*, the Plaintiffs put particular emphasis on the gravity of the debtor's fault. This position is supported by the Supreme Court in the *Time* decision, who categorized it as "undoubtedly the most important factor"[23].

[33] Along those lines, the Plaintiffs made extensive proof and argument that the Companies marketed their cigarettes to under-age smokers and to non-smokers. We consider those arguments in section II.E of this judgment.

I.C. THE COMPANIES' VIEW OF THE KEY ISSUES

[34] The Companies, for their part, were consistent in emphasizing the evidentiary burden on the Plaintiffs. In its Notes, JTM identifies the key issues as being:

> **16.** The first issue in these cases is whether JTIM can be said to have engaged in wrongful conduct at all, given that class members are entitled to take risks and that they knew or could have known about the health risks associated with smoking.
>
> **17.** Secondly, the issue is whether this Court can conclude that JTIM committed any fault, given that throughout the class period it behaved in conformity with the strict regulatory regime put in place by responsible and knowledgeable public health authorities.
>
> **18.** Thirdly, to the extent that JTIM has committed any fault, the issue is whether that fault can engage its liability. Unless Plaintiffs show that it led each class member to make the decision to smoke or continue smoking when he/she would not otherwise have made that choice, *and* that it was the resulting "wrongful smoking", attributable to the fault of JTIM, that was the physical cause of each member's disease (sic). Without such proof, collective recovery is simply not possible or justified in these cases.
>
> **16.** (sic) Finally, with respect to punitive damages, the key issue (apart from the fact that they are prescribed) is whether a party that has conformed with public policy, including by warning consumers since 1972 of the risks of smoking in accordance with the wording prescribed by the government, can be said to have intentionally sought to harm class members that have made the choice to smoke, especially in the absence of any evidence from any class member that anything that JTIM is alleged to have done had any impact whatsoever on him or her.

[35] The Companies also underline – seemingly on dozens of occasions - that the absence of testimony of class members in these files represents an insurmountable obstacle to proving the essential elements of fault, damages and causation for each Member. The class action regime, they remind the Court, does not relieve the Plaintiffs of

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

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

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[24] The witnesses called by any of the parties who testified concerning matters relating to ITL are listed in Schedule D to the present judgment and those called by the Plaintiffs who testified concerning non-company matters are listed in Schedule C. Schedules E and F apply to JTM and RBH respectively.

[25] See section II.C.1.

of challenges and made good faith efforts to reduce the risks of smoking (and continue to do so).

293. The work carried on in the R&D department of ITL was professional and driven by ethical considerations. In particular, Dr. Porter could name no avenues of work that were worth pursuing in the search for a less hazardous cigarette but which were not pursued by ITL or the larger BAT group.

294. Acting in good faith and in accordance with the state of the art at all relevant times, ITL took steps to reduce the hazards associated with its cigarettes. Contrary to what Plaintiffs might suggest, the mere fact that smoking continues to pose a (known) risk to consumers due to the inherent make-up of cigarettes simply does not give rise to a de facto "dangerous product" or "defective product" claim.

[43] Also, in response to a request from the Court as to when each Company first admitted that smoking caused a Disease, ITL pointed out that, early on in the Class Period, its scientists adopted the working hypothesis that there is a relationship between smoking and disease.

[44] Whatever the merits of these arguments, they contain clear admissions that ITL manufactured, marketed and sold products that were dangerous and harmful to the health of consumers.

[45] This is confirmed by the testimony of ITL's current president, Marie Polet. At trial, she made the following statements:

ON JUNE 4, 2012:

Q121: A - Well, BAT has acknowledged for many, many years that smoking is a cause of serious disease. So, absolutely, I believe that that's something that I agree with.

Q158: A- The company I have worked for, for those years, and that's BAT, yes. So I can't speak to Imperial Tobacco specifically but I can tell you that I've always recalled BAT saying that there was a risk associated to smoking and accepting that risk.

Q251: A- I think we have a duty to work on trying to reduce the harm of the products we sell; I believe we are responsible for that.

Q302: A- What I believe is that smoking can cause a number of serious and, in some cases, fatal diseases. And those diseases that I see here are commonly referred to as these diseases (referring to a list of diseases) that smoking can cause.

Q339: A- … It was very clear at that point in time, and I believe it was very clear many years before, decades before actually, and I can only speak to my own environment, and that was Europe, that smoking was a ... you know, represented a health risk. It was very clear and it had been very clear in my view for many years before I joined (in 1978).

> Q811: A- I think, as I... I think I said that earlier, as a company selling a product which can cause serious disease, it is our responsibility to work and to do as much as we can to try and develop ways and means to reduce the harm of those products. So I believe that that's the company's position at this point in time.
>
> ON JUNE 5, 2012:
>
> Q334: A- I would say that none of them (ITL's brands) is safe. I don't think any tobacco product in any form could qualify under the definition of "safe."

[46] Although she added a number of qualifiers at other points, for example, that smoking is a general cause of lung cancer but it cannot be identified as the specific cause in any individual case, Mme. Polet's candid statements provide further admissions to the effect that ITL did manufacture, market and sell a product that was dangerous and harmful to the health of consumers during the Class Period.

[47] In fact, none of the Companies today denies that smoking is a cause of disease in some people, although each steadfastly denies any general statement that it is the major cause of any disease, including lung cancer.

[48] The real questions, therefore, become not whether the Companies sold a dangerous and harmful product but, rather, when did each of them learn, or should have learned, that its products were dangerous and harmful and what obligations did each have to its customers as a result. These points are covered in the other Common Questions.

[49] Also examined in the other Common Questions is the Companies' argument that it is not a fault to sell a dangerous product, provided it does not contain a safety defect. A safety defect is described in article 1469 of the Civil Code as being a situation where the product "does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in the design or manufacture of the thing, poor preservation or presentation of the thing, or the lack of sufficient indications as to the risks and dangers it involves or as to safety precautions".

[50] The Plaintiffs, on the other hand, argue that the special rules set out in articles 1469 and 1473 shift the burden of proof on this point to the Companies. While confirming this position, article 1473 creates two possible defences, whereby the manufacturer must prove:

a. that the victim knew or could have known of the defect or

b. that the manufacturer could not have known of it at the time the product was manufactured or sold[26].

[51] We must examine both possible defences. The formulation of the second Common Question makes it appropriate to undertake that analysis immediately, though we are fully cognizant that we have not as yet been made any finding of fault by the Companies.

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

II.B. DID ITL KNOW, OR WAS IT PRESUMED TO KNOW OF THE RISKS AND DANGERS ASSOCIATED WITH THE USE OF ITS PRODUCTS?

[52] The pertinence of this question flows from the two articles of the Civil Code mentioned above. Article 1469 indicates that a safety defect in a product occurs where it does not afford the safety which a person is normally entitled to expect, including by reason of a lack of sufficient indications as to the risks and dangers it involves. Nevertheless, even where a safety defect exists, the second paragraph of article 1473 would exculpate the manufacturer if he proves either that the plaintiff knew of it or that he, the manufacturer, could not have known of it at the time and that he acted diligently once he learned of it.

[53] Exactly what are the risks and dangers associated with the use of cigarettes for the purposes of this Common Question? The class descriptions answer that. The increased likelihood of contracting one of the Diseases is a risk or danger associated with smoking, as admitted by Mme. Polet. The same can be said for the likelihood of becoming dependent on cigarettes in light of the fact that they increase the probability of contracting one of the Diseases.[27]

[54] As for knowledge of the risks and dangers relating to the Diseases and dependence, the evidence indicates that both scientific and public recognition of the risks and dangers of dependence came later than for the Diseases. For example, it was not until his 1988 report that the US Surgeon General clearly identified the dependence-creating dangers of nicotine use, whereas he pointed out the health risks of tobacco smoke as early as 1964. As well, warnings on the cigarette packs began in 1972, but did not mention dependence or addiction until 1994.

II.B.1 THE BLAIS FILE

II.B.1.a AS OF WHAT DATE DID ITL KNOW OF THE RISKS AND DANGERS?

[55] In April and May 1958, three BAT scientists made an omnibus tour of the United States, with a stop in Montreal, for the purpose, *inter alia*, of seeking information on "the extent to which it is accepted that cigarette smoke 'causes' lung cancer". Their ten-page report on the visit (Exhibit 1398) portrays an essentially unanimous consensus among the specialists interviewed to the effect that smoking causes lung cancer:

> CAUSATION OF LUNG CANCER
>
> With one exception (H.S.N. Greene) the individuals with whom we met believed that smoking causes lung cancer if by "causation" we mean any chain of events that leads eventually to lung cancer and which involves smoking as an indispensable link. In the USA only Berkson, apparently, is now prepared to doubt the statistical evidence and his reasoning is nowhere thought to be sound[28].

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[27] The Plaintiffs characterize "compensation", as discussed later in this judgment, as one of the risks and dangers of smoking. Although the Court disagrees with that characterization, it does agree that compensation is a factor that needs to be considered in the present judgment, which we do further on.

[28] At page 3 pdf.

> CONCLUSIONS
>
> 1. Although there remains some doubt as to the proportion of the total lung cancer mortality which can fairly be attributed to smoking, scientific opinion in USA does not now seriously doubt that the statistical correlation is real and reflects a cause and effect relationship[29].

[56] Given the close intercorporate and political collaboration between the tobacco industries in the US and Canada by the beginning of the Class Period[30], the state of knowledge in this regard was essentially the same in both countries, as well as in England, where BAT was headquartered. Nevertheless, except for one short-lived blip on the radar screen by Rothmans in 1958, which the Court examines in a later chapter, no one in the Canadian tobacco industry was saying anything publicly about the health risks of smoking outside of corporate walls. In fact, at ITL's instigation, it and the other Companies started moving towards a "Policy of Silence" about smoking and health issues as of 1962.[31]

[57] Within the industry's walls, however, certain individuals in ITL and BAT were finding it increasingly difficult to hold their tongue. Not surprisingly, the ones most recalcitrant in the face of this wall of silence were the scientists.[32]

[58] Prominent among them was BAT's chief scientist, Dr. S.J. Green, now deceased. In a July 1972 internal memo entitled "THE ASSOCIATION OF SMOKING AND DISEASE" (Exhibit 1395), Dr. Green goes very far indeed in advocating full disclosure. The force of his text is such that it is appropriate to cite, exceptionally, a large portion of it:

> I believe it will not be possible indefinitely to maintain the rather hollow "we are not doctors" stance and that, in due course, we shall have to come up in public with a more positive approach towards cigarette safety. In my view, it would be best to be in a position to say in public what was believed in private, i.e., to have consistent responsible policies across the board.
>
> …
>
> The basic assumptions on which our policy should be built must be recognized and challenged or accepted. A preliminary list of assumptions is suggested:
>
> 1) The association of cigarette smoking and some diseases is factual.
>
> …
>
> 6) The tobacco smoking habit is reinforced or dependent upon the psycho-pharmacological effects mainly of nicotine.

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29 At page 9 pdf.

30 As of 1933, BAT had major shareholdings in ITL: see Exhibit 20,000.1. Later in this judgment, we discuss this collaboration, including the embracing of the scientific controversy strategy and the cross-border role of the public relations firm Hill & Knowlton.

31 This refers to the "Policy Statement" discussed in Section II.F.1 of the present judgment.

32 At trial, one of ITL's most prominent scientists, Dr. Minoo Bilimoria, stated what might seem the obvious, especially for a micro-biologist: "I've known of the hazard in smoking even before (the US Surgeon General's Report of 1979). I didn't have to have a Surgeon General report to tell me that smoking was not good for you". (Transcript of March 5, 2013 at page 208)

> …
>
> 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

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[33] This analysis unavoidably goes beyond the specific issue of the starting point of ITL's knowledge of the risks and dangers of its products. The light it casts on ITL's attitude towards divulging what it knew to the public and to government is also relevant to the question of punitive damages.

[34] See "ITL's Position on Causation Admission" filed as a supplement to its Notes.

alone[35], were at all relevant times premised on that hypothesis. It follows that, since the company was going to great lengths to eradicate the dangers, it had to know of them.

[68] Speaking of research, it should not be overlooked that one of the main research projects of the Companies, dating back even to before the Class Period, was the development of filters. Their function is to filter out the tar from the smoke, and it is from the tar, as it was famously reported by an eminent British researcher, that people die.[36]

[69] Then there is the expert evidence offered by the three Companies as to the date at which the public should be held to have known about the risks and dangers[37]. Messrs. Duch, Flaherty and Lacoursière put that date as falling between 1954 (for Duch) and the mid-1960s (for Flaherty).

[70] Although to a large degree the Court rejects the evidence of Messrs. Flaherty and Lacoursière, as explained later, there is no reason not to take account of such an admission as it reflects on the Companies' knowledge[38]. It is merely common sense to say that, advised by scientists and affiliated companies on the subject[39], the Companies level of knowledge of their products far outpaced that of the general public both in substance and in time[40]. These experts' evidence leads us to conclude that the Companies had full knowledge of the risks and dangers of smoking by the beginning of the Class Period.

[71] The Court acknowledges that little in the preceding refers directly to the Diseases of the Blais Class. For the most part, Dr. Greene and Mr. Gibb speak of "disease" in a generic way and the historians are no more specific. Nevertheless, we do not see this as an obstacle to arriving at a conclusion with regard to ITL's knowledge with respect to the Diseases. No one can reasonably doubt that the average tobacco company executive at the time would have included lung cancer, throat cancer and emphysema among the diseases likely caused by smoking.

[72] Thus, the Court concludes that at all times during the Class Period ITL knew of the risks and dangers of its products causing one of the Diseases.

[73] This conclusion not only answers the second Common Question in the affirmative with respect to ITL, but it also eliminates the second of the possible defences offered by article 1473. Hence, to the extent that ITL is found to have committed the fault of selling a product with a safety defect, its only defence would be to prove that the

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35 ITL also had essentially unlimited access to the research conducted by BAT in England under a cost-sharing agreement.

36 M.A.H. Russell wrote in a June 1976 issue of the British Medical Journal: *"People smoke for nicotine but they die from the tar"* (Exhibit 121).

37 Later on in this judgment we show a table indicating the dates at which the various history experts opined as to that knowledge.

38 We do not accept this opinion as being accurate with respect to the knowledge of consumers, as we discuss in detail further on.

39 This applies less to JTM prior to its acquisition by RJRUS.

40 In *Hollis v. Dow Corning Corp* ([1995] 4 S.C.R. 634: "***Hollis***") the Supreme Court comes to a similar conclusion with respect to relative level of knowledge, going so far as to qualify the difference in favour of the manufacturer as an "enormous informational advantage" at paragraphs 21 and 26.

Members knew or could have known of it or could have foreseen the injury[41]. We shall deal with that aspect next.

II.B.1.b AS OF WHAT DATE DID THE PUBLIC KNOW?

[74] Although the knowledge of the public is not directly the subject of Common Question Two, it makes sense to consider it now, during the discussion of the defences offered by article 1473[42]. In that light, the proof offers two main avenues for assessing this factor: the expert reports of historians and the effect of the warnings placed on cigarette packages as of 1972 (the "**Warnings**")[43].

II.B.1.b.1 THE EXPERTS' OPINIONS: THE DISEASES AND DEPENDENCE

[75] The Companies filed three expert reports attempting to establish the date that the risks and dangers of smoking became "common knowledge" among the public. ITL filed the report of David Flaherty (Exhibit 20063), while JTM offered the opinion of Raymond Duch (Exhibit 40062.1) and shared with RBH the report of Jacques Lacoursière (Exhibit 30028.1)[44]. The Plaintiffs offered the historian, Robert Proctor, as an expert and he also testified on this issue.

[76] Mr. Christian Bourque, an expert in surveys and marketing research, testified for the Plaintiffs with respect to the information contained in, and the motivation behind, the marketing surveys conducted for the Companies. Although some of what he said touched on this issue, his evidence is not conducive to determining a cut-off date for the question at hand. In light of that, the Court will not consider the evidence of Professor Claire Durand in this context, since her mandate was essentially to criticize Mr. Bourque's work.

[77] The following table summarizes the historical experts' opinions as to the dates at which the public attained common knowledge of the danger to health and the risk of developing tobacco dependence:

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41 We note that, even if that hurdle is overcome, there will still remains the general fault under article 1457 of failing to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. There are also the alleged faults under the CPA and the Quebec Charter.

42 The Companies made proof as to the date at which Canada and other public health authorities knew of the risks of smoking. In light of the Court of Appeal's judgment dismissing the action in warranty against Canada, the Court finds no relevance to that question in the current context. Whether or not Canada acted diligently, for example, with respect to imposing the Warnings, does not affect the actual level of knowledge of the public.

43 For the sake of completeness, we should note that, starting in 1968, Health Canada published a series of press releases providing "League Tables" showing the tar and nicotine levels in Canadian cigarettes, the first press release being filed as Exhibit 20007.1. No one alleges that this initiative represented a significant factor in the public's gaining adequate knowledge of the risks and dangers of smoking.

44 JTM also filed the reports of Robert Perrins (Exhibits 40346, 40347) with respect to the knowledge of the government and the public health community. For reasons already noted, the Court does not find this aspect relevant given the current state of the files.

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

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45 See pages 3 and 4 of his report: Exhibit 20063.
46 See page 3 of his report: Exhibit 30028.1.
47 Exhibit 40062.1, at page 5.
48 Transcript of November 29, 2012, at pages 34-38.

essentially at the same time as that for danger to health, while Professor Flaherty felt it came even earlier, and before knowledge related to disease. Professors Duch and Proctor, on the other hand, agreed that knowledge of dependence came much later than for danger to health. This reflects what the public health authorities were saying, as seen in the twenty-four-year gap between the two in the US Surgeon General Reports: 1964 versus 1988.

[83] Professor Lacoursière opined that during the 1950s it was very unlikely (*très peu probable*) that a person would not have been made aware (*n'ait pas eu connaissance*) of the health dangers of smoking regularly and the risk of dependence attached to it.[49] By the end of the next decade, 1960-69, his view firmed up to a point where ignorance of the danger in both cases was a near impossibility:

> **278.** I can affirm, in my role as historian, that it was nearly impossible for a person not to know of the dangers to health of regular smoking and the dependence that it can cause. (the Court's translation)[50]

[84] Not surprisingly, his opinion on the degree of awareness of the dangers of smoking and of possible dependence extant at the end of the following decades solidify to the point of it being "impossible" ("*il est devenu impossible*") not to know by the end of the 1970s (at page 69), and incontrovertible ("*incontestable*") up to the end of the Class Period (at pages 90 and 104).

[85] Both Professors Flaherty and Lacoursière based their opinions exclusively on publicly-circulated documents, such as newspapers, magazines, television and radio shows, school books and the like. Neither included the Companies' internal documents in their analysis, arguing persuasively that the public could not have been influenced by such items, since they were never circulated publicly.

[86] We can accept that logic, but they were much less persuasive in their justification for omitting to consider any of the voluminous marketing material circulated by the Companies over the Class Period. Both of them completely ignored the Companies' numerous advertisements appearing in the same newspapers and magazines from which they extracted articles and airing on the same television and radio stations that especially Professor Lacoursière referred to. As well, they took no note of billboards, signs, posters, sponsorships and the like on the level of public awareness of the dangers of smoking and of dependence.

[87] Professor Lacoursière attempted to justify this omission on his lack of expertise in evaluating the effect of advertising on the public. In cross-examination, however, he admitted that advertising can have an effect on public knowledge, noting that the ads were quite attractive, "to say the least".[51] This indicates that advertising material is

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[49] *154. En tant qu'historien, à la suite de l'étude des documents analysés, je peux affirmer qu'il est très peu probable que quelqu'un n'ait pas eu connaissance de dangers pour la santé du fait de fumer régulièrement et de la dépendance que cela peut créer.* - Exhibit 30028.1.

[50] *Je peux affirmer, en tant qu'historien, qu'il devient presque impossible que quelqu'un n'ait pas connaissance des dangers pour la santé du fait de fumer régulièrement et la dépendance que cela peut créer.* - at page 53 of the report: Exhibit 30028.1.

[51] *C'est le moins que je puisse dire*: Transcript of May 16, 2013, at page 144.

something that should be considered in assessing common knowledge/*connaissance populaire*. It also indicates that Professor Lacoursière's report is incomplete, since it omits elements that have a real impact on his conclusions.

[88] As for Professor Flaherty, he brushed off this omission by saying that he initially intended to include an analysis of marketing material but, after long discussions with lawyers for ITL, who, he insisted, imposed no restrictions on him, he concluded that this type of communication really didn't have much of an impact on common knowledge.

[89] Professor Flaherty was remarkably stubborn on the point but seemed eventually to concede that there might be some influence, not, however, enough to bother with. This is a surprising position indeed, one that not only flies in the face of common sense, but also contradicts a view he supported several years earlier.

[90] In 1988, he sent to ITL what he described as a periodic report relating to research that was not specific to the present files (Exhibit 1561). There, in a section entitled "Remaining Research Activities", he wrote:

> 8. We have not done any explicit research on cigarette advertising, although we are aware from U. S. materials of significant episodes in advertising. My intuitive sense is that advertising is a component of any person's information environment and that it would be unwise not to think about the health claims that have been made about smoking since the 1910s, especially in terms of preparation for litigation.

[91] His "intuitive sense" that advertising is a component of any person's information environment is, as we note above, only common sense. The sole explanation he offered for the metamorphosis of his reasoning by the time he wrote his report for our files came in cross examination on May 23, 2013. There, he stated that: "I decided, early on, that the probative effect of the information content of advertising for Canadian cigarettes that I saw was not contributing anything beyond name rank and serial number to the smoking and health debate".

[92] It is difficult to reconcile that view with his statement at page 5 of his report that "The only category of material that I have intentionally not reviewed is tobacco advertising, since it is outside the scope of my area of expertise to opine on the impact of the messages inherent in such advertising". He should make up his mind. Did he ignore tobacco advertising because it is not important, or was it because it is outside of his expertise? If the latter, why did he not see it the same way in 1988?

[93] As well, it seems inconsistent, to say the least, that these experts should be so chary to opine on the effect of newspaper and magazine ads on people's perception when they have absolutely no hesitation with respect to the effect of articles and editorial cartoons in the very same newspapers and magazines in which those ads appeared. They seem to have been tracing their opinions with a scalpel in order to justify sidestepping such an obviously important factor. In doing so, they not only deprive the Court of potentially valuable assistance in its quest to ascertain one of the key facts in the case, but they also seriously damage their credibility.

[94] As if this were not enough, there is another obstacle to accepting these opinions. These are historians who purport to opine on how the publication of certain information in the general media translates into knowledge of and/or belief in that information. Neither one professed to have any expertise in psychology or human behaviour, yet their opinions invade both these areas.

[95] Professor Flaherty talks of "common knowledge", but all either he or Professor Lacoursière is showing is the level of media attention given to the issue. That is not knowledge. That is exposure. On that basis, how can they opine on anything more than surveying what was published and publicly available? It is more in the field of the survey expertise of Professor Duch where one can see indices of common knowledge.

[96] For all these reasons, the Court cannot give any credence to the reports of Professors Flaherty and Lacoursière, other than for the purpose of showing part, and only part, of the information about smoking available to the public - and to the Companies - over the Class Period.

[97] Turning to Dr. Proctor, he does not opine as to the date of knowledge by the public in his report (Exhibit 1238), his mandate being to comment on the reports of Professors Flaherty, Lacoursière and Perrins. At trial, however, he was questioned by the Court as to the likely date at which the average American knew or reasonably should have known that the smoking of cigarettes causes lung cancer, larynx cancer, throat cancer or emphysema.

[98] Having first replied that it was during the 1970s and 1980s, he later seemed to favour the 1970s, saying that "The surveys show that, by the seventies (70s), more than half of people answered yes when asked that question. And I view that … as most Americans."[52] The question was as to the date of knowledge, not belief, to the extent that that makes a difference. He also answered on the basis of surveys, which, in our view, is the appropriate measure in this context.

[99] With respect to dependence, he testified that the American public's knowledge was not "extremely common" until after the 1988 Surgeon General's Report[53].

[100] It is true that he was opining as to Americans and not Canadians, but there appears to be a high degree of similarity in the levels of awareness about tobacco in the two countries. This is echoed by one of JTM's expert, Dr. Perrins, who states that: "An examination of the understanding that the Federal Government and the public health and medical communities had of the smoking and health issue and its practice, in Canada, should take into account the histories of similar developments in both the United States and the United Kingdom".[54]

[101] Accordingly, the Court has no hesitation in deducing certain tendencies relevant to the Canadian and Quebec cases from proof adduced with respect to the US and UK situations, including those about the level of public awareness. That said, we might well

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52 Transcript of November 29, 2012, at pages 34-38.
53 *Ibidem*, at page 47.
54 Report of Dr. Perrins, Exhibit 40346, at page 11.

find some minor differences owing to specific events occurring in one or the other of those countries.

[102] As for Professor Duch, his mandate was "to review the published public opinion data and provide my opinion on the awareness of the Quebec (and Canada) population from 1950 to 1998 of the health risks associated with smoking and of the public's view that smoking can be difficult to quit"[55]. His conclusions, as stated at page 5 of his report, are:

> 1: The Quebec population's awareness of the reports linking smoking with lung cancer or other health risks:
>
> - By at least 1963 there was an exceptionally high level of awareness, 88 percent, among the Quebec population of reports or information that smoking may cause lung cancer or have other harmful effects.
> - Even before then, in 1954, 82 percent of the Quebec population was aware of reports that smoking may cause lung cancer.
>
> 2. The population's awareness of the risk of smoking being "habit forming" or being an "addiction":
>
> - Since the first relevant survey identified in 1979, over 80 percent of the population indicated that smoking is a habit and 84 percent reported it is very hard to stop smoking (in 1979). By 1986 the majority of the population considered smoking to be an "addiction".

[103] On the Diseases, the conclusion that smoking "may cause cancer or other harmful effects" does not satisfy the Court. The minimum acceptable level of awareness should be much higher than that, for example, "is likely" or "is highly likely". The Companies have the burden of proof on this ground of defence, as stated in article 1473. In addition, we are in the context of a dangerous product and it is logical to seek a higher assurance of awareness[56]. This is reflected in the cautionary note that Professor Duch adds in paragraphs 53 through 57 of his report concerning the complexities of measuring such questions.

[104] Consequently, his date of 1963 seems unrealistic as the date by which the public acquired sufficient knowledge about smoking and the Diseases, i.e., knowledge sufficient to trigger the defence offered by article 1473. Whatever the effect of Minister LaMarsh's conference held in that year, the evidence points to a much later date.

[105] In 1963, the Canadian government had not even started its efforts at educating the public and was, in fact, still educating itself on many of the key aspects of the question. It wasn't until 1968 that Health Canada first published the tar and nicotine levels for Canadian cigarette brands through the League Tables and it was a year later that the House of Commons mandated Dr. Isabelle to study tobacco advertising, a study that by necessity spilled over into general issues of smoking and health.

[106] Upon further review, and after reasonable adjustments, the Court sees a fair amount of compatibility between the opinions of Professors Proctor and Duch.

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55 Exhibit 40062.1, at page 5.

56 This reasoning is echoed in the higher degree of intensity of the obligation to inform in such circumstances, as discussed below.

[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. 4005O)	• HEALTH CANADA ADVISES THAT CIGARETTES ARE ADDICTIVE • HEALTH CANADA ADVISES THAT TOBACCO SMOKE CAN HARM YOUR CHILDREN • HEALTH CANADA ADVISES THAT CIGARETTES CAUSE FATAL LUNG DISEASE • HEALTH CANADA ADVISES THAT CIGARETTES CAUSE CANCER • HEALTH CANADA ADVISES THAT CIGARETTES CAUSE STROKE AND HEART DISEASE • HEALTH CANADA ADVISES THAT SMOKING DURING PREGNANCY CAN HARM YOUR BABY • HEALTH CANADA ADVISES THAT SMOKING CAN KILL YOU • HEALTH CANADA ADVISES THAT TOBACCO SMOKE CAUSES FATAL LUNG DISEASE IN NON SMOKERS

[111] The effect of the various iterations of the Warnings must be analyzed in light of the atmosphere and attitudes prevailing at the time each of them appeared. Professor Viscusi, an expert for the Companies, advised the Court that the novelty of the first Warnings in 1972 would likely have caused the public to take greater notice of them than would normally be the case. He added, however, that their effect would soon have become essentially negligible, especially because they were simply repeating things that the public already knew.

[112] In the same vein, Professor Young, another of the Companies' experts, disparaged pack warnings as a means of informing consumers about a product's safety defects.

Canada not lessen the Warnings' credibility, it might well have increased it by associating the Warnings directly with a highly-credible source.

[61] The *Tobacco Act* , which was assented to on April 25, 1997, replaced the TPCA and provided for Warnings on cigarette packages. These new Warnings were not implemented until after the end of the Class Period, therefore, neither they nor the other provisions of the *Tobacco Act* are relevant for these files.

[113] That said, the Warnings are the most frequent, direct, and graphic communications that smokers receive about cigarettes. We cannot accept that they have absolutely no effect and, in this regard, we are simply following the Companies' lead.

[114] They attribute such importance to the Warnings that they submit that, as of the appearance of the Warning about addiction in 1994, no Canadian smoker can have been unaware of the dependence-creating properties of cigarettes. They go so far as to identify September 12, 1994, the date that the regulation creating that Warning came into effect, as the very day on which prescription started to run for the Létourneau Class. This shows great respect, indeed, for the impact of the Warnings, even if the Court would not go so far in that respect.

[115] As for the contents of the Warnings, we have noted how they became more and more specific over the Class Period. The question remains as to when they became specific enough, i.e., at what point can it be said that, other things being equal, the Warnings caused the Members to know of the safety defect for the purposes of article 1473.

[116] It is important to note that the test for that level of knowledge is affected by the type of product in question. Where it is a toxic one, i.e., dangerous for the physical well-being of the consumer, that test is more stringent[62]. This higher standard thus applies to both files here.

[117] With respect to the Diseases, despite its novelty in 1972, the statement that "Danger to health increases with amount smoked", as well intentioned as it might have been, is unlikely to have struck fear into the heart of the average smoker. In the same vein, the remarkably naïve admonition to avoid inhaling that was added in 1975 must have inspired either a hearty chuckle or a cynical shake of the head in most smokers, for, as President Obama is said to have responded in a different context: "Inhaling is the whole point".

[118] It appears that during the 1980s, in the absence of a legislative basis for imposing them[63], the Warnings' message dragged behind the public's knowledge. Once the powers under the TPCA were exercised in 1988, however, the Warnings started having some bite.

[119] Cancer is mentioned for the first time in the 1988 Warnings, although only lung cancer. We note that the other Diseases are not specified but, as with the Companies' executives, no one can reasonably doubt that the average smoker at the time would have included lung cancer, throat cancer and emphysema among the diseases likely caused by smoking.

[120] Getting back to the date of sufficient knowledge of the risk of contracting one of the Diseases, our analysis of the experts' reports leads us to conclude that adequate

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62 Jean-Louis BAUDOUIN and Patrice DESLAURIERS, *La responsabilité civile*, 8ème éd., vol. 2, p. 2-354, page 370; Pierre LEGRAND, *Pour une théorie de l'obligation de renseignement du fabricant en droit civil canadien*, (1980-1981) 26 McGill Law Journal 207, pages 260 – 262 and 274; Barreau du Québec, *La réforme du Code civil*, page 97; Paul-André CRÉPEAU, *L'intensité de l'obligation juridique*, Cowansville, Éditions Yvon Blais, 1989, p. 1, page 1.

63 The TPCA came into force in 1988.

public knowledge would have been acquired well before the 1988 change to the Warnings. We favour the end of the 1970s.

[121] Consequently, the Court holds that the public knew or should have known of the risks and dangers of contracting a Disease from smoking as of January 1, 1980, which we shall sometimes term the "**knowledge date**". It follows that the Companies' fault with respect to a possible safety defect by way of a lack of sufficient indications as to the risks and dangers of smoking ceased as of that date in the Blais File.

[122] As for the Létourneau File, the public's knowledge came later. The Warnings were completely silent about dependence until 1994, while the US Surgeon General took until 1988 to adopt a firm stand on it. For their part, Professors Proctor and Duch point to the 1980s. Then there is the Companies' position favouring the adoption of the new Warning on addiction of September 1994.

[123] The Court notes that, as with the Diseases, there is a reasonable level of compatibility within the evidence of Professors Duch and Proctor, which also reflects the contents of the Warnings.

[124] To start, of Professor Duch's range of dates, i.e., 1979 and 1986, his view is that, by the latter, only "the majority of the population considered smoking to be an 'addiction'". A majority is not sufficient on this point. The "vast majority" is more along the lines that the experts, and the Court, favour.

[125] To reach that level would require a number of additional years. That being so, however, the intense publicity on the issue of dependence around the beginning of the 1990s was such that knowledge on the topic was being acquired rapidly. One need only consider the 1988 Surgeon General Report and the 1994 addiction Warning. These are key factors, but not dispositive.

[126] Although Canadians paid much attention to the Surgeon General Reports, the Court sees the new Warning on addiction as confirmation that the Quebec public did not have sufficient knowledge before its appearance. This is indirectly supported by statements made by the CTMC in its lobbying to avoid such a warning in 1988. It argued that "Calling cigarettes "addictive" trivializes the serious drug problems faced by our society, but more importantly (t)he term "addiction" lacks precise medical or scientific meaning[64].

[127] That the Companies recognize the new Warning's importance is telling, but the Court puts more importance on the fact that Health Canada did not choose to issue a Warning on dependence before it did. If the government, with all its resources, was not sufficiently concerned about the risk of tobacco dependence to require a warning about it, then we must assume that the average person was even less concerned.

[128] That said, even something as visible as a pack warning does not have its full effect overnight.

[129] The addiction Warning was one of eight new Warnings and they only started to appear on September 12, 1994. It would have taken some time for that one message to

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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

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65 Exhibit 1337-2M.
66 Exhibit 40062.1, at pdf 56 and 160.
67 Exhibit 1337-2M, at pdf 9.
68 Exhibit 11 at pdf 5.
69 Descôteaux was an employee of ITL, and for a few years its parent company, IMASCO, for some 37 years. He was the Director of Public Affairs from 1979 until he retired in 2002, overseeing community, media and government relations, as well as lobbying.

criticism the company was encountering over its products[70]. In it, he says the following on the subject of dependence:

> A word about addiction. For some reason, tobacco adversaries have not, as yet, paid too much attention to the addictiveness of smoking. This could become a very serious issue if someone attacked us on this front. We all know how difficult it is to quit smoking and I think we could be very vulnerable to such criticism.
>
> I think we should study this subject in depth, with a view towards developing products that would provide the same satisfaction as today's cigarette without "enslaving" consumers.[71] (emphasis in the original)

[136] Today, Mr. Descôteaux tries to brush off the contents of this report as the product of youthful excess, pointing out that he was only 29 years old at the time. That might well be the case, but that is not the point. This document shows that the risk of creating tobacco dependence was known, accepted and openly discussed within ITL by 1976. They all knew how difficult it was to quit smoking, to the point of "enslaving" their customers.

[137] Indeed, some four years earlier, Dr. Green of BAT had characterized as a basic assumption that "The tobacco smoking habit is reinforced or dependent upon the psycho-pharmacological effects mainly of nicotine", as we noted above[72]. The basis for that assumption must have been present for many years, given that ITL's expert, Professor Flaherty, feels that it was common knowledge among the public since the mid-1950s that smoking was difficult to quit, and that by that time "the only significant discussion in the news media on this point concerned whether smoking constituted an addiction, or whether it was a mere habit"[73].

[138] If the public knew of the risk of dependence by the 1950s, the Court feels safe in concluding that ITL knew of it at least by the beginning of the Class Period. We so conclude.

II.B.2.b AS OF WHAT DATE DID THE PUBLIC KNOW?

[139] As explained above, the Court holds that the public knew or should have known of the risks and dangers of becoming tobacco dependent from smoking as of March 1, 1996 and that the Companies' fault with respect to a possible safety defect ceased as of that date in the Létourneau File.

[140] Let us be clear on the effect of the above findings. The cessation of possible fault with respect to the safety defects of cigarettes has no impact on the Companies' possible faults under other provisions, i.e., the general rule of article 1457 of the Civil Code, the Quebec Charter or the Consumer Protection Act. There, a party's knowledge is less relevant, an element we consider in section II.G.1 and .2 of the present judgment.

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

[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

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[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.

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75 Transcript of March 20, 2013 at pages 68 and 78.

76 Dr. Negrete admits that a minority of smokers do not become dependent, generally because of genetic or "cerebral structural" characteristics, although he affirms that about 95% of daily smokers are dependent. See pages 8 and 20 of his report: Exhibit 1470.1.

77 Transcript of January 27, 2014, at page 81.

78 *Ibidem*, at page 75.

[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

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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

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81 *Face à cette évidence, on doit conclure que le risque accru de morbidité et mort prématurée constitue le plus grave dommage subi par les personnes avec dépendance au tabac*, at page 2.

82 *Une moindre qualité de vie - tant du point de vue des limitations physiques que des perturbations dans les fonctions psychique et sociale - doit donc être considérée comme un des inconvénients majeurs associes avec la dépendance tabagique*, at page 2.

83 *La personne qui développe une dépendance a la nicotine, même sans être atteinte d'aucune complication physique, subit l'énorme fardeau d'être devenue l'esclave d'une habitude psychotoxique qui régit son comportement quotidien et donne forme à son style de vie. L'état de dépendance est, en soi même, le trouble principal causé par le tabagisme.*
Cette dépendance implique une perte de liberté d'action, un vivre enchaine au besoin de consommer du tabac, même quand on préférerait ne pas fumer, at pages 2-3.

84 Even if Dr. Negrete meant brain disease, he is not alone on that. To support his statement that "*toute dépendance chimique est fondamentalement une maladie du cerveau*" (Exhibit 1470.1, page 11), he cited an article in the journal *Science* entitled "*Addiction Is a Brain Disease, and It Matters*" (Exhibit 1470.1, footnote 15, see Exhibit 2160.68).

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)

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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

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[87] See Dr. Negrete's second report, Exhibit 1470.2.

Rothmans as the exception[88]. They plead that the public was receiving sufficient information from other sources: by the schools, parents, doctors and the Warnings.

[186] We cite above extracts from Mr. Descôteaux's 1976 memo to Mr. Kalhok (Exhibit 11), which underscores the fact that "the addictiveness of smoking" was still below the radar even of tobacco adversaries. Hence, ITL knew not only that its products were dependence creating but also knew that through a good portion of the Class Period the anti-smoking movement, much less the general public, was not focusing on that danger.

[187] In light of the above, no more need be said on this question. ITL did knowingly market a dependence-creating product, and still does, for that matter. As with the previous Common Questions, whether or not this constitutes a fault depends on additional elements, ones that are examined below.

II.C.3 DID ITL CHOOSE TOBACCO THAT CONTAINED HIGHER LEVELS OF NICOTINE IN ORDER TO KEEP ITS CUSTOMERS DEPENDENT?

[188] To answer this, it is necessary to examine the role and effect of the research done at Canada's Delhi Research Station ("**Delhi**") in Delhi, Ontario starting in the late 1960s[89]. As described in a 1976 newspaper interview by Dr. Frank Marks, Delhi's Director General at the time, Delhi's role was to "(help) growers to produce the best crop possible for the most economic input expenditures to maintain a good net profit - and in addition - the type of tobacco most acceptable from a health viewpoint and for consumer acceptance"[90].

[189] One of the principal projects undertaken at Delhi was the creation of new strains of tobacco containing higher nicotine than previous strains ("**Delhi Tobacco**")[91]. This project was successful to the point that by 1983 essentially all the tobacco used in commercial cigarettes in Canada was Delhi Tobacco (Exhibit 20235). This was due in part, no doubt, to pressure by Canada on the Companies to buy their tobacco from Canadian farmers. [92]

[190] The Plaintiffs allege that the Companies controlled the research priorities at Delhi to the point of being able to dictate what type of projects would be carried out. Thus, they see the work done to develop higher-nicotine tobacco as a plot to assist the Companies in their quest to ensure and increase tobacco dependence among the populace.

[191] With respect, neither the documentary evidence nor the testimony at trial bear that out.

[192] Dr. Marks testified directly on this point:

> 196Q-Did the cigarette manufacturing companies ask Delhi to design and develop the higher nicotine strains?

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88 See Exhibits 536 and 536A.

89 Delhi was jointly funded by Health Canada and Agriculture Canada.

90 Exhibit 20784.

91 Canada holds the patents to the various strains of Delhi Tobacco and earns royalties from their use by the Companies. The Court does not consider this fact to be of any relevance to these cases.

92 It is relevant to note that Delhi Tobacco gave a significantly higher yield per acre than previous strains, an important consideration for tobacco growers, AgCanada's main "clients".

> A- No, they did not.
>
> 197Q-Where did the idea come from?
>
> A- Part of the LHC Program and knowing... us knowing that the filtration process was going to be taking out a certain amount of the tar and, also, nicotine at the same time. So that was the impetus for going to a higher... higher nicotine type tobacco, so that when they did filter out tar, there would still be enough nicotine left for the smoker to get some satisfaction from it.[93]

[193] This explanation is consistent with the flow of evidence about Canada's approach to reducing the impact of smoking on Canadians' health in the 1970s and 1980s: "If you can't quit smoking, then smoke lower tar cigarettes".

[194] Rather than pointing to the Companies, the proof indicates that Canada was the main supporter of higher nicotine tobacco in its campaign to develop a less hazardous cigarette, i.e., one with a higher nicotine/tar ratio.[94] Health Canada assumed that by increasing the amount of nicotine inhaled "per puff", smokers could satisfy their nicotine needs with less smoking. It saw this as a way of developing a "less hazardous" cigarette, and even hoped to use the Companies' advertising as a means of promoting such products.[95]

[195] The problem was that the levels of tar and nicotine in tobacco follow each other. A reduction of, say, 20% in the tar will generally result in about a 20% reduction in the nicotine, which can leave the smoker "unsatisfied". Canada saw higher nicotine tobaccos as a way to preserve a sufficient level of nicotine after reducing the tar. In fact, this appears to have been something of a worldwide movement[96].

[196] It is true that the Companies favoured this approach, but there is no indication that they were the ones driving the Delhi bus in this direction[97]. In fact, it could be argued that higher nicotine cigarettes would permit a smoker to satisfy his nicotine needs with fewer cigarettes a day, thus reducing cigarette sales.

[197] On another point, the Plaintiffs argue at paragraph 585 of their Notes that "ITL had the ability to create a non addictive cigarette but instead chose to work to maintain or increase the addictive nature of its cigarettes". The submission is that the Companies did this in order to hook their customers on nicotine to the greatest extent possible so as to protect their market. Here again, the evidence fails to substantiate the allegation.

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93 Transcript of December 3, 2013, at page 64.

94 Anecdotally, it is interesting to note that certain years' crops of Delhi Tobacco were so high in nicotine that it made the taste unacceptable. As a result, ITL imported low-nicotine tobacco from China to be blended with the Delhi Tobacco in order to produce cigarettes acceptable to smokers.

95 See Exhibits 20076.13, at page 2 and 20119, at page 3.

96 A useful analysis of the "high-nicotine tobacco movement" is found in a 1978 memo of Mr. Crawford of Macdonald Tobacco Inc. to Mr. Shropshire: Exhibit 647.

97 The Companies, on the other hand, certainly did cooperate. For example, Health Canada requested assistance from them in conducting smoker acceptance testing of the new tobaccos, and their cooperation in this regard was essential to the success of Delhi Tobacco.

[198] Although it is technically possible to produce a non-addictive cigarette[98], the evidence was unanimous in confirming that consumers would never choose it over a regular cigarette.

[199] Nicotine-free cigarettes were tested by several companies and consumer reaction confirmed their lack of commercial acceptance. They tasted bad and gave no "satisfaction". Even neutral government employees working at Delhi confirmed that. Furthermore, no evidence was adduced that such a cigarette would have any less tar than a regular cigarette.

[200] In light of the above, the present question loses its relevance. Accepting that they did choose tobacco with higher levels of nicotine, the Companies were in a very practical way forced to do so by Health Canada. Moreover, in the context of the time, far from being a nefarious gesture, this could actually be seen as a positive one with respect to smokers' health.

[201] Thus, by using tobacco containing higher levels of nicotine, ITL was neither attempting to keep its customers dependent nor committing a fault. This finding does not, however, negate possible faults with respect to the obligation to inform smokers of the dependence-creating properties of tobacco of which it was aware.

II.D. DID ITL TRIVIALIZE OR DENY OR EMPLOY A SYSTEMATIC POLICY OF NON-DIVULGATION OF SUCH RISKS AND DANGERS?

[202] Since Common Question "E" deals with marketing activities, the Court will limit its analysis in the present chapter to ITL's actions outside of the marketing field. This covers two rather broad areas: what ITL said publicly about the risks and dangers of smoking and what it did not say.

[203] In order to weigh these factors, it is necessary to understand what the Companies should have been saying. This requires a review of the nature and degree of the obligations on them to divulge what they knew, taking into account that the standards in force might have varied over the term of the Class Period. We shall thus consider the "obligation to inform"[99].

[204] Thereafter, we shall consider what the public knew, or could have known, about the dangers of smoking. It is also relevant to examine what ITL knew, or at least thought it knew, about what the public knew, for a party's obligation to inform can vary in accordance with the degree to which information is lacking. This analysis will apply to both files unless otherwise indicated.

[205] Before going there, however, we must, unfortunately, make several comments concerning the credibility of certain witnesses.

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98 Such a product would have little or no nicotine, presumably being made from the mild leaves from the very bottom of the tobacco plant, versus those from higher up the stalk.

99 We treat this term as being synonymous with "duty to warn".

II.D.1 CREDIBILITY ISSUES

[206] The Court could not help but have an uneasy feeling about parts of the testimony of many of the witnesses who had been associated with ITL during the Class Period, particularly those who occupied high-level positions in management. Listening to them, one would conclude that there was very little concern within the company over the smoking and health debate raging in society at the time.

[207] Witness after witness indicated that issues such as whether smoking caused lung cancer or whether possible legal liability loomed over the company because of the toxicity of its products or whether the company should do more to warn about the dangers of smoking were almost never discussed at any level, not even over the water cooler. It went to the point of having ITL's in-house counsel, a member of the high-level Management Committee, confirm that he did not "specifically recall" if in that committee there had ever even been a discussion about the risks of smoking or whether smoking was dangerous to the health of consumers[100].

[208] How can that be? It is not as if these people were not aware of the maelstrom over health issues raging at the company's door. They should have been obsessed with it and its potentially disastrous consequences for the company's future prosperity - and even its continued existence. But one takes from their testimony that it was basically a non-issue within the marketing department and the Management Committee.

[209] If that is so, how can one explain ITL's embracing corporate policies and goals designed to respond to such health concerns, as it says it did? The company adopted as its working hypothesis that smoking caused disease, and it devoted a significant portion of its research budget to developing ways and means to reduce health risks, such as filters, special papers, ventilation, low tar and nicotine cigarettes and, through "Project Day", a "safer cigarette"?

[210] Make no mistake. There can be no question here of managerial incompetence. These are impressive men, each having decades of relevant experience in high positions in major corporations, including ITL. There must be another explanation.

[211] Might it be that the corporate policy at the time not to comment publicly on smoking and health issues carried over even to discussing them internally? This would be consistent with the BAT group's sensitivity towards "legal considerations".[101]

[212] One example of that sensitivity was provided by Jean-Louis Mercier, a former president of ITL. He testified that BAT's lawyers frowned on ITL performing scientific research to verify the health risks of smoking because that might be portrayed in lawsuits as an admission that it knew or suspected that such risks were present. Another example comes from BAT's head of research, Dr. Green, who confided to ITL's head of research in

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[100] See the transcript of April 2, 2012, at pages 86 and 157. This 73-year-old witness professed to have a faulty memory, but he repeatedly demonstrated exact recall in responses that appeared to favour ITL's position.

[101] See Exhibit 29 at pdf 8 cited at paragraph 61 of the present judgment.

a 1977 memo that " ... it may be suggested that it is better in some countries to have no such (position) paper - "it's better not to know" and certainly not to put it in writing"[102].

[213] It simply does not stand to reason that, at the time they were getting legal advice going to the extent of limiting the type of research that ITL's large and well-staffed R&D department should perform, company executives were not discussing the hot topic of smoking and health.

[214] Either way, it goes against the Company. If false, it undermines the credibility and good faith of these witnesses. If true, it demonstrates both a calculated effort to rig the game and inexcusable insouciance. In any case, it is an element to consider in the context of punitive damages.

II.D.2 THE OBLIGATION TO INFORM

[215] Prior to 1994, the Civil Code dealt with this obligation under article 1053, the omnibus civil fault rule. The "new" Civil Code of 1994 approaches it in two similar but distinct ways, maintaining the general civil fault rule in article 1457 and specifying the manufacturer's duty in article 1468 and following. While the latter are new provisions of law, they are essentially codifications of the previous rules applicable in the area.

[216] Article 1457 is the cornerstone of civil liability in our law. It reads:

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.	**1457.** Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.	Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.
[...]	[...]

[217] The Plaintiffs allege that the Companies failed to abide by the rules of conduct that every reasonable person should follow according to the circumstances, usage or law by the mere act of urging the public to use a thing that the Companies knew to be dangerous. Subsidiarily, they argue that it would still be a fault under this article by doing that without warning of the danger.

[218] The Court sees a fault under article 1457 as being separate and apart from that of failing to respect the specific duty of the manufacturer with respect to safety defects, as set out in article 1468 and following. The latter obligation focuses on ensuring that a potential user has sufficient information or warning to be adequately advised of the risks he incurs by using a product, thereby permitting him to make an educated decision as to whether and how he will use it. The relevant articles read as follows:

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102 See Exhibit 125D.

1468. The manufacturer of a movable property is liable to reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable. […]

1468. Le fabricant d'un bien meuble, même si ce bien est incorporé à un immeuble ou y est placé pour le service ou l'exploitation de celui-ci, est tenu de réparer le préjudice causé à un tiers par le défaut de sécurité du bien. […]

1469. A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in the design or manufacture of the thing, poor preservation or presentation of the thing, or the lack of sufficient indications as to the risks and dangers it involves or as to safety precautions.

1469. Il y a défaut de sécurité du bien lorsque, compte tenu de toutes les circonstances, le bien n'offre pas la sécurité à laquelle on est normalement en droit de s'attendre, notamment en raison d'un vice de conception ou de fabrication du bien, d'une mauvaise conservation ou présentation du bien ou, encore, de l'absence d'indications suffisantes quant aux risques et dangers qu'il comporte ou quant aux moyens de s'en prémunir.

1473. The manufacturer, distributor or supplier of a movable property is not liable to reparation for injury caused by a safety defect in the property if he proves that the victim knew or could have known of the defect, or could have foreseen the injury.

Nor is he liable to reparation if he proves that, according to the state of knowledge at the time that he manufactured, distributed or supplied the property, the existence of the defect could not have been known, and that he was not neglectful of his duty to provide information when he became aware of the defect.

1473. Le fabricant, distributeur ou fournisseur d'un bien meuble n'est pas tenu de réparer le préjudice causé par le défaut de sécurité de ce bien s'il prouve que la victime connaissait ou était en mesure de connaître le défaut du bien, ou qu'elle pouvait prévoir le préjudice.

Il n'est pas tenu, non plus, de réparer le préjudice s'il prouve que le défaut ne pouvait être connu, compte tenu de l'état des connaissances, au moment où il a fabriqué, distribué ou fourni le bien et qu'il n'a pas été négligent dans son devoir d'information lorsqu'il a eu connaissance de l'existence de ce défaut.

[219] When discussing the ambit of this obligation in our law, Quebec authors have taken inspiration from at least two common law judgments: *Dow Corning Corporation v. Hollis*[103], a British Columbia case ("***Hollis***"), and *Lambert v. Lastoplex Chemicals Co. Limited*[104], an Ontario case ("***Lambert***"). Baudouin cites these two Supreme Court of Canada decisions on a number of points[105]. Hence, the issue of a manufacturer's duty to warn is one where the two legal systems coexisting in Canada see the world in a similar way, and for which we see no obstacle to looking to common law decisions for inspiration.

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103 *Op. cit.*, Note 40.

104 [1972] R.C.S. 569.

105 See, for example, Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at para. 2-354, footnotes 62, 68 and para. 2-355.

[220] The Quebec jurisprudence on this question appears to have started with the exploding-gun case of *Ross v. Dunstall* ("***Ross***") in 1921[106]. Its ground-breaking holding was that a manufacturer of a defective product could have extracontractual (then known as "delictual") liability towards a person that did not contract directly with it.

[221] The Plaintiffs advance that it also stands for the proposition that the mere marketing of a dangerous product constitutes an extracontractual fault against which there can be no defence. They cite Baudouin in support:

> 2-346 - *Observations* – Cette reconnaissance (de l'existence d'un lien de droit direct entre l'acheteur et le fabricant) établissait, en filigrane, une distinction importante entre le produit dangereux, impliqué en l'espèce, et le produit simplement défectueux, la mise en marché d'un produit dangereux étant considérée comme une faute extracontractuelle.[107] (The Court's emphasis)

[222] The Court does not read either the *Ross* judgment or the citation from Baudouin in the same way as do the Plaintiffs. In *Ross*, it appears never to have crossed Mignault J.'s mind that the marketing of a dangerous product could constitute an automatic fault in and of itself. The closest that he comes to that is when he writes:

> […] but where as here there is hidden danger not existing in similar articles and no warning is given as to the manner to safely use a machine, it would appear contrary to the established principles of civil responsibility to refuse any recourse to the purchaser. Subject to what I have said, I do not intend to go beyond the circumstances of the present case in laying down a rule of liability, for each case must be disposed of according to the circumstances disclosed by the evidence.[108]

[223] In light of that, far from asserting that the sale of a dangerous product will always be a fault, the statement in Baudouin appears to be limited to underlining the possible extracontractual nature of marketing a dangerous product without a proper warning[109], as opposed to its being strictly contractual. That is the only rule of liability that Mignault J. appears to have been laying down in *Ross*.[110]

[224] Building on the sand-based foundation of the above argument, the Plaintiffs venture into the area of "risk-utility" theory. They argue that, "absent a clear and valid legislative exclusion of the rules of civil liability, every manufacturer must respect its duties under civil law to not produce and market a useless, dangerous product, and repair any injury caused by its failure to do so".[111] Implicit in this statement is the assumption not only that cigarettes

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106 S.C.R. (1921) 62 S.C.R. 393.

107 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at para 2-346, p. 362.

108 *Ross, op. cit.*, Note 106, at p. 421.

109 It is important to note that, even in 1921, our courts recognized the duty to warn, a fact that disarms any argument here to the effect that imposing such a duty as of the beginning of the Class Period, some thirty years later, is an error of "hindsight".

110 Plaintiffs also cite the reflection of Professor Jobin as to whether, in the most serious of cases, an extremely dangerous item should ever be put on the market, regardless of the warnings attached: Pierre-Gabriel JOBIN, *La vente*, 3ème éd., Cowansville, Éditions Yvon Blais, 2007, pages 266-267. The question is an interesting one, flowing, as it seems to, from "risk-utility" theory, which we discuss below. That said, in our view it overstates the situation at hand.

111 At paragraph 42 of their Notes.

are dangerous, but that they are also useless and, moreover, that there exists a principle of civil law forbidding the production and marketing of useless products that are dangerous.

[225] Although the Companies now admit that cigarettes are dangerous, the proof does not unconditionally support their uselessness. Even the Plaintiffs' expert on dependence, Dr. Negrete, admits that nicotine has certain beneficial aspects, for example, in aiding concentration and relaxation[112].

[226] In any event, the Court finds no support in the case law and doctrine for a principle of civil law similar to the one that the Plaintiffs wish to invoke. In Quebec, the first paragraph of article 1473 makes it possible to avoid liability for a dangerous product, even one of questionable use or social value, by providing sufficient warning to its users. The rule is similar in the common law[113].

[227] Our review of the case law and doctrine applicable in Quebec leads us to the following conclusions as to the scope of a manufacturer's duty to warn in the context of article 1468 and following:

a. The duty to warn "serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product"[114];

b. A manufacturer knows or is presumed to know the risks and dangers created by its product, as well as any manufacturing defects from which it may suffer;[115]

c. The manufacturer is presumed to know more about the risks of using its products than is the consumer;[116]

d. The consumer relies on the manufacturer for information about safety defects;[117]

e. It is not enough for a manufacturer to respect regulations governing information in the case of a dangerous product;[118]

f. The intensity of the duty to inform varies according to the circumstances, the nature of the product and the level of knowledge of the purchaser and the degree of danger in a product's use; the graver the danger the higher the duty to inform;[119]

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112 See Exhibit 1470.1, at page 3.

113 *Hollis, op. cit.,* Note 40, at page 658, citing *Buchan v. Ortho Pharmaceutical Canada Ltd.*, (1986) 32 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*

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120 *Hollis*, *op. cit.,* Note 40, at page 655.

121 *Hollis*, *op. cit.,* Note 40, at page 654; *Lambert*, *op. cit.,* Note 104, at pages 574-575.

122 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at para 2-354; Lambert, at pages 574-575.

123 *Bail*, *op. cit.*, Note 115, at page 587.

124 Pierre LEGRAND, *Pour une théorie de l'obligation de renseignement du fabricant en droit civil canadien*, (1980-1981) 26 McGill Law Journal, 207 at page 229.

125 Pierre-Gabriel JOBIN, *La vente*, *op. cit.*, Note 110, pages 294-295, paragraph 211. He cites some six cases in support at footnote 116.

126 At paragraph 89 of JTM's Notes.

127 At paragraph 110 of JTM's Notes.

discharged its duty to inform."[128] In this regard, JTM argues that the duty to warn is not equivalent to a duty to convince.

[231] On the question of the source of the awareness, the test under article 1473 is whether the consumer knew or could have known of the safety defect, as opposed to whether the manufacturer had taken any positive steps to inform. That confirms JTM's position, but does not paint the full picture.

[232] Where the manufacturer knows that the information provided is neither complete nor sufficient with respect to the nature and degree of probable danger[129], the duty has not been met. That is the case here. We earlier held that the Companies were aware throughout the Class Period of the risks and dangers of their products, both as to the Diseases and to dependence. They thus knew that those risks and dangers far surpassed what either Canada, through educational initiatives, or they themselves, through the pack warnings, were communicating to the public. That represents a grievous fault in light of the toxicity of the product.

[233] Much of this also applies to JTM's second argument opposing the imposition of a duty to convince. Again, the test is, in general: "knew or could have known", but the bar is higher for a dangerous product. Turning that test around, in these circumstances it seems appropriate to ask whether the Companies knew or could have known if the public was being sufficiently warned. The answer is that the Companies very well knew that they were not.

[234] Putting aside specialized, scientific studies to which the public would not normally have access, the information available during much of the Class Period was quite general and unsophisticated. We include in that the pre-1988 Warnings.

[235] It is telling, for example, that Health Canada did not see the need to impose starker Warnings until 1988. This indicates that the government could not have been fully aware of the exact nature and extent of the dangers of smoking, otherwise we must presume that they would have acted sooner. This was apparent to the Companies, a fact that they essentially admit in a June 1977 RJRM memo drafted by Derrick Crawford.

[236] Reporting on a meeting between Health Canada and, *inter alia*, the Companies to discuss the project for a less hazardous cigarette, Mr. Crawford mocked the technical abilities of Health Canada in several areas and noted that "they were actually looking to us for help and guidance as to where they should go next"[130]. In his concluding paragraph, he underlines the government's shortcomings and lack of understanding:

> 7. One had to leave this meeting with a sense of frustration — so much time spent and so little achieved. On the other hand it leaves one with a degree of optimism for the future as far as the industry is concerned. They are in a state of chaos and are uncertain where to turn next from a scientific point of view. They want to be

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128 At paragraph 365 of Plaintiffs' Notes. Emphasis in the original.

129 Theoretically, at least, incomplete information could still provide sufficient warning.

130 Exhibit 1564, at pdf 1. At pdf 6, he does state that the Companies would be willing to give guidance if the government were prepared to embark on a realistic programme, which he felt they were not ready to do.

> seen to be doing the right thing, and to keep their Dept. in the forefront of the Smoking & Health issue. However it appears they simply do not have the funds to tackle the problem in a proper scientific manner. Our continuing dialogue can continue for a long time, as they feel meetings such as these are beneficial. Pressure must be off shorter butt lengths for a considerable time[131]

[237] If the Companies knew that Health Canada was in a state of confusion, they had to assume that the public was even less up to speed. Farther on, we look at what ITL knew about what the public knew and conclude that its regular market surveys would have led it to believe that much of the public was in the dark about smoking and health realities. This should have guided ITL's assessment of whether it had met its duty to inform. It did not.

[238] Rather than taking the initiative in helping the government through the learning process, the Companies' strategy was to hold Canada back as long as possible in order to continue the *status quo*. Smoking prevalence was still growing in Canada through much of this period[132] and the Companies were reaping huge profits. It was in their financial interest to see that continue as long as possible.

[239] By choosing not to inform either the public health authorities or the public directly of what they knew, the Companies chose profits over the health of their customers. Whatever else can be said about that choice, it is clear that it represent a fault of the most egregious nature and one that must be considered in the context of punitive damages.

[240] So far in this section, the Court has focused on the manufacturer's obligation to inform under article 1468 and following but, under article 1457, a reasonable person in the Companies' position also has a duty to warn.

[241] In a very technical but nonetheless relevant sense, the limits and bounds of that duty are not identical to those governing the duty of a manufacturer of a dangerous product. This flows from the "knew or could have known" defence created by article 1473.

[242] Under that, a manufacturer's faulty act ceases to be faulty once the consumer knows, even where the manufacturer continues the same behaviour. In our view, that is not the case under article 1457. The consumer's knowledge would not cause the fault, *per se*, to cease. True, that knowledge could lead to a fault on his part, but that is a different issue, one that we explore further on.

II.D.4 WHAT ITL SAID PUBLICLY ABOUT THE RISKS AND DANGERS

[243] In its Notes, ITL dismisses Plaintiffs' arguments, and the evidence, or lack thereof, on which they are based:

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131 Exhibit 1564, at pdf 8. The issue of shorter butt lengths was one that the Companies opposed, so this comment indicates that Health Canada's problems would keep pressure off the Companies to change their practices on that point.

132 Prevalence, i.e., the percentage of Canadians smoking, peaked in 1982, although sales did not peak until a year later because of population growth.

> **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

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134 See the Exhibit 105 series.

135 Exhibit 2.

of the House of Commons studying the effects of smoking on health[136]. The following are extracts from its front page:

> Mr. Paré pointed out that in the last 15 years no clinical or experimental evidence has been found to support the statistical association of smoking with various diseases. In fact, considerable evidence to the contrary has been found and many scientist and medical people were now prepared to say so publicly.
>
> There is an emerging feeling among many people that smoking isn't really the awful sin it has been made out to be, Mr. Paré said. He attributed this to the fact that the tobacco industry has recently been able to counter the arguments of the anti-smoking advocates with the testimony of reputable scientists. More has been leaned about tobacco in the last five years, he said, and as a result the industry feels more confident of its position.
>
> Highlights of (the industry's) brief
>
> - There is no proof that tobacco smoking causes human disease.
>
> …
>
> - Statistical associations, on which many of the claims against smoking are based, have many failings and do not show causation.
>
> …
>
> - Attacks on tobacco and its users – for health and other reasons – are not new. They have been recurring for centuries.
> - The tobacco industry has diligently sought answer to the unresolved health questions.
>
> …
>
> - Although there is no proof of any health significance in the levels of so-called "tar" and nicotine in the smoke of cigarettes, the industry has responded to the demands of some of its consumers by producing brands that deliver less "tar" and nicotine.
>
> …
>
> - The industry has acted with restraint in challenging the extreme, biased, and unproved charges that cigarettes are responsible for all kinds of ailments.

[249] It is important to note that Mr. Paré's comments before the Isabelle Committee and the extracts of the 120-page brief reproduced in *The Leaflet* were all submitted on behalf of the Ad Hoc Committee of the Canadian Tobacco Industry, later to become the CTMC. Paré was the Chairman of that organisation at the time. As such, he and the brief were speaking for all the members of the Canadian tobacco industry and the extracts cited above must therefore be taken as having been endorsed by each of the Companies.

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[136] ITL makes a claim of Parliamentary Privilege on this edition of its newsletter. Although the Court accepts that claim for Mr. Paré's actual testimony before the committee, it rejects it with respect to a voluntary restatement or "republication" of his comments outside of that body: *Jennings v. Buchanan*, [2004] UKPC 36, at pages 12 and 18 (UK Privy Council).

[250] By the time of Mr. Paré's testimony before the Isabelle Committee in 1969, the Companies had long known of the risks and dangers of smoking and yet they wilfully and knowingly denied those risks and trivialized the evidence showing the dangers associated with their products.

[251] The campaign continued. In a written reply to the question: "How can you reconcile your leadership in an industry whose product is indicted as a health hazard?" posed by the Financial Post in November 1970, Mr. Paré, speaking for ITL, writes:

> However, no proof has been found that tobacco smoking causes human disease. The results of the scientific research and investigation indicate that tobacco, especially the cigarette, has been unfairly made a scapegoat in recent times for nearly every ill that can affect mankind.
>
> In the indictment against smoking other factors such as environmental pollution, genetic factors and occupational exposures have not been adequately assessed. Attempts have been made to build up statistics to claim that smokers suffer more illnesses and loss of working days, but there is no valid experimental evidence to support this claim.[137]

[252] This reflects the standard mantra of the industry at the time, the "scientific controversy" by which the harmful effects of smoking on health were not exactly denied but, rather, were characterized as being complicated, multi-dimensional and, especially, inconclusive, requiring much further research. It insinuated into the equation the idea that genetic predisposition and "environmental factors", such as air pollution and occupational exposures, could be the real causes of disease among smokers.

[253] Seven years after the correspondence with the Financial Post, the message had not changed. In a December 1976 document entitled "Smoking and Health: The Position of Imperial Tobacco", we see the following statement:

> 6. I.T.L. is in agreement with serious-thinking consumers, whether they choose to smoke or not, who view the smoking and health question as being inconclusive, as requiring continuing research and corrective measures as definitive findings are established.[138]

[254] In fairness, ITL did permit certain research papers produced by it or on its behalf to be published in scientific journals, some of which were peer reviewed. In particular, some of Dr. Bilimoria's work in collaboration with McGill University was published[139]. This, however, does not impress the Court with respect to the obligation to warn the consumer.

[255] Such papers were inaccessible to the average public, both because of their limited circulation and of the technical nature of their content. Moreover, the fact that the general scientific community might have been informed of certain research results does not satisfy ITL's obligation to inform. Except in limited circumstances, as under the

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137 Exhibit 907.

138 Exhibit 28A, at page 1.

139 It is unfortunate that this "openness" on ITL's part did not apply across the board. In 1985, its president, Stewart Massey, asked BAT if it had objections or comments about the publication of certain research papers, to which Mr. Heard of BAT replied: *"I think it is unwise to publish any findings of our studies on smoking behaviour on any smoking products"*: Exhibit 1603.2.

learned intermediary doctrine, the duty to warn cannot be delegated. As the Ontario Court of Appeal states in *Buchan*:

> I think it axiomatic that a drug manufacturer who seeks to rely on the intervention of prescribing physicians under the learned intermediary doctrine to except itself from the general common law duty to warn consumers directly must actually warn prescribing physicians. The duty, in my opinion, is one that cannot be delegated.[140]

[256] On the other hand, the role played by Health Canada with respect to smoking and health issues might fit into the learned intermediary definition. In that regard, however, the Companies would have had to show that they actually warned Health Canada of all the risks and dangers that they knew of. As shown elsewhere in the present judgment, they failed to do that.

[257] Getting back to what ITL and the other Companies were telling the public, the CTMC continued the same message after Mr. Paré's departure. In a 1979 letter to the Editorial Page Editor of the Montreal Star newspaper[141], Jacques Larivière, the CTMC's head of communications and public relations, responded to an editorial by sending two documents, accompanied by the following comments on the second one:

> The second document, "Smoking and Health 1964-1979 The Continuing Controversy"[142] was produced by the Tobacco Institute in Washington in an attempt to inject some rational thinking into the debate and to replace the emotionalism with fact.

[258] The Tobacco Institute is the US tobacco industry's trade association and the document defends "the continuing smoking and health controversy" where "there are statistical relationships and several working hypotheses, but no definitive and final answers" and "scientists have not proven that cigarette smoke or any of the thousands of its constituents as found in cigarette smoke cause human disease.[143]

[259] In the opinion of Professor Perrins, one of the Companies' experts, only "outliers" were denying the relationship between smoking and disease after 1969. He defined outliers as persons who defend a position that the vast majority of the community rejected.[144] The Tobacco Institute document that the CTMC turned to "to inject some rational thinking into the debate and to replace the emotionalism with fact" was published ten years after Dr. Perrins' outlier date. It contradicted what the Companies knew to be the truth and it was sent to a newspaper, as were other similar communications at the time.

[260] The Companies argue that these types of statements had little or no play with the public and could not have caused anyone to smoke. They also point out that not a single Member came forward to testify that any of the Companies' statements in favour of their products caused him to start or to continue to smoke.

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140 *Buchan*, at pages 31-32. The learned intermediary doctrine will often apply in the type of relationship between a doctor and his patient with respect to information provided by a pharmaceutical company to the medical community but not to the general public.

141 Exhibit 475.

142 Exhibit 475A.

143 At pdf 5-7.

144 See the transcript of August 21, 2013, at pages 70-76 and 235-236.

[261] The latter statement is true and it is one that the Companies raise time and again against the Plaintiffs' case on a number of issues, starting well before the opening of the trial. It is also one that never inspired great sympathy from the Court, and our lack of enthusiasm remains unabated.

[262] We have repeatedly held that, in class actions of this nature, the usefulness of individual testimony is inversely proportional to the number of people in the class. As we shall see, the number of people in the Classes here varies from 100,000 to 1,000,000. These proportions render individual testimony useless, a viewed shared by the Court of Appeal[145]. They also render hollow the Companies' cry for an unfavourable inference resulting from the absence of Members' testimony.

[263] In any event, the Court is of the view that the Plaintiffs are entitled to a presumption[146] that the Companies' statements (outside of marketing efforts, which are analyzed further on) were generally seen by the public and did lead to cigarette smoking.

[264] As Professor Flaherty's time lines show, the Companies' statements were widely reported in newspapers and magazines read in Quebec[147]. The Companies rely on this evidence to show that the general public was aware of the negative publicity about smoking through newspaper and magazine articles, but the knife cuts both ways. Although fewer and fewer with time, articles reporting the Companies' stance appeared in the same publications. One must presume that they would also have been seen by the general public.

[265] As well, the effect of the gradual reduction of these statements after the Companies decided to abstain from making any public statements about health, as discussed in the following chapter, is mitigated by the reality that, during the Class Period, the Companies never rescinded these statements. In fact, as late as the end of 1994 ITL was still defending the existence of the same "scientific controversy" that Mr. Paré had been preaching decades earlier[148]. As noted by Professor Flaherty, ITL's own expert:

> November/December 1994 issue of *The Leaflet*, an Imperial Tobacco publication for employees and their families, had an article entitled — Clearing the Air: Smoking and Health, The Scientific Controversy" which contained this excerpt: "The facts are that researchers have been studying the effects of tobacco on health for more than 40 years now, but are still unable to provide undisputed scientific proof that smoking causes lung cancer, lung disease and heart disease ... The fact is nobody knows yet how diseases such as cancer and heart disease start, or what factors affect the way they develop. We do not know whether or not smoking could cause these diseases because we do not understand the disease process".[149]

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145 See Imperial *Tobacco v. Létourneau*, 2012 QCCA 2013, at parapgraph 51.

146 We present our understanding of the rules relating to presumptions in section VI.E of the present judgment.

147 See the titles of smoking and health stories in newspapers in the series of Exhibits filed under number 20063.2 and following, especially in the pre-1975 years.

148 We discuss the birth of the scientific-controversy strategy in section II.F.2 of the present judgment.

149 Exhibit 20063.10, at pdf 154.

[266] True, this article was directed principally at its own employees, presumably hundreds or even thousands of them, but it highlights the degree to which ITL's posture and message had not changed even 25 years after the first date when only outliers were denying causality, or at least the existence of a relationship between smoking and disease[150].

[267] On the other hand, many of the Companies' statements were technically accurate. Science has not, even today, been able to identify the actual physiological path that smoking follows in causing the Diseases. That, however, is neither a defence nor any sort of moral justification for denying the link. As noted in our review of the manufacturer's obligation to inform, its knowledge that its product has caused bodily damage in other cases triggers the principle of precaution whereby it should warn of that possibility.[151]

[268] Thus, one can only wonder whether the people making such comments were remarkably naïve, wilfully blind, dishonest or so used to the industry's mantra that they actually came around to believe it. Their linguistic and intellectual pirouettes were elegant and malevolent at the same time. They were also brutally negligent.

[269] ITL and the other Companies, through the CTMC and directly[152], committed egregious faults as a result of their knowingly false and incomplete public statements about the risks and dangers of smoking.

[270] As a final note on the subject, ITL and the other Companies argue that their customers were getting all the information they needed through other sources, especially the Warnings. Although these do form part of what the Companies were saying publicly, for reasons alluded to above[153] and developed more fully in the next section, it is more logical to deal with the Warnings in the context of what the Companies were not saying publicly.

II.D.5 WHAT ITL DID NOT SAY PUBLICLY ABOUT THE RISKS AND DANGERS

[271] Throughout much of the Class Period, the Companies adhered to a strict policy of silence on questions of smoking and health[154]. They justify their decision in this regard on three accounts: the Warnings gave notice enough, no one would believe anything they said anyway and, in any event, it was up to the public health authorities to do that and they did not want to contradict the message Health Canada was sending.

[272] The history of the implementation of the Warnings, even after the enactment of the TPCA, shows constant haggling between Canada and the Companies, initially, as to whether pack warnings were even necessary, and then, as to whether they should be attributed to Health Canada, and finally, as to the messages they would communicate.

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150 See the transcript Dr. Perrins: August 21, 2013, at pages 70-76 and 235-236.

151 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 2-354; *Lambert*, at pages 574-575.

152 We analyze the situation of the other Companies in the chapters dealing with them.

153 See section II.B.1.b.2 of the present judgment.

154 See, for example, the testimony of ITL's former Vice-President of Marketing, Anthony Kalhok, in the transcript of April, 18, 2012, at page 113.

The Companies resisted the Warnings at all stage and attempted, and generally succeeded, in watering them down.

[273] A good example of this is seen as late as August 1988 in the CTMC's comments to Health Canada on the proposed Warnings under the TPCA. Lobbying against a Warning on addiction, its president wrote the following to a Health Canada representative:

> Particularly in the absence of clear government sponsorship of the proposed messages, we have serious difficulty with the specific language of the health messages contained in your July 29th proposals. We do not accept the accuracy of their content.
> With or without attribution, we are particularly opposed to an "addiction" warning. Calling cigarettes "addictive" trivializes the serious drug problems faced by our society, but more importantly. (sic) The term "addiction" lacks precise medical or scientific meaning. (Exhibit 694, at page 10 PDF)

[274] The Warning on addiction was not introduced for another six years, presumably at least in part as a result of the CTMC's interventions.

[275] Be that as it may, the Companies maintain that the Warnings, whether voluntary or imposed, satisfied in every aspect their obligations to inform the customer of the inherent risks in using their products. In fact, they read subsection 9(2) of the TPCA as a type of injunction blocking them from saying anything more, particularly when coupled with the ban on advertising in effect as of 1988. That provision reads:

> **9(2)** No distributor shall sell or offer for sale a tobacco product if the package in which it is contained displays any writing other than the name, brand name and any trade marks of the tobacco product, the messages[155] and list referred to in subsection (1), the label required by the *Consumer Packaging and Labelling Act* and the stamp and information required by sections 203 and 204 of the *Excise Act*.

[276] Plaintiffs disagree. They correctly point out that subsection 9(3) of the TPCA rules out that argument:

> **9(3)** This section does not affect any obligation of a distributor, at common law or under any Act of Parliament or of a provincial legislature, to warn purchasers of tobacco products of the health effects of those products".

[277] This should have been notice enough to the Companies that the public health authorities were clearly not trying to occupy the field with respect to warning the public. On the other hand, it is, of course, true that the Companies should not say or do anything that would contradict Health Canada's message, but that posed no obstacle to acting properly.

[278] The "restrictions" on the Companies' statements to the public are every bit as present today as they were during the Class Period, nevertheless, for at least the last ten years each Company has been warning the public of the dangers of smoking on its

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[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

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[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:

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[157] Exhibit 34, at pdf 5. See also Exhibit 561, JTM's website in 2008, cited in the preceding footnote.
[158] Dr. Young's report: Exhibit 21316.

> Yes, my conclusions was that... are that it was reasonable that Defendants did not provide health warnings, product warnings, regarding the health risks of smoking prior to nineteen seventy-two (1972); that it was reasonable they did not provide additional or different information on health warnings, including a detailed list of all diseases potentially caused by smoking, statistical information about the probability of various health consequences, or detailed lists of known and suspected carcinogens.
>
> And then, finally, that the adoption of earlier warning, or one with additional or different information, would not likely have had a significant effect on smoking initiation or quitting rates in Quebec.[159]

[292] Smoking is a public health risk, in his view, and public health risks should be, and generally are, controlled by the public health authorities as far as warning, education and risk management are concerned. He views the proper role of printed warnings on product packaging as being "instructional" with regard to how to use the product properly, not "informational" with regard to the possible dangers of the product.

[293] If that is the case, then the Companies' position that the Warnings provided sufficient information is impaled on its own sword.

[294] In performing his mandate, his first related to tobacco products, Dr. Young saw no need to consider any internal company documentation or, for that matter, public company documentation, such as advertising material and public pronouncements. He approached his work "entirely from a warnings perspective, and from warnings theory"[160].

[295] We note that his use of the term "warnings" relates specifically and solely to on-package warnings. He was not engaged to address the overall obligation to warn. There is a danger that these two issues could be confused. The latter is much broader than the former, as seen in this exchange before the Court:

> 459Q-I'm not talking about warning, I'm talking about telling the public one way or the other.
>
> A- Well, my opinions really only relate to what a reasonable manufacturer would do with regard to warnings. So other communications and so forth would be the judgment of others, as far as whether or not they're appropriate.[161]

[296] Thus, Dr. Young was not mandated to, nor did he, make any effort to analyze the actual degree to which the Quebec public - or the Canadian public health authorities for that matter – were ignorant of the risks and dangers of smoking at various times over the Class Period. He was not provided any of the available evidence on the internal documents of the Companies dealing with things like their marketing, advertising and public relations campaigns and the long history of their negotiations with Health Canada about the Warnings, as well as their assessment of general consumer awareness of the risks related to smoking.

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159 Transcript of March 24, 2014, pages 83-84.

160 Transcript of March 24, 2014 at page 51. See pages 46-51 of that day's transcript. See also pages 3, 18, 26, 31 of his report.

161 Transcript of March 24, 2014 at pages 208-209.

[297] By restricting himself to theoretical questions, as he was hired to do, he saw no need to examine the level of the Companies' own knowledge of the public health risks of smoking, or the extent to which they were sharing that knowledge with their customers and with the government. Of equal importance, Dr. Young was unable to evaluate the degree to which the Companies, based on their own knowledge, realized that the government of Canada might be underestimating and thus under-reporting the risks of smoking during the first four decades of the Class Period.

[298] Pressed on the latter point in cross-examination, he did not hesitate to admit that the Companies had a duty to ensure that the public health authorities were properly informed of what the Companies knew about the risks of smoking:

> 455Q-Okay. So let's take the nineteen sixties (1960s). If the tobacco manufacturer knew that cigarettes caused lung cancer, there was no need for them to warn the public about that; that's your opinion?
>
> A- The reasons that manufacturers still would not provide warnings about residual risk would still apply. So what I would expect them to do at that point, if the Government or public health officials did not know, would be, rather than provide that as the source of a message on an on-product label, I would expect them to go to public health officials and identify what needs to be done in response to that. And the Government could decide to deal with it in terms of a warning, or they could decide to deal with that through other means.
>
> 456Q-Okay. So you would expect that the manufacturer go to the Government and tell them everything that they knew about the risk of tobacco smoke, on a regular basis, a continuous basis; correct?
>
> A- I would expect them to convey material information that they had about the risk to public health authorities.[162] (The Court's emphasis)

[299] Dr. Young's opinions, although probably correct within the confines of his terms of engagement, are of limited use to the Court. As was the case with most of the other experts called by the Companies, he was given neither the necessary background information nor the leeway to step outside the strict bounds of his mandate.

[300] Except for pack warnings, his theoretical analysis seems to assume a communications vacuum between the Companies and their customers and the government. He admits that, not being an advertising expert, "I haven't even looked into the role that that (advertising) played overall".[163] Later, he adds the following clarification:

> I've really only focused on the issue related to warnings, and the necessity of having consistency in warning messages between public health officials and the manufacturer. And I have not addressed issues related to advertising or other types of communications that may have been in play at any given point in time. And since I don't know how those other types of communications would... the extent to which they'd be seen, the influence they might have on people, I can't

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[162] Transcript of March 24, 2014, pages 207-208.
[163] Transcript of March 24, 2014, page 126.

> really comment on that, apart to say from... that any warning information provided by the manufacturer should be consistent with government policy regarding smoking health risks.[164]

[301] By his omitting to consider the undeniable effects of the very professional advertisements and public relations campaigns that the Companies were putting forth during much of the Class Period, and admitting that he was not competent to do so, Dr. Young's evidence loses most of its usefulness for the Court. And even on the subject of pack warnings, there are gaps left unfilled.

[302] For example, he does not deal with the attitudes and actions of the Companies with respect to the conception and implementation of the Warnings, both at the initial stage of non-legislated implementation and throughout the evolution of the programme. Dr. Young was not informed by his clients of that part of the story, nor was he provided internal company documentation relating to it. He felt no need to query further because, as he was often forced to say, it was not material to his mandate.

[303] This subject is, however, very much material to the Court's mandate, as it could have a role not only with respect to the present Common Question, but also in the context of punitive damages. Hence, it is unfortunate that it was not seen fit to allow this expert "in the design and implementation of consumer product warnings and safety communications" to assist the Court on aspects of the design and implementation of the Warnings.

[304] In summary, Dr. Young's evidence was so restricted by the terms of his mandate that it was not responsive to the questions at hand. Its overall effect is more that of a red herring, distracting attention away from the real issues and directing it towards secondary ones that, although of some marginal relevance, tend to muddy the analysis of the primary ones. That said, certain of the points he made are enlightening and useful and it is possible that we could refer to some of them at the appropriate time.

[305] Dr. Viscusi, a law and economics professor at Vanderbilt University, was accepted by the Court as an expert on how people make decisions in risky and uncertain situations and as to the role and sufficiency of information, including warnings to consumers, when making the decision to smoke. In his report (Exhibit 40494), he described his mandate as addressing two subjects:

- the theory of warnings and health risk information provision in situations of risk and uncertainty and the characteristics relevant to the consumer choice process in these situations and
- the sufficiency of the publicly available information in Canada over time regarding the health risks of cigarette smoking, viewed from the standpoint of fostering rational decision making by the individual consumer.

[306] He reports the following three conclusions:

- The data demonstrate that there has been sufficient information in Canada for decades for consumers to make rational smoking decisions given the state of

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[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

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165 Transcript of January 20, 2014, at pages 76, 77 and 216.

166 The Court assumes that he is speaking of the world as it was during the Class Period, since anyone listening to a pharmaceutical ad on television today would be surprised to hear that.

167 See, for example, his footnote 11, at page 20 of Exhibit 40494.

168 See paragraph 86 of their Notes.

- This product is deadly. It contains many toxic and carcinogenic constituents and poisons every organ in the human body. It will kill half of those who do not succeed in quitting.

[312] Without going quite that far, the Companies should have done much more than they did in warning of the dangers. Today, through their websites and other current communications channels, they move in the direction of raising the alarm. Nothing was stopping them from doing that at any moment of the Class Period using the means available at the time. RBH took the step in 1958[169]. Other than that, however, the Companies chose to do nothing.

[313] Is this equivalent to trivializing or denying or employing a systematic policy of non-divulgation of the risks and dangers? Silence can trivialize and, indirectly, deny, but that is not the important question. The real question is to determine whether the Companies met their duty to warn. The Companies' self-imposed silence leads to only one possible answer there: they did not.

[314] Remaining in the context of what ITL did not say publicly about the risks and dangers of smoking, let us examine if its perception of the public's level of knowledge should flavour our assessment of its behaviour.

II.D.6 WHAT ITL KNEW ABOUT WHAT THE PUBLIC KNEW

[315] As mentioned earlier, in the context of the duty to inform, the Plaintiffs felt it important to spotlight the Companies' knowledge of what the public knew or believed about the dangers of smoking. In this regard, they filed two expert reports by Mr. Christian Bourque (Exhibits 1380 and 1380.2), an executive vice-president at Léger Marketing in Montreal and recognized by the Court as an expert on surveys and marketing research.

[316] The Companies attempted to counter Mr. Bourque's evidence through the testimony of two experts of their own: Professor Raymond Duch, recognized by the Court as an expert in the design of surveys, the implementation of surveys, the collection of secondary survey data and the analysis of data generated from survey research, and Professor Claire Durand, an expert in surveys, survey methods and advanced quantitative analysis

[317] In his principal report (the "**Bourque Report**"), Mr. Bourque stated his mandate to be:

- To determine the Companies' knowledge from time to time of the perceptions or knowledge of consumers concerning certain risks and dangers related to the consumption of tobacco products
- To identify the apparent objectives of the surveys, i.e., to determine the information relating to certain risks and dangers related to the consumption

[169] See our discussion of Mr. O'Neill-Dunne's initiatives in that year in section IV.B of the present judgment.

> of tobacco products that the Companies sought to obtain, as well as the reasons for the Companies' commissioning these surveys.[170]

[318] In spite of the broad wording of the first item, it is important to clarify that he was not asked to review published survey reports. His scope was limited to the internal survey data available to the Companies, especially ITL's two monthly consumer surveys: the *Monthly Monitor* and the *Continuous Market Assessment* ("**CMA**", together: the "**Internal Surveys**")[171]. He also considered a less-frequently-published report entitled *The Canadian Tobacco Market at a Glance*, which appears to cover industry-wide questions, as opposed to primarily ITL issues.

[319] Apparently exceeding the limits of his mandate, he attempts to draw conclusions from the Internal Surveys about the public's general knowledge of the dangers of smoking. For example, he sees the data on the level of agreement with the survey statement "smoking is dangerous for anyone" as an indication that smokers' knowledge of the dangers of smoking was far below universal, especially early in the Class Period. Mr. Bourque draws that conclusion from *The Canadian Tobacco Market at a Glance* of December 1991, which shows the following results [172]:

Years 1971 to 1990	71	**72**	73	**74**	75	76	77	**78**	**79**	**80**	81	82	**83**	84	85	86	87	88	**89**	90	91
Dangerous for anyone (%)	48	**59**	56	**63**	64	67	71	**72**	**72**	**74**	75	76	**76**	77	77	79	77	77	**79**	80	79

[320] As shown below, the CMAs for the same question during that period give a slightly different result, one which Mr. Bourque could not explain from the documents available to him[173]. That said, although the figures are slightly higher in 1972, 1974 and 1983, the differences are small enough so as not to affect the analysis the Court carries out below:

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170 *Déterminer la connaissance qu'avaient ponctuellement les compagnies de tabac quant aux perceptions ou connaissances des consommateurs quant à certains risques et dangers reliés à la consommation des produits du tabac;*
Identifier le(s) but(s) apparent(s) visé(s) par les études, soit de déterminer les renseignements relatifs à certains risques et dangers reliés à la consommation des produits du tabac que les compagnies de tabac cherchaient à obtenir, ainsi que les raisons qui poussaient les compagnies de tabac à réaliser ces études.

171 The Monthly Monitors were monthly reports, eleven a year, prepared by an outside firm on the basis of some 2,000 in-home interviews designed to measure the use of various products, including tobacco, by Canadian adults, i.e., both smokers and non-smokers. They were originally called "8Ms" at the time they were conducted only 8 months a year. The CMA's were monthly telephone surveys of smokers only (people who smoked at least five cigarettes a day) in Canada's 28 largest cities. Also prepared by an outside firm, their purpose was to assess brand performance and brand switching tendencies among the various demographic segments of the smoking population.

172 From page 11 of the Bourque Report, Exhibit 1380 citing Exhibit 987.1, at pdf 7. The underlined figures correspond to the years cited by Mr. Bourque for the CMAs, as set out in the following paragraph.

173 The explanation might lie in the fact that the CMAs analyzed smokers only, while the *Canadian Tobacco Market at a Glance* could be canvassing the total population on that question: see the description of "Consumer" at the top of page 5 pdf of Exhibit 987.1.

Year	1972	1974	1978	1979	1980	1983	1989
Smoking is dangerous for anyone (%)	62	65	71	72	74	78	79[174]

[321] Transposing these results onto actual public knowledge is not necessarily advisable. They contrast sharply with published survey data cited by Professor Duch, which indicates much higher levels of consciousness at earlier dates. In fact, both he and Professor Durand were vociferous in their criticisms of the quality of the questions and the methodology followed in the Internal Surveys. They insisted that neither was in conformity with accepted survey methodology and practice and the results cannot be relied upon for the purpose of evaluating the general public's knowledge of anything.

[322] As for Mr. Bourque, it was not part of his mandate to defend the scientific integrity of the Internal Surveys, nor did he try. His task was to analyze their contents.

[323] Given that, in light of the uncontradicted testimony of Professors Duch and Durand, the Court accepts their advice to exclude the Internal Surveys as a source of reliable information as to the actual knowledge of the general public on the issues dealt with therein. Moreover, it is clear from their design and implementation that that was not the purpose these surveys were meant to serve, as discussed below.

[324] Accordingly, the Court will not rely on the first part of the Bourque Report for the purpose of ascertaining the actual level of public knowledge of the dangers of smoking. Given this conclusion, it is not necessary to analyze the generally ill-focused criticisms by Professors Duch and Durand of Mr. Bourque's analysis of the data[175].

[325] This does not mean, however, that the first part of the Bourque Report serves no useful purpose to the Court. That the Internal Surveys do not meet the highest standards of survey methodology does not render them irrelevant. They cast light on a very relevant issue: what ITL perceived and believed, accurately or not, about the public's knowledge of the dangers of smoking. In this area, the Court is convinced that ITL had confidence in the Internal Surveys.

[326] It is true that Mr. Ed Ricard, a marketing manager, stated that ITL used the CMAs more to understand trends over time than to provide an accurate snapshot at any one point. Nevertheless, when called by the Plaintiffs in May and August 2012, he gave no indication that ITL did not believe that snapshot. In fact, the opposite is the case, as we note below.

[327] When called back by ITL in October 2013, after the testimony of Professors Duch and Durand, he parroted their criticisms of the Internal Surveys. He declared that the CMAs were not representative of the total Canadian population and pointed out that the figures reported in Exhibit 988B, a 1982 CMA report, were "quota samples" of urban Canadian smokers only, as opposed to samples of all Canadians.

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[174] The Bourque Report, Exhibit 1380, at pages 12-13.

[175] They both refused to consider the report from the perspective of Mr. Bourque's mandate, i.e., to analyze the Companies' knowledge, adamantly insisting on focusing only on the weaknesses of the Internal Surveys as a source of the public's knowledge, as determined from published surveys.

[328] Mr. Ricard's 2013 comments, reflecting, as they do, those of Professors Duch and Durand, appear to be correct, but they do not cohabitate well with his 2012 testimony. At that time, he expressed much more confidence in the CMAs. The transcript of May 14, 2012 shows the following exchange at page 49:

> 33Q- After this study was made, is there a reason why you didn't check with your customers if they were ... or verify the awareness of health risks with your customers?
>
> A- Mr. Justice, it was... I don't know why we would not have spent more time specifically on that question, it was... First of all, I would have to say, just from my own personal assessment, certainly during the time I was there, **based on the level of belief that we were measuring in the marketplace through the CMA, we felt that people knew and were aware of the rest**. And so, from my own personal point of view, I didn't see any need to measure it, because we felt people were aware. (The Court's emphasis)

[329] This is clear proof that, whatever their defects in terms of survey methodology, the CMAs were seen by ITL's management as providing accurate insight into what smokers were thinking[176]. They thus reflect ITL's knowledge about the smoking public's knowledge, or ignorance, of the dangers of smoking. This is relevant in the context of the duty to inform and to our analysis of the second part of the Bourque report.

[330] The Plaintiffs argue that the Companies had to ascertain the public's level of knowledge of the dangers of smoking in order to fulfill their duty to inform. To that end, they asked Mr. Bourque to opine on the apparent objectives of the Internal Surveys.

[331] He states that the Companies' objective was not to measure the level of smokers' knowledge on an ongoing basis in order to inform them of the risks and dangers of smoking but, rather, to see if the information circulating in that regard might pose a threat to the market or affect smokers' perceptions.[177] He saw the objectives of the Internal Surveys as relating almost exclusively to marketing and production planning.[178]

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176 We remind the reader that the CMAs surveyed smokers only, not the general population.

177 *Ceci nous laisse croire que l'objectif de ces manufacturiers de tabac n'était pas de mesurer le niveau de connaissance ou la perception des fumeurs sur une base continue (afin de les informer au besoin), mais plutôt de vérifier si l'information circulant dans l'environnement devenait une menace, ou du moins en quoi elle pouvait affecter leurs perceptions*. (Exhibit 1380, at page 31).

178 Some of Mr. Bourque's comments in this regard are as follows:
En effet, nos recherches nous ont permis de comprendre que des études étaient souvent commandées en réaction à des événements externes, comme la mise en place d'une nouvelle réglementation, la publication d'un rapport lié à la santé et la cigarette ou des campagnes publicitaires anti-tabac, afin d'en mesurer les contrecoups. L'objectif de ces études réactives était de vérifier si de tels événements hors de leur contrôle pouvaient affecter négativement les perceptions des consommateurs (voir section 2.1).
Il appert aussi que le but visé par la conduite d'études à propos de certains risques et dangers reliés à la consommation des produits du tabac était de voir en quoi ces perceptions ou connaissances pouvaient avoir un impact sur les attitudes et comportements des fumeurs. En d'autres mots, on voulait savoir si et en quoi ces perceptions ou connaissances pouvaient amener les fumeurs à arrêter de fumer ou limiter leur consommation de produits du tabac. La démarche s'inscrit donc dans une logique de

[332] This is not surprising. It coincides with what ITL's representatives consistently stated. No one ever asserted that the role of the Internal Surveys was to measure customers' knowledge of the dangers of smoking. So be it, but that does not erase the Internal Surveys' message to ITL.

[333] From the figures out of *The Canadian Tobacco Market at a Glance* reproduced in the table above, ITL would have concluded that from 52% (in 1971) to 21% (in 1989) of smokers did not feel that smoking was dangerous for anyone. The CMAs over that period reflect the same level of ignorance. They also show that it was not until 1982 that the percentage of respondents who felt that smoking was dangerous for anyone surpassed 75%. This is the level of awareness that ITL's expert, Professor Flaherty, opined is required for something to be "common knowledge"[179].

[334] It is true that the technical credibility of that data might be suspect in the eyes of an expert 30, 40 or 50 years later, but we must view this through ITL's eyes at the time. Mr. Ricard was there, and he confirmed that ITL believed the data and relied on it for important business decisions.

[335] ITL's argument that its customers were already fully informed of the risks and dangers of smoking through the media, school programmes, the medical community, family pressure and, as of 1972, the Warnings loses most of its speed after hitting up against this wall of evidence. Moreover, the Internal Surveys also made ITL aware that the Warnings were far from being major attitude changers on this point.

[336] As seen in the tables above, the degree of sensitivity of smokers increased only gradually after the introduction of the Warnings in 1972. In fact, it dropped from 59% to 56% the following year. After that, it rose only about one percent a year through 1991. Thus, as far as ITL knew, the Warnings were not the panacea it is now claiming them to be.

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suivi des mouvements du marché actuel et potentiel, afin de prévoir la demande, mais également afin d'ajuster les stratégies de marketing (voir section 2.2). (at pages 8 and 9; the Court's underlining)
À la lumière des études trouvées et présentées dans cette section, il semble que bien peu d'études mesuraient les mêmes éléments, en utilisant les mêmes questions, de manière continue dans le temps et portant spécifiquement sur la perception ou la connaissance des risques et dangers. Les compagnies de tabac dont nous avons fait mention obtenaient plutôt des données ponctuelles sur les perceptions et connaissances des consommateurs quant à certains risques et dangers reliés à la consommation de produits du tabac. (at page 29)
Ceci nous laisse croire que l'objectif de ces manufacturiers de tabac n'était pas de mesurer le niveau de connaissance ou la perception des fumeurs sur une base continue (afin de les informer au besoin), mais plutôt de vérifier si l'information circulant dans l'environnement devenait une menace, ou du moins en quoi elle pouvait affecter leurs perceptions. De plus, cette mesure permet la création et l'ajustement des stratégies marketing: les manufacturiers de cigarettes voudront positionner les différentes marques de leur portefeuille selon des dimensions relatives à la santé si celles-ci deviennent importantes pour le consommateur. (at page 31; the Court's underlining)

[179] See page 5 of Professor Flaherty's Report (Exhibit 20063) for a definition of "common knowledge". In his testimony on May 23, 2013, Professor Flaherty set "more than 75%" as the threshold figure for the "vast majority" of a group to be aware of a fact, thus making it "common knowledge". In his testimony, Professor Duch preferred the figure of 85%.

[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

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180 Compensation can theoretically occur in the opposite direction, i.e., where a smoker moves to a higher yield cigarette he might "undersmoke" it, but this aspect is not relevant to the present cases.

181 Although the evidence did not deal directly with the point, it appears that smokers do not compensate consciously, i.e., in a pre-meditated fashion. This seems logical, since, if it was done on purpose, it would make no sense to switch to the lower-yield brand.

182 The natural tar to nicotine ratio in tobacco smoke is about ten to one and will remain at that proportion even if the tar level is reduced, so that a reduction in tar will generally result in a proportionate reduction in nicotine.

represent full, complete or 100% compensation. Partial (or incomplete) compensation would be deemed to have occurred if the reduction in intake was between the zero and full compensation levels.[183]

[342] Compensation can occur through a number of techniques, such as:

- Increased number of cigarettes smoked per day,
- Increased number of puffs per cigarette, resulting in smoking the cigarette "lower down", i.e., closer to the filter,
- More frequent puffs,
- Increased volume of smoke per puff: Dr. Dixon's choice as the most often used technique for compensation,
- Increased depth of inhalation per puff,
- Increased length of time holding the smoke in and
- Blocking of filter-tip ventilation holes by the fingers or lips.[184]

[343] Smoking machines do not compensate. It follows that machine-measured delivery of tar and nicotine, although allowing one to distinguish the relative strength of one brand compared to another, will not generally reflect the actual amount of tar and nicotine ingested by a smoker. In the same vein, since people's smoking habits and manners, including their degree of compensation, vary individually, the amount of tar and nicotine derived by any one smoker will be different from that of his neighbour.

[344] One cannot examine compensation without first examining the evolution of cigarette design during the Class Period.

[345] Very summarily, with the ostensible goal of reducing smokers' intake of tar, the Companies modified certain design features of their cigarettes during the 1960s, 70s and 80s. Filters became almost universal during this time, to which were often added ventilation holes in the cigarette paper to bring in air to dilute the smoke. More porous cigarette paper, expanded tobacco and reconstituted tobacco were also used to the same end. There is no need to delve into the details of these for present purposes.

[346] It is sufficient to note that these design features resulted in cigarettes whose tar and nicotine delivery, as measured by a smoking machine, were lower than before. These "lower-yield" products were labelled with descriptors, such as "light" or "mild"[185]. They had less tar, as measured by smoking machines, but they also had less nicotine, flavour and "impact". Enter compensation.

[347] People who switch to a "lighter" brand of cigarette can – and generally do – compensate, at least initially. As a result of compensation, although they might well ingest less of the toxic components of smoke than with their previous brand, they still

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183 Exhibit 20256.1, pages 14-15.

184 See Dr. Dixon's report, Exhibit 20256.1, page 21 and Dr. Castonguay's report, Exhibit 1385, at pages 50 and following.

185 We discuss the effect of these descriptors below, in section II.E.2.

receive significantly more than would be expected from a linear application of the machine-measured reduction of tar content.

[348] Dr. Dixon opined that, although compensation occurred in many if not most cases, it was temporary and, even then, only partial: about half[186]. Thus, a smoker who changed to a cigarette showing a smoking-machine-measured reduction of tar and nicotine of 30% would only have reduced them by about 15% because of compensation. Rather than ingesting 70% of the previous amounts, the smoker would be taking in about 85%.

[349] Thus, lower-yield cigarettes end up having what could be called a "hidden delivery" of tar and nicotine. Replying to a question from the Court in this area, Dr. Dixon responded as follows:

> 910Q-Okay. All right. And I'm thinking of the effect of compensation on the smoker, and my question to you is, is full compensation a danger that should be associated with the use of low-yield cigarettes?
>
> A- Sorry, is it a danger?
>
> 911Q-Is it a danger? Is there a risk or danger associated with the use of low-yield cigarettes?
>
> A-I don't think there's any more risk or danger in their use than there is with the high-yield cigarettes. If full compensation was the norm, then there would be no point in having the low-tar cigarettes, because there would be no benefit in terms of exposure reduction and, therefore, one would not expect to see any benefit in terms of the health risk reduction.
> But if it's partial compensation, then you are seeing a reduction in exposure which, hopefully, would be reflected ultimately in a risk reduction for certain diseases.
>
> 17 912Q-But it wouldn't eliminate the risk.
>
> 18 A- It certainly wouldn't eliminate the risk, no.
>
> 913Q-It wouldn't eliminate the danger, smoking a low-yield...
>
> 21 A- Oh, of course. No no.
>
> 22 914Q-... even smoking a lower-yield cigarette?
>
> 23 A- No. I mean, a lower yield cigarette is dangerous, but maybe not quite as dangerous as a high-yield cigarette.[187]

[350] The arguments that compensation is generally partial and temporary, i.e., that after a while the switcher stops compensating, seem logical and the Court is convinced

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

that the Companies believed that to be the case. Nevertheless, even with only partial and temporary compensation, there is still a hidden delivery.

[351] Given all this, should compensation or its hidden delivery be considered a safety defect in reduced tar and nicotine cigarettes and did ITL know, or was it presumed to know, of that risk or danger? If so, it would have had a duty to warn consumers about it, unless another defence applies.

[352] ITL does not deny that it was aware from very early in the Class Period that compensation occurred.[188] In fact, the proof shows that it was the Companies, either individually or through the CTMC, that warned Health Canada of the likelihood of this essentially from the beginning, as seen from the following paragraph in RBH's Notes:

> **664.** Defendants themselves advised the federal government that compensation would occur and negate at least some of the potential benefit of lower tar cigarettes for some smokers. Indeed, on May 20, 1971 the CTMC met with members of Agriculture Canada and National Health and Welfare's Interdepartmental Committee on Less Hazardous Smoking. At the meeting, in response to the Interdepartmental Committee's request for reduced nicotine levels, the CTMC warned the Interdepartmental Committee of compensation issues, including a tendency among smokers to "change smoking patterns to obtain a minimum daily level of nicotine when they switched to low nicotine brands at that this could increase the total intake of tar and gases."[189]

[353] In spite of its awareness, Health Canada embraced reduced tar and nicotine and put forth the message that, if you can't stop smoking, at least switch to a lower tar and nicotine cigarette.

[354] We are not saying that Canada was wrong in going in that direction. It reflects the knowledge and beliefs of the time, and its principal message: "STOP SMOKING", was incontestably well founded. On the other hand, Health Canada certainly appears to have been occupying the field with respect to information about reduced-delivery products.

[355] Once they had warned Health Canada of the situation regarding compensation, it is difficult to fault the Companies for not intervening more aggressively on that subject. To do so would have undermined the government's initiatives and possibly caused confusion in the mind of the consumer. Perhaps more importantly, at the time it was genuinely thought that reduced delivery products were less harmful to smokers, even with compensation.

[356] The defence set out in the second paragraph of article 1473 gives harbour to the Companies on this point and we find no fault on their part for not doing more than they did with respect to warning of the dangers associated with compensation.

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188 The Court agrees with ITL's reply (in its Appendix V) to the Plaintiffs' argument at paragraph 537 of their Notes. The BAT document cited (Exhibit 391-2M) contains little more than speculative musings and there is no indication that ITL ever took any of it seriously.

189 See Exhibit 40346.244, at page 3.

II.D.8 THE ROLE OF LAWYERS

[357] The Plaintiffs made much of the fact that over the Class Period ITL seemed to seek prior approval from lawyers for almost every corporate decision regarding smoking and health. Its policies and practices relating to document retention/destruction, in particular, were scrutinized and implemented by lawyers, generally outside counsel, including those representing BAT and its US subsidiary, Brown and Williamson.

[358] There is nothing wrong with a large corporation "checking with the lawyers" within its decision-making process, especially for a tobacco company during the years when society was falling out of love with the cigarette. In fact, not to take this precaution in that atmosphere could have been outright negligent in certain cases. That said, there are, of course, limits as to how much a law firm should do for its client.

[359] In that vein, the Plaintiffs argue that ITL and its outside counsel crossed over the line on the question of the destruction of scientific research reports held in ITL's archives in the early 1990s. Some background information is necessary.

[360] In a 1985 "file note"[190], J.K. Wells, an in-house attorney for Brown & Williamson, advocated purging the company's scientific files of "deadwood", a term he used seven times in a two-page document. This smacked of overkill and seemed curiously out of the ordinary, all the more so in light of his admonition not to make "any notes, memo or lists" of the discarded "deadwood". Antennae twitch.

[361] Two years later, BAT lawyers expressed concern about certain aspects of the BAT group's internal documents, including research reports and research conference minutes[191]. Then, in a November 1989 memo[192], the same Mr. Wells presented a "synopsis of arguments that it is crucial to avoid the production of scientific witnesses and documents at this time, even if production were to occur in the indefinite future". Writing with reference to the trial of the constitutional challenge to the TPCA before the Quebec Superior Court, he identified the following points:

- The documents will be difficult for company witnesses to explain and could allow plaintiffs to argue that scientists in the company accepted causation and addiction;
- Company witnesses will not be prepared in order to explain the documents adequately and preserve credibility of management's statements on smoking and health and to deal with "sharp cross examination on smoking and health questions certain to be suggested by government experts"[193];
- The company's Canadian lawyers are unprepared to deal with the science or the language of the documents or to prepare or defend witnesses adequately or to cross examine opposing experts.

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190 Exhibit 1467.1.
191 Exhibit 1467.3, at pdf 2: "About three years ago we took initiatives …".
192 Exhibit 1467.2.
193 Exhibit 1467.2, at page 1.

[362] Mr. Wells went on to express concern over documents from Canada and remarks that "the Canadian case is in an especially disadvantageous posture for document production. The government is likely to go directly to the heart of the Canadian and BATCo research documents most difficult to explain".

[363] About that time, BAT was attempting to repatriate to Southampton, England all copies of all research documents emanating from its laboratories there. They seemed to have concerns similar to those expressed by Brown & Williamson, in that, as explained by its former external counsel, John Meltzer, "(BAT) was concerned that those documents may be produced in litigation, or in other situations, where there wouldn't be an opportunity to put those documents in their proper context or to explain the language that was used in them by the authors of the documents"[194].

[364] To BAT's consternation, and that does not appear to be an exaggeration, ITL was not cooperating with the repatriation. ITL's head of research and development, Dr. Patrick Dunn, was furious with the command to send all BAT-generated research reports back to England, particularly since ITL had contributed to the cost of most of those and had contractual rights to them. Negotiations ensued between the two companies.

[365] Enter Ogilvy Renault. ITL's in-house attorney, Roger Ackman, testified that he hired the Montreal law firm of Ogilvy Renault to assist him in the matter. After negotiation, it was agreed that, following the repatriation to Southampton, BAT would fax back to ITL any research report that ITL scientists wished to consult. That decided, in the summer of 1992 lawyers at Ogilvy Renault supervised the destruction of some 100 research reports in ITL's possession[195].

[366] Mtre. Ackman, whose memory was either hot or cold depending on the question's potential to harm ITL[196], made the following statements concerning his engagement of an outside law firm in this context:

> 396Q-Can you give us any reason why Imperial would involve outside counsel, or counsel of any kind, to destroy research documents in its possession?
>
> A- I hired the Ogilvy Renault firm, Simon Potter, to help me in this exercise.
>
> 397Q-Which exercise?
>
> A- The destruction of the documents. And he did most of the negotiations for us.
>
> 398Q-But what negotiations?
>
> A- With BAT.

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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.

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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?

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199 Exhibit 58 in these files.
200 Transcript of June 18, 2012, at page 33.

> A- I don't have an answer for that, sir. I can't give you the specific reason, or any reason. Unless the companies agreed between themselves ... that agreement between the companies was done, that's the way it was done. [201]

[372] It is more than surprising that his recollection was so, let us say, "vague" on such a major issue, one on which he recalled many other much less important details. Later in that transcript, at page 203, he states that he hired Ogilvy Renault because "I wanted the best legal advice I could get". That was crystal clear to him, but as to why he needed such good legal advice in order to destroy research documents, he could not give specific reasons, or any reason.

[373] Mtre. Ackman's testimony cannot but leave one suspicious about ITL's motives in hiring outside attorneys to destroy documents from its research archives. Mtre. Barnes testified that Mtre. Meltzer came from England shortly before with three lists ranking the documents to be returned or destroyed. Although Mtre. Meltzer refused to answer many questions about the lists on the grounds of professional secrecy, all agreed that these lists existed.

[374] Given that, what special expertise of any sort was required to pack up the documents on the lists and ship them to BAT, much less legal expertise? Yet, instead of shipping them across the Atlantic, ITL shipped them across town. There they were held, and later destroyed, by lawyers.

[375] The litigation-based objectives of ITL in ridding itself of these documents lead inexorably to a litigation-based conclusion as to the motive for using outside lawyers to carry out the deed: ITL was attempting to shield this activity behind professional secrecy.

[376] If there could have been another plausible reason, none come to mind and, more importantly, none were offered by ITL. In fact, Mtre. Ackman, the person in charge of the exercise, and who was "concerned with the potential impact that those documents would have were they produced (in court)", as Mr. Metzer stated[202], could not suggest any other explanation.

[377] As a result, the Court is compelled to draw an adverse inference with respect to ITL's motives behind this incident. It was up to ITL to rebut this inference, yet the evidence it adduced had nothing but the opposite effect. We therefore find that it was ITL's intention to use the lawyers' involvement in order to hide its actions behind a false veil of professional secrecy.

[378] This constitutes an unacceptable, bad-faith and possibly illegal act designed to frustrate the legal process. This finding will play its part in our assessment of punitive damages.

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201 Transcript of April 2, 2012, at page 137.

202 See Exhibit 510, Mtre. Meltzer's testimony, at pages 44 and 45.

II.E. DID ITL EMPLOY MARKETING STRATEGIES CONVEYING FALSE INFORMATION ABOUT THE CHARACTERISTICS OF THE ITEMS SOLD?

[379] The *Oxford Dictionary of English* defines marketing as "the action or business of promoting and selling products or services, including market research and advertising". Thus, the Companies' marketing activities can be divided into two main areas: market research, including surveys of various kinds, and advertising, in all its forms. We have already said much about the Companies' market research, so here we shall focus on their advertising and sponsorship activities, which seems to be the intent of the question in any event.

[380] The Plaintiffs see tobacco advertising during the Class Period as being pervasive, persuasive and fundamentally false and misleading. They explain their position in their Notes as follows:

> **695**. Tobacco promotion is inherently injurious to the consumer. The problem is the nature of the product: a useless, addictive and deadly device. It's a fault to advertise it. It's a greater fault to market it as a desirable product.
>
> **696**. It's an even greater fault to market it as a desirable product to children, who cannot be expected to have the capacity to filter out tobacco advertising from information they otherwise receive as credible and informative. The vast majority of class members became addicted while they were children. Defendants claimed that they never targeted these members when they were children, and that the only goal of their marketing was to influence their brand choice after they were over 18 and after their decision to smoke had been established (i.e. once they were addicted).
>
> **697**. The defendants used other aspects of marketing to convey false information about their products. They packaged them in colours and designs intended to undermine health concerns. They branded them with names - like "light", "smooth" and "mild" that implied a health benefit. They designed their cigarettes with features - like filters and ventilation - which changed to users' experience (sic) in ways that made smokers think these were safer products.

[381] ITL is not of the same view. Its Notes speak of the company's marketing strategies during the Class Period in the following words:

> **724**. In summary, there is no evidence that ITL employed marketing strategies which conveyed "false information about the characteristics of the items sold". Indeed, the claims asserted by Plaintiffs in support of this common question – even if they could be established on the evidence (which they cannot) – do not amount to conveyance of "false information" about cigarettes. Really, Plaintiffs' complaint is that ITL promoted cigarettes in a positive light, and committed a fault in so doing. This position has no foundation in law.
>
> **725**. The fact of the matter is that ITL's marketing of its products were at all times regulated (either by the Voluntary Codes or by legislation), were in compliance with applicable advertising standards, and contained not a single misrepresentation as to the product characteristics of cigarettes. Indeed, ITL's marketing never made any representations about the "safety" of its products, other than the express warnings that were included on all print advertising as of 1975.

> **726**. Moreover, there is absolutely no evidence in the record – from Class Members or otherwise – to substantiate Plaintiffs' bald assertions that ITL's marketing somehow misled or confused Class Members.

[382] Since it was not saying anything at all about smoking and health other than what was in the Warnings, ITL wonders how it could have conveyed false information about that. And putting that aside, what proof is there that what they did say in their advertising until it was banned in 1988 affected any person's decision to start or continue smoking?

[383] The Plaintiffs' proof on this topic was made through their expert, Dr. Richard Pollay. For the most part, the conclusions in his report (Exhibit 1381) neither surprise the Court nor particularly condemn the Companies' advertising practices. The following partial extracts are examples:

> 18.1 Advertising and promotion are selling tools – Firms spend on advertising in the belief that this will increase sales and profits over what they would be in the absence of advertising.
>
> 18.3 Advertising is carefully managed and well financed.
>
> 18.4 Ads are carefully calibrated – Some ads appeal to the young but are careful not to appear too young.
>
> 18.5 Cigarette ads are not informative – Consumers learn next to nothing about the tobacco, the filters, the health risks, etc.
>
> 18.6 Health information is totally absent – The only health information that is ever contained is just the minimum that has mandated in law (sic).
>
> 18.8 Creating "Friendly Familiarity" – Repeated exposure (to brand names and logos) would give these a "friendly familiarity" such that their risks would be under estimated.
>
> 18.9 Brand Imagery – With good advertising some brands are made to seem young, or male, or adventuresome, or "intelligent" or sophisticated, or part of the good life.
>
> 18.13 Ads designed to recruit new smokers – Strategies toward this include making brands seem "independent", "self-reliant", "adventuresome", risk-taking, etc.

[384] These are hardly troubling indictments. For the most part, they say little more than what the Companies already admit: they were not using their advertising dollars to warn consumers about the risks and dangers of smoking. As for portraying smoking in a positive light, we hold further on that advertising a legal product within the regulatory limits imposed by government is not a fault, even if it is directed at adult non-smokers[203].

[385] This said, in addition to his conclusions with respect to marketing to youth, which we consider below, the strongest accusations Professor Pollay makes are in the two following conclusions:

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

> 18.11 Ads designed to reassure and retain conflicted smokers – The ads for many brands seek to reassure smokers with health anxieties or to off-set their guilt for continuing to smoke. … Strategies toward this end include making brands seem "intelligent" or "sophisticated".
>
> 18.12 Ads designed to mislead. The advertising executions for many brands were explicitly conceived and designed to reassure smokers with respect to health risks. In so doing, since no cigarettes marketed were indeed safe, these ads were designed to mislead consumers with respect to their safety and healthfulness. It is also my opinion that when deployed they would indeed have a tendency to mislead.

[386] These accusations merit analysis.

[387] Concerning paragraph 18.11, a perusal of Professor Pollay's report indicates that this point centers on low-tar brands of cigarettes, for example in his paragraphs 6.6, 14.4 and 14.5. In the section of this judgment examining Delhi Tobacco[204], we conclude that Health Canada was the main advocate of reduced-delivery products in conjunction with its "if you can't stop smoking, at least switch to a lower tar and nicotine cigarette" campaign.[205] We also note that the Companies were under pressure to cooperate with that by producing low-tar brands.

[388] Under such circumstances, it was simply normal business practice to research the market for such brands. If that research showed that some smokers switched as a way of easing their guilt or anxiety about smoking, it would be normal to use that knowledge in developing advertising for them. The Court sees no fault in that.

[389] As for paragraph 18.12, Professor Pollay's analysis of ads that might have been misleading does not focus on ones that were misleading with respect to smoking and health so much as ones that could have misled with respect to certain attributes of a cigarette brand. His long study in his chapter 10 of the "less irritating" claims for Player's Première is a good example of that. He does not connect that situation to health issues.

[390] It is not the Court's mandate to evaluate the general accuracy of the Companies' ads or their degree of compliance with advertising norms and guidelines. To be relevant here, the misleading content of ads must be with respect to smoking and health.

[391] In that regard, Professor Pollay concentrates on the issue of "light" and "mild" descriptors. The Court will deal with that below.

[392] But first, one cannot examine marketing in this industry without considering the history of the restrictions imposed on the Companies' marketing activities through their own initiatives: the Voluntary Codes.

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[204] See section II.C.3 of this judgment.

[205] See also Exhibits 20076.13 and 20119, where Health Canada foresees using the Companies' advertising to promote "less hazardous" low tar and nicotine products.

II.E.1 THE VOLUNTARY CODES

[393] The Plaintiffs see the Voluntary Codes as a gimmick that the Companies adopted principally with the goal of staving off more stringent measures by the Canadian government. As they say in their Notes:

> **698**. Peculiar to the world of cigarette marketing was the adoption by the defendants of their own set of rules to validate their marketing actions. As will be shown later, the Code was a ruse to prevent consumers from receiving genuine protection in the form of government regulation. But it was also a public relations deceit: the defendants never had the intention to follow most of its rules, nor did they follow them.

[394] Starting in 1972[206], the Companies agreed among themselves to the first of a series of four "Cigarette and Cigarette Tobacco Advertising and Promotion Codes", with the participation and approval of the Canadian Government (the "**Voluntary Codes**" or the "**Codes**")[207]. The first rule of the first Voluntary Code excluded cigarette advertising on radio and television, and that code imposed several other restrictions on advertising. Those limitations changed little over the next 16 years.

[395] In 1988 the Government passed the TPCA, which for the first time imposed a total ban on the advertising of tobacco products in Canada by section 4(1): "No person shall advertise any tobacco product offered for sale in Canada". JTM and ITL successfully challenged that law and the relevant parts of it, including section 4(1), were ruled unconstitutional in 1995.

[396] Two years later the government passed the *Tobacco Act*[208], containing what could be considered a softening of the prohibition, although it is doubtful that the Companies take much comfort from it. Section 22(1), remains in force today and reads as follows:

22.(1) Subject to this section, no person shall promote a tobacco product by means of an advertisement that depicts, in whole or in part, a tobacco product, its package or a brand element of one or that evokes a tobacco product or a brand element.[209]	**22.(1)** Il est interdit, sous réserve des autres dispositions du présent article, de faire la promotion d'un produit du tabac par des annonces qui représentent tout ou partie d'un produit du tabac, de l'emballage de celui-ci ou d'un élément de marque d'un produit du tabac, ou qui évoquent le produit du tabac ou un élément de marque d'un produit du tabac.

[397] Despite Canada's legislative initiatives as of 1988, it appears that the Codes remained in force throughout the Class Period, with modifications being made at least

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206 There was, in fact, a 1964 "Cigarette Advertising Code": Exhibit 40005B. It is certainly the forerunner of the later Codes in several aspects, but the evidence is not clear as to whether Canada was consulted on its composition.

207 Filed as Exhibits 20001-20004. Certain extracts are reproduced in Schedule I to the present judgment.

208 S.C. 1997, c. 13.

209 The other provisions of section 22 of the Tobacco Act appear to have been used to such a limited extent that it is not necessary to analyze them for present purposes. They are reproduced in Schedule H to the present judgment.

twice, once in 1975 and again in 1984. As well, they covered more than strictly advertising. It is noteworthy that they were the vehicle through which the Warnings were introduced, and modified at least once. Concerning advertising practices, they embraced, in particular, the following concepts[210]:

- no cigarette advertising on radio and television;
- no sponsorship of sports or other popular events;
- cigarette advertising will be solely to increase individual brand shares (as opposed to growing the overall market);
- cigarette advertising shall be addressed to "adults 18 years of age and over";
- cigarette advertising shall not make or imply health-related statements, nor claims relating to romance, prominence, success or personal advancement;
- cigarette advertising shall not use athletes or entertainment celebrities;
- models used in cigarette advertising must be at least 25 years of age.

[398] The Companies' witnesses assured the Court that they scrupulously complied with the Codes and the evidence, in fact, turns up very few contraventions. Moreover, on the rare occasion when a Company did stray from the agreed-upon course, the others were quick to call it to order, since it was perceived that any delinquency in this regard could lead to an unfair advantage over one's competitors.

[399] In any event, this is not the forum to police the Companies' compliance with the Voluntary Codes. The Court's concern here is limited to the conveyance of false information about the characteristics of cigarettes with respect to smoking and health. We see nothing in the Codes that does that.

[400] There could be some truth, however, in the Plaintiffs' charge that the Codes were nothing more than "a ruse to prevent consumers from receiving genuine protection in the form of government regulation". The Companies certainly viewed the Codes as a means to avoid legislation in the area.

[401] On the other hand, the government understood that and tried to use it to the advantage of the Canadian public. Marc Lalonde, Minister of Health from 1972 to 1977, testified that he used the threat of legislation as a means of getting the Companies to publish Warnings that delivered the message that Canada thought was in the public interest[211].

[402] Although Canada had its eyes open when negotiating the Codes, it cannot be denied that the Companies were attempting to divulge through them as little as possible about the dangers of their products. It is probable that part of their overall strategy of silence included making concessions in order to avoid being obliged to say more. Those concessions form the nucleus of the Voluntary Codes.

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210 The Voluntary Codes deal at length with Warnings.

211 See the transcript of June 17, 2013, at pages 51, 139, 153. See also footnote 57 to the present judgment concerning Minister Munro's actions.

[403] As such, we find that the Companies did not commit a fault by creating and adhering to the Voluntary Codes.

II.E.2 "LIGHT AND MILD" DESCRIPTORS

[404] The Plaintiffs argue that the Companies championed the use of descriptors, such as "light", "mild", "low tar, low nicotine", etc., in association with reduced-delivery cigarettes[212] as a marketing strategy to mislead smokers into thinking that those products were safer than ones that delivered more tar.

[405] It might surprise to learn that such terms as "light" and "mild" had no defined meaning within the industry and were not based on any absolute scale of delivery. The concepts were very much brand-family specific. All they indicated was that the "light" version of a brand delivered less machine-measured tar and nicotine than the "parent product" within that brand family. In other words, Player's Lights delivered less tar and nicotine than Player's Regulars and nothing more.

[406] As such, everything depended on the tar and nicotine contents of the parent product within that brand family. In fact, a "light" version of a very strong brand often delivered more tar and nicotine than the "regular" version of a less strong brand, whether of the same Company or of one of the other Companies.[213]

[407] The use of these descriptors within brand names affected smokers' choice of products. Fairly quickly, smokers came to rely on them more than on the tar, nicotine and carbon monoxide rankings printed on the packs. The Plaintiffs see fault in the fact that the Companies used them without explaining them and never warned smokers that reduced-delivery cigarettes were still dangerous to health. They fault the Companies as well for "colour coding" their packs: using lighter pack colours to suggest milder products[214].

[408] In his report, Professor Pollay states:

> 9.2 Perceptions are Key. Because there are no standards or conventions to the use of the terminology describing cigarettes in Canada, consumers are confused and this makes consumer "strength perceptions" at variance with, and more important than, actual tar deliveries.

[409] He opines that ITL knew that the use of the term "lights" might be misleading. He bases this on the fact that BAT had a 1982 document stating that "There are those who say that either low tar is no safer or, in fact, low tar is more dangerous". BAT expressed fear that wide publication of this type of opinion could undermine "the credibility of low tar cigarettes".[215]

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212 Those containing lower tar and nicotine than traditional cigarettes.

213 In section II.D.7 of the present judgment we analyze the effect of compensation and how it can distort the actual amount of tar and nicotine ingested as opposed to machine-measured amounts, and we shall not repeat that here.

214 Exhibit 1381, section 9.5.

215 Exhibit 1381, section 11.2.1.

[410] Early on, Canada opposed the use of the terms "light" and "mild". Health Minister Lalonde testified that the Ministry found the terms to be confusing. A May 1977 letter from Dr. A.B. Morrison of Health Canada to Mr. Paré, representing the CTMC, presents a concise summary of the issue:

> May I suggest that the Council (the CTMC) review its position on the use of such terminology on packages and in advertising so that we may discuss it along with other matters in our forthcoming meeting. Notwithstanding the fact that there are no standards for determining the appropriateness of the terms "mild" or "light" from a public health point of view, these would appear to be inappropriate when applied to cigarettes having tar and nicotine levels exceeding 12 milligrams of tar and 0.9 milligrams of nicotine. We do not think that the appearance of tar and nicotine levels on packages or in advertisements for cigarettes which are marketed as "light" and "mild" overcomes the risk that consumers will associate these terms with a lower degree of hazard. Inevitably, I believe, some people will come to the conclusion that cigarettes with quite high tar and nicotine levels are among the more desirable from a health point of view.[216]

[411] It appears that Canada would have preferred calling reduced-delivery products something along the lines of "low tar cigarettes".[217] It is not immediately obvious that this would have been less misleading. Though they might have been lower in tar than other products within their brand family, these products were not generally low in tar in an absolute sense and they still brought risk and danger to those who smoked them.

[412] There seems to have been a fair degree of confusion among all concerned as to how to market reduced-delivery products to the consumer. Accepting that, the Court does not see any convincing evidence that the use of the descriptors "light" or "mild", in the context of the times, was any more misleading than any other accurate terms would have been, short of adding a warning containing all the relevant information that the Companies knew about their products.

[413] As such, we do not find a fault in the Companies' use of those descriptors.

II.E.3 DID ITL MARKET TO UNDER-AGE SMOKERS

[414] The Plaintiffs made much of what they allege to be a clear policy by the Companies of marketing to underage youth, i.e., to persons under the "legal smoking age" in Québec as it was legislated from time to time ("**Young Teens**")[218]. That age moved from 16 years to 18 years in 1993.[219]

[415] Two of the conclusions in Professor Pollay's report (Exhibit 1381) refer specifically to youth marketing:

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216 Exhibit 50005.

217 See Exhibits 20076.13, at page 2 and 20119, at page 3.

218 The term "legal smoking age" is a misnomer; it is more a "legal selling age". The law does not prohibit smoking below a certain age but, rather, prohibits the sale of cigarettes to persons below a certain age. Thus, the "legal age" refers to the minimum age of a person to whom a vendor may legally sell cigarettes.

219 See *Tobacco Sales to Young Persons Act*, section 4(1) – Exhibit 40002B.

> 18.4 Ads are carefully calibrated. Guided by research and experience ads are carefully crafted. For examples, some ads appeal to the young, but are careful not seem too young; some ads portray enviable lifestyles, but rely on those which consumers aspire to and believe to be attainable; some ads show people associated with athletic activities, but are careful to show them in a moment of repose, lest the ad invoke associations of breathlessness.
>
> 18.13 Ads designed to recruit new smokers. The marketing and advertising strategies of Canadian firms were conceived to attract viewers to start smoking. This was done primarily by associating some brands of cigarettes with lifestyle activities attractive to youth, and to associate these brands with brand images resonant with the psychological needs and interests of youth. Strategies toward this end made brands seem "independent", "self-reliant", "adventuresome," "risk-taking," etc.

[416] Professor Pollay accurately notes that the "younger segment" of the population is one that was of particular interest for all the Companies. He cites a number of internal documents attesting to that, including the following extracts from 1989 memos, the first from ITL and the second from RJRUS:

> I.T.L. has always focused its efforts on new smokers believing that early perceptions tend to stay with them throughout their lives. I.T.L. clearly dominates the young adult market today and stands to prosper as these smokers age and as it maintains its highly favorable youthful preference.
>
> The younger segment represents the most critical source of business to maintain volume and grow share in a declining market. They're recent smokers and show a greater propensity to switch than the older segment. Export has shown an ability to attract this younger group since 1987 to present.[220]

[417] There are many documents in which the Companies underline the importance of the "young market" or the "younger segment", without specifying what that group encompasses. Several documents do, however, show that it can extend below the legal smoking age. For example, Dr. Pollay cites a 1997 RBH memo discussing "Critical Success Factors" that states: "Although the key 15-19 age group is a must for RBH, there are other bigger volume groups that we cannot ignore".[221]

[418] ITL denies ever targeting Young Teens and indicates that to do so would be neither appropriate nor tolerable (Notes, para. 614). Nevertheless, they query the legal relevance of the issue in the following terms (Notes, para. 611):

> However, as a preliminary matter, the legal significance of such an allegation is not plainly evident. [ ] There is no free-standing civil claim for "under-age marketing". No fault can be established on such a practice alone, and thus no liability can be imposed. [ ] Rather, they apparently urge this Court to find that "youth marketing" is both a fault and an injury – in and of itself – without any legal or factual basis for advancing such a position.

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220 Exhibit 1381, at page 14.
221 Exhibit 1381, at page 14.

[419] The evidence is not convincing in support of the allegation of wilful marketing to Young Teens. There were some questionable instances, such as sponsorships of rock concerts and extreme sports but, in general, the Court is not convinced that the Companies focused their advertising on Young Teens to a degree sufficient to generate civil fault.

[420] This said, the evidence is strong in showing that, in spite of pious words[222] and industry marketing codes[223] to the contrary, some of the Companies' advertising might have borne a sheen that could appeal to people marginally less than 18 years of age[224]. That, however, cannot be an actionable fault, given that the federal and provincial legislation in force allowed the sale of cigarettes to anyone 16 years of age or older until 1993 and that from 1988 to 1995 the Companies were not advertising at all.

[421] It is true that the Companies sought to understand the consumption practices of Young Teens in studies such as RJRM's Youth Target Study in 1987 and ITL's Plus/Minus projects and its Youth Tracking Studies. In fact, the 1988 version of the latter looked into "the lifestyles and value systems of young men and women in the 13 to 24 age range"[225]. As well, a number of the Companies' marketing-related documents and surveys include age groups down to 15-year-olds[226].

[422] The Companies explain that this was to coincide with Statistics Canada's age brackets, which appears to be both accurate and reasonable. They also explain that, in the face of the reality that many young people under the legal purchasing age did nonetheless smoke[227], they needed to have an idea of the incidence in that age group in order to plan production amounts, as they did with all other age groups. This is not, in itself, a fault.

[423] There is also the fact that, as discussed above, the Voluntary Codes stipulated that "Cigarette advertising shall be addressed to adults 18 years of age and over". None of the Companies would permit a competitor to gain an advantage by breaking the rules

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222 See the discovery of John Barnett, president of RBH, at Exhibit 1721-080529, at Question 63 and following.

223 See, for example, Rule 7 of the 1975 Voluntary Code at Exhibit 40005G-1975: "Cigarette or cigarette tobacco advertising will be addressed to adults 18 years of age or over and will be directed solely to the increase of cigarette brand shares". The latter point implies that it will not target non-smokers.

224 Company marketing executives were adamant that the Companies always respected the provisions of the Voluntary Codes, including the prohibition against advertising to persons under 18 years age as of 1972. They also admitted that it is inevitable that "adult" advertising would be seen by Young Teens.

225 See Exhibit 1381, at pages 40-41.

226 ITL's two monthly surveys, the Continuous Marketing Assessment and the Monthly Monitor, regularly canvassed smokers as young as 15 years old, at least until the legal age of smoking was increased to 18. One 1991 survey relating to Project Viking shows that consultants for ITL compiled statistics on age segments going as low as "eight or under", but this is clearly an anomaly. See Exhibit 987.21A, pages 33 and 35.

227 Table 18-1 of Exhibit 987.21A (page 35 PDF) indicates that about 24% of Quebec smokers started smoking "regularly" at 14 years of age or less, with another 11.1% and 15.7% starting at 15 and 16 years old, respectively, for a total of 50.8%. Another ITL study (Exhibit 139) indicates that "2. Although about 20% start before 15, 30% start after the age of 18", i.e., that 70% start at 18 years of age or less.

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

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228 See, for example, Exhibits 40407 and 40408.

229 The witnesses, including essentially all the former executives of the Companies, were unanimous in declaring that it would be wrong to encourage Young Teens to start smoking. In fact, John Barnett, the president of RBH, extended this taboo even to adult non-smokers: "Because it wouldn't be the right thing to do" (Exh 1721-080529, at Question 63 and following).

230 Although he was called by JTM, his evidence is relevant to the situation of all the Companies.

231 See, for example, Rule 7 of the 1975 code: Exhibit 40005K-1975. All the codes are produced in the 40005 series of exhibits.

effect of JTIM's marketing to mislead smokers about the risks of smoking, to offer them false reassurance, or to encourage those who were considering quitting not to do so".

[431] The Court cannot accept Dr. Soberman's view, although much of what he says, in the way he phrases it, is surely true. It is simply too unbelievable to accept that the highly-researched, professionally-produced and singularly-attractive advertising used by JTM under RJRUS, and by the other Companies, neither was intended, even secondarily, to have, nor in fact had, any effect whatsoever on non-smokers' perceptions of the desirability of smoking, of the risks of smoking or of the social acceptability of smoking. The same can be said of the effect on smokers' perceptions, including those related to the idea of quitting smoking.

[432] His testimony boils down to saying that, where a company finds itself in a "mature market", it loses all interest in attracting any new purchaser for its products, including people who did not use any similar product before. This flies so furiously in the face of common sense and normal business practice that, with respect, we must reject it.

[433] Hence, the Court finds that, perhaps only secondarily, the Companies' targeted adult non-smokers with their advertising. So be it, but where is the fault in that? Not only did the law allow the sale of cigarettes to anyone of a certain age, but also the Companies respected the government-imposed limits on the advertising of those products.

[434] There is no claim based on the violation of those limits or, for that matter, on the violation of any of the Voluntary Codes in force from time to time. Consequently, we do not see how the advertising of a legal product within the regulatory limits imposed by government constitutes a fault in the circumstances of these cases.

[435] This is not to say that the Companies' marketing of their products could not lead to a fault. The potential for that comes not so much from the fact of the marketing as from the make-up of it. For a toxic product, the issue centers on what information was, or was not, provided through that marketing, or otherwise. That aspect is examined elsewhere in this judgment, for example, in section II.D.

II.E.5 DID THE CLASS MEMBERS SEE THE ADS?

[436] The Companies insist that the Plaintiffs must prove that each and every Member of both Classes saw misleading ads that would have caused him or her to start or to continue smoking. Like a tree falling in an abandoned forest, can advertising that a plaintiff does not hear make any noise? Or cause any damage?

[437] In view of the meagre findings of fault on this Common Question, it is not necessary to go into great detail as to why we reject the Companies' arguments on this point. Summarily, let us say that we would simply follow the same logic the Companies' historians espoused: there were so many newspaper and magazine articles about the dangers of smoking that people could not have avoided seeing them. For the same reason, it seems obvious that people could not have avoided seeing the Companies' ads appearing alongside those articles in the very same newspapers and magazines.

II.E.6 CONCLUSIONS WITH RESPECT TO COMMON QUESTION E

[438] We find no fault on the Companies' part with respect to conveying false information about the characteristics of their products. It is true that the Companies' ads were not informative about smoking and health questions, but that, in itself, is not necessarily a fault and, in any event, it is not the fault proposed in Common Question E.

II.F. DID ITL CONSPIRE TO MAINTAIN A COMMON FRONT IN ORDER TO IMPEDE USERS OF ITS PRODUCTS FROM LEARNING OF THE INHERENT DANGERS OF SUCH USE?

[439] The relevance of this question is not so much in determining fault as in finding the criteria to justify a solidary (joint and several) condemnation among the Companies under article 1480 of the Civil Code.[232]

[440] As to the facts, if there was a "common front" among the Companies, it seems logical to assume that the CTMC, the successor to the Ad Hoc Committee, would have served as the principal vehicle for it. We shall thus analyze the role of the CTMC in some detail but, before going there, let us examine an event that took place even before the creation of the Ad Hoc Committee in 1963 that, in hindsight, appears to have been the genesis of inter-Company collaboration in Canada: the "Policy Statement".

II.F.1 THE 1962 POLICY STATEMENT

[441] In October 1962 the presidents of all eight (at the time) Canadian tobacco products companies signed a document entitled the "Policy Statement by Canadian Tobacco Manufacturers on the Question of Tar, Nicotine and Other Tobacco Constituents That May Have Similar Connotations" (Exhibits 154, 40005A). Among the signatories were ITL, Rothmans of Pall Mall Canada Limited, Benson & Hedges (Canada) Ltd. and Macdonald Tobacco Inc.

[442] The Policy Statement followed closely on the heels of the publication by the Royal College of Physicians in Great Britain of its report on Smoking and Health in 1962 (Exhibit 545). The Royal College's analysis concluded that:

> 41. The strong statistical association between smoking, especially of cigarettes, and lung cancer is most simply explained on a causal basis. This is supported by compatible, though not conclusive, laboratory and pathological evidence …[233]

[443] Reflecting the heightened awareness of a potential causal link between smoking and disease, two companies, Benson & Hedges and Rothman, who were not yet merged, started advertising certain of their brands with reference to their relatively lower levels of tar compared with other companies' products. This appears to have been the fuse that ignited the move by ITL's president, Edward Wood, to embark on the Policy Statement initiative.

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[232] The Plaintiffs also refer to the collaboration between the Companies and their respective parent or *de facto* controlling companies in England and the United States. The obvious collaboration between such related companies is not relevant to the consideration at play for the application of article 1480 and the Court will not analyze that aspect in the present context.

[233] Exhibit 545, at page 27.

[444] For its part, the "Policy Statement" is a one-paragraph undertaking, with a five-point preamble and a six-point appendix. It reads as follows:

> We, the undersigned, (company name) conceive it to be in the public interest to agree to refrain from the use, direct or implied, of the words tar, nicotine or other smoke constituents that may have similar connotations, in any and all advertising material or any package, document or other communication that is designed for public use or information.[234]

[445] The reason behind such a policy is ostensibly set out in the preamble to the document, particularly at item 5 thereof. The preamble reads:

> 1. Whereas there has been wide publicity given to studies and reports indicating an association between smoking and lung cancer;
> 2. Whereas the conclusions reached in these studies and reports are based essentially on statistical data;
> 3. Whereas no cause-and-effect relationship has been found through clinical or laboratory studies;
> 4. Whereas research on an international basis is being continued on an intensified scale to determine the true facts about smoking;
> 5. Whereas any claim, reference or use in any manner in advertising of data pertaining to tar, nicotine or other smoke constituents that may have similar connotations may be misleading to the consumer and therefore contrary to the public interest;

[446] The primary concern expressed there refers to misleading the consumer and acting contrary to the public interest. That, however, do not appear to be the dominant motivator of Mr. Wood. In his letter urging the presidents of the other companies to adopt the proposed policy (Exhibit 154A), he seems much more preoccupied with avoiding both the suggestion that the industry knew there was a connection between smoking and hazards to health as well as the spectre of government intervention:

> There is no doubt in my mind that we as manufacturers contribute to the public apprehension and confusion by reference to tar and nicotine in our advertising. If our desire is to reassure the smoker, there is the real danger of misleading him into believing that we as manufacturers know that certain levels of tar and nicotine remove the alleged hazard of smoking. In so doing I believe we are performing a disservice to the smoker and to ourselves for we are assisting in the creation of a climate of fear that is contrary to the public interest and, incidentally, damaging to the entire industry.
>
> Moreover, I am quite clearly of the conviction that to permit tar and nicotine and the public apprehension associated with it to become an area of competitive advertising will, in due course, compel government authority to take a firm stand on this matter. In the hope that we as leaders of our industry can prevent such intervention by agreeing to take the necessary steps to keep our own house in order, I have drafted and attach to this letter a statement of policy to which I would urge your agreement.

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[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.

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

II.F.2 THE ROLE OF THE CTMC

[451] The Ad Hoc Committee appears to have been created at a meeting of the Canadian tobacco industry held at the Royal Montreal Golf Club in August of 1963. The purpose of the meeting was to prepare the industry's representations to the conference on smoking and health convened by Health and Welfare Canada for November of that year: the LaMarsh Conference.

[452] The US public relations firm, Hill & Knowlton, attended and counselled the Companies, as it had already been doing for years in the United States. In fact, the same representative, Carl Thompson, also attended the now-infamous meeting at the Plaza Hotel in 1953 where the scientific-controversy strategy was created by the US tobacco presidents[238].

[453] At the LaMarsh Conference, several executives of Canadian tobacco companies, mostly from ITL, presented the position of the Canadian tobacco industry on the question of the link between smoking and disease. As opposed to the Policy Statement, which was not announced in the media, in making these presentations the industry was publicly acting with one voice[239].

[454] As appears from the press release issued by the Ad Hoc Committee on November 25, 1963 (Exhibit 551A), its spokesperson, John Keith, the president of ITL, toed the industry line and preached the scientific controversy and the lack of hard scientific proof of causation. Here is the summary of the committee's presentation, as reported in that press release:

> Any causal relationship of smoking to these diseases is a disputed and open question, according to the Industry which cited the findings of scores of medical scientist throughout the world. Among the points made were:
>
> - Exaggerated charges against smoking are frequently repeated but remain unproved.
> - Knowledge of lung cancer is scanty.
> - Statistical studies on smoking and disease are of questionable validity.
> - Many environmental factors affect lung cancer incidence and mortality.
> - Chemical and biological experiments have completely failed to support an association between smoking and lung cancer.
> - Examination of smokers' lungs after death from causes other than lung cancer usually reveals no evidence of pre-cancerous conditions.

[455] In light of the Companies' numerous objections as to the relevance of the situations in the US and UK, it is ironic to note that both the trade associations and the Companies regularly sought out the assistance and expertise of US and British tobacco industry representatives and consultants in preparing the Canadian industry's position, *inter alia*, for presentation to government inquiries. A good example of this is seen in a 1964 memo by Leo Laporte of ITL:

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238 Transcript of November 28, 2012, Professor Proctor, at pages 30 and following.
239 See Exhibit 551C, at pdf 2.

> In the preparation of the pertinent scientific information, we will undoubtedly use the services of Carl Thompson of Hill & Knowlton, Inc., New York. H & K were largely responsible for the preparation of our brief on scientific perspectives presented on behalf of the Canadian Tobacco Industry to the Conference on Smoking and Health of the Department of National Health and Welfare in 1963. We will also seek whatever information and guidance we can obtain from the Council for Tobacco Research in New York, as well as from our friends in the U.S. and, if necessary, the U.K.[240]

[456] Some five years later, in front of the Isabelle Committee of the House of Commons, the Companies once again acted in unison through the Ad Hoc Committee, with regular assistance from US industry representatives. There the Ad Hoc Committee, this time through the mouthpiece of ITL's then president, Paul Paré, continued the same message that the industry had been voicing for several years, as seen in a press release issued the day of Paré's testimony:

> In a fully-documented brief to the Standing Parliamentary Committee on Health, Welfare and Social Affairs, the Industry made these points:
>
> 1 - There is no scientific proof that smoking causes human disease;
>
> 2 - Statistics selected to support anti-smoking health charges are subject to many criticisms and, in any case, cannot show a causal relationship.
>
> 3 - Numerous other factors, including environmental and occupational exposures, are suspect and being studied in relation to diseases allegedly linked with smoking;
>
> 4 – "Significant beneficial effects of smoking," as recognized by the US Surgeon General's report, are usually overlooked and should be given consideration.
>
> 5 - Measures being proposed for control of tobacco and its advertising and marketing are not warranted, would have serious adverse effects, and would create dangerous precedents for the Canadian economy and public.[241]

[457] Some of these types of statements, carefully worded as they are, are technically true when taken on a point-by-point basis. For example, it is accurate to say that other factors are suspected as causes of certain smoking-associated diseases and that science had not, and still has not, explained the specific causal mechanism between smoking and disease. On the other hand, some of them are only partly true or, on the whole, patently false.

[458] It is the overall look and feel of the message, however, that most violates the Companies' obligation to inform consumers of the true nature of their products. By attempting to lull the public into a sense of non-urgency about the health risks, this type of presentation, for there were many others, is both misleading and dangerous to people's well-being.

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240 Exhibit 1472, at pdf 1-2; see also Exhibits 544D, 544E, 603A, 745 and 1336 at pdf 2. It is also revealing that the CTMC often circulated, cited and relied on publications of the Tobacco Institute, the US tobacco industry's trade association. See, for example, Exhibits 486, 964C and 475A.

241 Exhibit 747, at pdf 1-2.

[459] Strong evidence existed at the time to support a causal link between cigarettes and disease and it was irresponsible for the Canadian tobacco industry to attempt to disguise that Sword of Damocles. By working together to this end, the Companies conspired to impede the public from learning of the inherent dangers of smoking and thereby committed a fault, a fault separate and apart from – and more serious than - that of failing to inform.

[460] As for the Isabelle Committee, in spite of the industry's polished representations, it issued a report (Exhibit 40347.11) advocating recommendations that read like a list of the Companies' worst nightmares, at least for the time. Yet Dr. Isabelle and the other members did nothing much more than consider evidence easily available to anyone wishing to consider the question. In applying that evidence, their common sense approach to the risks of smoking - and the conclusions to which this so obviously led - defy rebuttal even over forty years later:

> However, it is perhaps best to consider the relationship between cigarette smoking and disease in its simplest terms - the fact that cigarette smokers have an increased overall death rate. This observation, made in various studies in different parts of the world, depends only on counting deaths, is completely independent of diagnosis and, thereby, any argument about improved diagnostic skills and errors or changes in reporting and classification of deaths between various places and times. It is only necessary to compare the numbers of deaths among smokers and non-smokers.[242]
>
> […]
>
> These findings would appear to be sufficient, from a public health viewpoint, to decide that cigarette smoking is a serious hazard to health and should be actively discouraged. They are, nevertheless, buttressed by the fact that the increased death rates of cigarette smokers are largely due to diseases of the respiratory and circulatory systems which are the systems that are intimately exposed to cigarette smoke or its components. Also, death rates from lung cancer, chronic bronchitis and emphysema and coronary heart disease increase with the number of cigarettes smoked and decrease when smoking is discontinued, thus indicating a dose-response relationship[243].

[461] One cannot but be amazed that the truly brilliant minds running the Companies at the time were apparently unable, even when grouping their wisdom and intelligence together within the CTMC, to work out such a straightforward syllogism. In fact, it mocks reason to think that they did not.

[462] Nevertheless, the publication of that report in December 1969 renewed and refined the message of the LaMarsh Conference of some six years earlier. In addition, it contained pages of recommendations and proposed legislation to assist in moving towards, if not a solution, then at least a lessening of the problem that was causing the sickness and death of thousands of Canadians every year.

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

[463] The reaction of the Canadian tobacco industry, through the CTMC[244], was to continue its efforts not only to hide the truth from the public but, as well, to delay and water down to the maximum extent possible the measures that Canada wished to implement to warn consumers of the dangers of smoking. The Plaintiffs' Notes cite the following example of Canada's frustration with the industry's attitude some ten years after the Isabelle Report:

> **1171**. Another two years hence, in November of 1979, the deputy minister in turn informed the Minister that their "experience with CTMC is that its members do no more than they have to, to carry out voluntary compliance" and that for the department the "essential question is whether to continue with the present frustratingly slow and only marginally effective slow process of negotiation and voluntary compliance with the CTMC or whether to take a more aggressive stance and introduce legislation".[245]

[464] In a January 1975 memo discussing a research proposal from an outside scientist to the CTMC Technical Committee, Mr. Crawford of RJRM states: "I stressed that we are following the same attitude here as in the U.S. - namely that the link between smoking and lung cancer has not been proven"[246]. This shows not only that the Companies, through the CTMC, were still sticking to their position at the time, but also that they were marching in step with the US industry's strategy.

[465] The CTMC also spearheaded the industry's rearguard campaign on the question of addiction. The keystone document on that issue was the 1988 Surgeon General report entitled "*Nicotine Addiction*". The Companies knew that this US document would receive broad publicity in Canada and that they had to deal with it.

[466] Rather than embracing its findings, the industry, centralizing its attack through the CTMC, chose to make every effort to undermine its impact. The May 16, 1988 memo to member companies capsulizing the CTMC's media strategy with respect to the report (Exhibit 487) merits citation in full:

> It has been agreed that the CTMC (either Neville or LaRiviere) will handle any media queries on the S-G' s Report on Nicotine Addiction.
>
> The comments fall into three broad categories:
>
> 1- The report flies in the face of common sense -
>
> - Thousands of Canadians and millions of people all over the world stop smoking each year without assistance from the medical community.
> - How can you describe someone who lights up a cigarette only after dinner as an "addict"?

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244 The CTMC was formally incorporated by federal Letters Patent only in 1982 as the industry's trade association (Exhibit 433I), but an unincorporated version had replaced the Ad Hoc Committee as of around 1971. As with most trade associations, its mandate was to coordinate the Companies' activities on industry-wide issues and to share the work and the cost thereof. It did not deal in matters related to the business competition among the Companies.

245 Citing Exhibit 21258 at pdf 2-3.

246 Exhibit 603A.

- The word addiction has been overextended in the non-scientific world: some people are "addicted" to soap operas, to chocolate and to quote Saturday's Montreal Gazette, "to love".

2- The S-G's Report is another example of how the smoking issue has been politicized. This is another transparent attempt to make smoking socially unacceptable by warming up some old chestnuts. We don't think the S-G is adding to his credibility by trading on the public confusion between words like "habit" and "dependence" and "addiction".·

3- The S-G's Report also trivializes the very serious illegal drug problem in North America. It is (ir)responsible to suggest that to use tobacco is the same as to use Crack? (sic)

[467] This posture was continued in the CTMC's reaction to the passage of the *Tobacco Products Control Act* later in 1988. In a letter to Health Canada in August, it vigorously opposed adding a pack warning concerning addiction, stating that "(c)alling cigarettes 'addictive' trivializes the serious drug problems faced by our society, but more importantly, the term 'addiction' lacks precise medical or scientific meaning"[247].

[468] In August 1989, the Royal Society of Canada issued its report mandated by Health Canada entitled: "Tobacco, Nicotine, and Addiction".[248] The Smokers' Freedom Society had commissioned Dr. Dollard Cormier, professor emeritus and Head of the Research Laboratory on Alcohol and Drug Abuse at the Université de Montréal, to write a critique of the report.[249]

[469] The SFS was a close ally, the Plaintiffs would say a puppet, of the tobacco industry and the CTMC circulated Professor Cormier's report widely, especially to members of the Canadian government and the opposition. This critique served as a foundation for the CTMC's aggressive campaign against adding a Warning about tobacco dependence. Its approach is reflected in an April 1990 letter from the CTMC president to Health Canada:

> Suffice it to say here that we regard the Royal Society report as a political document, not a credible scientific review, and we look upon any attempt to brand six million Canadians who choose to smoke as 'addicts' as insulting and irresponsible.
>
> While we do not and would not support any health message on this subject, we would note that the proposed message on addiction misstates and exaggerates even the Royal Society panel conclusion [...][250].

[470] Concerning the issue of whether or not to attribute the Warnings to Health Canada, the CTMC's attitude on behalf of the Companies is summarized in its 1986 letter to Minister Epp:

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247 Exhibit 694 at pdf 10.
248 Exhibit 212.
249 Exhibit 9A.
250 Exhibit 845 at pdf 6. See also Exhibit 841-2M, a 1986 letter from the CTMC to Minister Epp, at page 5.

> More specifically, we do not agree that your proposed health warnings are "scientifically correct" as stated in Appendix I to your letter of October 9, 1986. Such a proposal not only amounts to asking us to condemn our own product, but also would require us to accept responsibility for statements the accuracy of which we simply do not accept. Any admission, express or implied, that the tobacco manufacturers condone the health warnings would be inconsistent with our position.[251]

[471] On the subject of sponsoring research, the Plaintiffs criticize the CTMC for funding scientific "outliers" who dared question the long-accepted position that smoking caused disease and dependence. What is wrong with that? Some of the greatest discoveries in science have come from people who were considered "outliers" and "crackpots" because of their willingness to challenge the scientific establishment. That is not, in itself, a fault.

[472] Nor do we see it necessarily as a fault for a company not to fund research to further and refine current scientific understanding of a question. That is its prerogative. On the other hand, depending on the circumstances, a line can be crossed that turns such a practice into a fault.

[473] The circumstances here, according to the Plaintiffs, is that the Companies were publicly calling for additional objective research and yet were funding research that was anything but objective. The Court is uncomfortable in accepting such a proposition without a comprehensive analysis of all the research funded by the Companies, an exercise that goes beyond our capabilities and for which no expert's report was filed.

[474] As a result, we do not see Company or CTMC-sponsored research as playing a critical role in a finding of fault in the present affair. Where fault can be found, however, is in the failure or, worse, the cynical refusal to take account of contemporaneous, accepted scientific knowledge about the dangers of the Companies' products and to inform consumers accordingly.

[475] On the basis of the preceding and, in particular, the clear and uncontested role of the CTMC in advancing the Companies' unanimous positions trivializing or denying the risks and dangers of smoking[252], we hold that the Companies indeed did conspire to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use. A solidary condemnation in compensatory damages is appropriate.

II.G. DID ITL INTENTIONALLY INTERFERE WITH THE RIGHT TO LIFE, PERSONAL SECURITY AND INVIOLABILITY OF THE CLASS MEMBERS?

[476] This Common Question mirrors the language of the second paragraph of section 49 of the Quebec Charter and is a call for an award of punitive damages under that statute. This, however, does not cover the Plaintiffs' full argument for punitive damages, since they claim them also under the *Consumer Protection Act*.

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[251] Exhibit 841-2M, at page 5.

[252] We are not unaware of RBH's withdrawal from the CTMC for a short time during the Class Period but consider that immaterial for these purposes.

[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.

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[253] *Le syndicat national des employés de l'Hôpital St-Ferdinand et al. v. le Curateur public du Québec et al.*, EYB 1996-29281 (S.C.C.), at paragraph 121. See also paragraphs 117-118.

[483] We have held that the Companies failed under both tests, and this, for much of the Class Period. With respect to the Blais Class, we held that the Companies fault in failing to warn about the safety defects in their products ceased as of January 1, 1980, but that their general fault under article 1457 continued throughout the Class Period. In Létourneau, the fault for safety defects ceased to have effect as of March 1, 1996, while the general fault also continued for the duration of the Class Period.

[484] Given the consequences of these faults on smokers' health and well-being, this constitutes an unlawful interference with the right to life, security and integrity of the Members over the time that they lasted. Compensatory damages are therefore warranted under the Quebec Charter.

[485] On the second question, we found that the Companies not only knowingly withheld critical information from their customers, but also lulled them into a sense of non-urgency about the dangers. That unacceptable behaviour does not necessarily mean that they malevolently desired that their customers fall victim to the Diseases or to tobacco dependence. They were undoubtedly just trying to maximize profits. In fact, the Companies, especially ITL, were spending significant sums trying to develop a cigarette that was less harmful to their customers.

[486] Pending that Eureka moment, however, they remained silent about the dangers to which they knew they were exposing the public yet voluble about the scientific uncertainty of any such dangers. In doing so, each of them acted "with full knowledge of the immediate and natural or at least extremely probable consequences that (its) conduct will cause".[254] That constitutes intentionality for the purposes of section 49 of the Quebec Charter.

[487] Common Question G is therefore answered in the affirmative. Punitive damages are warranted under the Quebec Charter.

[488] We look in detail at the criteria for assessing punitive damages in Chapter IX of the present judgment. At that time we also consider the fact that the Quebec Charter was not in force during the entire Class Period, having come into force only on June 28, 1976.

II.G.2 LIABILITY FOR DAMAGES UNDER THE CONSUMER PROTECTION ACT

[489] Section 272, *in fine*, of the CPA creates the possibility for an award of extracontractual and punitive damages[255]. The full provision reads:

272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the	**272.** Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, un règlement ou un engagement volontaire souscrit en vertu de l'article 314 ou dont l'application a été étendue par un décret pris en vertu de l'article 315.1, le consommateur, sous réserve des autres recours prévus par la

254 Ibidem.

255 The *Consumer Protection Act* was first enacted in 1971, at which time it did not include the provisions on which Plaintiffs rely: articles 215-253 and 272. Those came into force on April 30, 1980.

other recourses provided by this Act,

(a) the specific performance of the obligation;
(b) the authorization to execute it at the merchant's or manufacturer's expense;
(c) that his obligations be reduced;
(d) that the contract be rescinded;
(e) that the contract be set aside; or
(f) that the contract be annulled.

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

présente loi, peut demander, selon le cas:

(a) l'exécution de l'obligation;
(b) l'autorisation de la faire exécuter aux frais du commerçant ou du fabricant;
(c) la réduction de son obligation;
(d) la résiliation du contrat;
(e) la résolution du contrat; ou
(f) la nullité du contrat,

sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.

[490] In claiming those damages, the Plaintiffs allege that the Companies contravened three provisions of the CPA:

- failing to mention an important fact in any representation made to a consumer, in contravention of section 228;
- making false or misleading representations to a consumer, in contravention of section 219; and
- ascribing certain special advantages to cigarettes, in contravention of section 220(a).

[491] As a preliminary question, there are five conditions to meet in order for the CPA to apply. They are:

a. A contract must be entered into;
b. One of the parties to the contract must be a "consumer";
c. One of the parties must be a "merchant";
d. The "merchant" must be acting in the course of his or her business; and
e. The contract must be for goods or services.[256]

[492] Although in these files the "merchants" involved in the contracts with the Members are not the Companies, that is not an obstacle. The Supreme Court cast that argument aside in *Time* when it stated that

> To be clear, this means that a consumer must have entered into a contractual relationship with a merchant or a manufacturer to be able to exercise the recourse provided for in s. 272 C.P.A. against the person who engaged in the prohibited practice.[257] (the Court's emphasis)

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[256] *Op. cit., Time*, Note 20, at paragraph 104, citing Claude MASSE, *Loi sur la protection du consommateur* : *analyse et commentaires*, (Cowansville : Les Éditions Yvon Blais Inc., 1999) at page 72.

[257] *Op. cit., Time*, Note 20, at paragraph 107.

[493] Thus, the initial hurdle to a claim damages under the CPA is vaulted. The Companies, however, see several others.

II.G.2.a THE IRREBUTTABLE PRESUMPTION OF PREJUDICE

[494] In *Time*, the Supreme Court supports the existence of an absolute or irrebuttable presumption of prejudice under section 272 once four threshold conditions are met. In the Plaintiffs' view, those conditions are met here and the Companies are without defence to a claim for compensatory damages.

[495] The four conditions are:

a. that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act;

b. that the consumer saw the representation that constituted a prohibited practice;

c. that the consumer's seeing that representation resulted in the formation, amendment or performance of a consumer contract, and

d. that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract, meaning that that the prohibited practice must be one that was capable of influencing a consumer's behaviour with respect to the formation, amendment or performance of the contract.[258]

[496] These conditions represent the cornerstones of an action in damages under the CPA. One might wonder as to what more is needed once they are met; in other words, of what use is a presumption of prejudice once these four elements are proven? The Supreme Court had this to say on the subject:

> [123] We greatly prefer the position taken by Fish J.A. in *Turgeon*[259], namely that a prohibited practice does not create a *presumption* that a merchant has committed fraud but in itself *constitutes* fraud within the meaning of art. 1401 C.C.Q. (para. 48). […] In our opinion, the use of a prohibited practice can give rise to an absolute presumption of prejudice. As a result, a consumer does not have to prove fraud and its consequences on the basis of the ordinary rules of the civil law for the contractual remedies provided for in s. 272 C.P.A. to be available. As well, a merchant or manufacturer who is sued cannot raise a defence based on "fraud that has been uncovered and is not prejudicial".[260] (Emphasis in the original)

[497] It thus appears that the only practical effect of this presumption is to ease the consumer's burden of proof concerning fraud: "the consumer does not have to prove that the merchant intended to mislead, as would be required in a civil law fraud case."[261]

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258 *Op. cit., Time*, Note 20, at paragraph 124.
259 *Turgeon v. Germain Pelletier Ltée*, [2001] R.J.Q. 291 (QCCA), ("***Turgeon***") at paragraph 48.
260 *Op. cit., Time*, Note 20, at paragraph 123.
261 *Op. cit., Time*, Note 20, at paragraph 128.

[498] The Companies contest the establishment of an irrebuttable presumption of any use to the Plaintiffs here. They argue that such a presumption can apply only with respect to the contractual remedies set out in sub-sections "a" through "f" of section 272, and not to a claim in damages and punitive damages mentioned in the final paragraph of the section. In its Notes, RBH explains as follows:

> **1255.** Under the CPA, a plaintiff must prove fault, causation, and prejudice in order to succeed on a claim. As discussed earlier in Section I.C.2., at paras. 207-209, proving the four elements set forth in *Richard v. Time Inc.* leads to a presumption of prejudice sufficient to support an award of the contractual remedies provided in CPA Section 272(a) - (f). But those are not the remedies sought here. To recover compensatory damages, Plaintiffs must prove that their injuries were the result of the CPA violation, and to recover punitive damages, Plaintiffs must also prove some need for deterrence.

[499] The Supreme Court's language in *Time* appears at first sight to support RBH's contention limiting the effect of the presumption to the contractual remedies enumerated. For example, in paragraph 123 the court specifies "the contractual remedies provided for in s. 272 C.P.A.", and in the last sentence of paragraph 124 one reads: "This presumption thus enables the consumer to demand, in the manner described above, one of the contractual remedies provided for in s. 272 C.P.A." So be it, but, to the extent that such a presumption has any relevance to these cases, it is not obvious why such a restriction should exist.

[500] Where a presumption of prejudice is established, why should its benefit to the consumer be limited to only some of the sanctions mentioned in article 272? This seems to go against "the spirit of the Act", something the Supreme Court is clearly desirous of preserving and advancing[262]. We see no justification for excluding extracontractual remedies from the ambit of the presumption, not to mention contractual remedies other than those enumerated in subsections "a" through "f", should any exist.

[501] *Time* is a case between the two contracting parties and, in it, the Supreme Court decided only what needed to be decided. In doing so, it did not rule out a broad application of the presumption.

[502] In fact, such a broad application is supported in several places in the decision. In paragraph 113, admittedly after it has spoken of a consumer obtaining "one of the contractual remedies provided for in s. 272 CPA", the Supreme Court goes on to cite the Quebec Court of Appeal in *Beauchamp*[263] to the effect that "(t)he legislature has adopted an absolute presumption that a failure by the merchant or manufacturer to fulfil any of these obligations causes prejudice to the consumer, and it has provided the consumer with the range of recourses set out in s. 272".

[503] There is also its statement at the end of paragraph 123 in *Time* that "The severity of the sanctions provided for in s. 272 *C.P.A.* is not variable: the irrebuttable presumption of prejudice can apply to all violations of the obligations imposed by the Act." As we have noted above, the obligations imposed by the Act include extracontractual ones, for example, where the merchant is not the person who engaged in the prohibited practice.

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262 *Op. cit., Time*, Note 20, at paragraph 123.

263 *Beauchamp v. Relais Toyota inc.*, [1995] R.J.Q. 741 (C.A.), at page 744.

[504] This tendency is carried through in paragraph 128 of *Time*:

> According to the interpretation proposed by Fish J.A. in *Turgeon*, a consumer to whom the irrebuttable presumption of prejudice applies has also succeeded in proving the fault of the merchant or manufacturer for the purposes of s. 272 C.P.A. The court can thus award the consumer damages to compensate for any prejudice resulting from that extracontractual fault.

[505] As for punitive damages, they would seem, again at first sight, to be excluded, given that the presumption is one of prejudice, and prejudice is not directly relevant to this type of damages. That, however, is misleading. As noted, the presumption's true effect is with respect to the merchant's fraudulent intentions: "the consumer does not have to prove that the merchant intended to mislead, as would be required in a civil law fraud case.[264]"

[506] We noted earlier that section 49 of the Quebec Charter targets the intentionality of the consequences of faulty conduct and not of the conduct itself. We also noted that "intention" in that context refers to "a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct".[265] To the extent that an analogy can be made between the two statures, a merchant's intention to mislead a consumer, i.e., to commit a fraud, meets that test. The irrebuttable presumption thus touches on issues relevant to punitive damages and can assist the consumer in a claim for those.

[507] Consequently, to the extent that it is necessary to decide this case, the Court holds that the irrebuttable presumption of prejudice, where it applies, assists with respect to all the types of damages mentioned in section 272 of the CPA. In harmony with that, we shall model our analysis of the alleged violations under the CPA around the four-part test for establishing this presumption.

[508] Before turning to that analysis, we note that one of the Companies' principal arguments against the award of any sort of damages under the CPA is that the Members lack sufficient interest. ITL puts it this way in its Notes:

> **134.** ITL submits that the requirement to demonstrate "legal interest" is an insurmountable hurdle for Plaintiffs to overcome in relation to the positive representations or advertisements that are alleged to be at issue in these proceedings. Plaintiffs simply assert that the legal interest requirement is satisfied because "the class members have all purchased cigarettes". And yet they make no attempt whatsoever to demonstrate that there is any temporal connection, however loose, between the purchase of cigarettes by particular class members and the existence of any misleading representation in the market at any particular time. In fact, there is no evidence at all that any class member read or saw any particular representations.

[509] Since the structure of the analysis we conduct below of the alleged contraventions, based on the four conditions precedent to the irrebuttable presumption, considers the Companies' concerns over the Members' interest, no more need be said about that at this point.

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264 *Op. cit., Time*, Note 20, at paragraph 128.

265 *Le syndicat national des employés de l'Hôpital St-Ferdinand et al. v. le Curateur public du Québec et al.*, EYB 1996-29281 (S.C.C.), at paragraph 121

II.G.2.b THE ALLEGED CONTRAVENTION UNDER SECTION 228 CPA

[510] Section 228 reads as follows:

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

[511] The Plaintiffs sum up their position on this allegation in their Notes, which specifies that this argument applies to both Classes:

> **153.** The evidence further reveals that the Defendants never voluntarily provided any information on the dangers inherent in the use of their products because they had adopted a joint strategy to deny these important facts. This systematic, intentional omission violates article 228 *CPA*. As a systematic failure to communicate, this violation reaches every member in both classes and extends in time from the entry into force of the *CPA* until the class period ends.

[512] In sections II.D.5 and 6 of the present judgment, we hold that the Companies were indeed guilty of withholding critical health-related information about cigarettes from the public, i.e., important facts. Since a "representation" includes an omission[266], the Companies failed to fulfil the obligation imposed on them by section 228 of Title II of the CPA. We also hold that their failure to warn lasted throughout the Class Period, including some twenty years while the relevant portions of the CPA were in force.

[513] On the question of whether the Members saw the representations, the Companies insist that the Plaintiffs must prove that every member of both classes saw them. Whether or not that is true, an omission to inform must be approached from a different angle, since, by definition, no one can see something that is not there. Every member of society was thus subjected to the omission to mention these important facts. Hence, the condition is met, even according to the Companies' standard.

[514] The question of whether the Members' "seeing" the representation resulted in the formation of the contract to purchase cigarettes is similar to the one examined in sections VI.E and F of the present judgment in the context of causation. There we hold, based on a presumption of fact, that the Companies' faults were one of the factors that caused the Members to smoke and that this presumption was not rebutted by the Companies. A similar presumption and rebuttal process apply here.

[515] Based on the reasoning in the above-mentioned sections, the Court accepts as a presumption of fact that the absence of full information about the risks and dangers of smoking was sufficiently important to consumers that it resulted in their purchasing cigarettes. Since there is no proof to the contrary, the third condition is met.

[516] The final condition is also met. The Companies' omission to pass on such critical, life-changing information about the dangers of smoking was incontestably capable of influencing a consumer's behaviour with respect to the decision to purchase cigarettes. It need not be shown that no one would have smoked had the Companies been

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[266] Section 216 of the CPA: "For the purposes of this title, representation includes an affirmation, a behaviour or an omission".

forthcoming. It suffices to find that proper knowledge was capable of influencing a person's decision to begin or continue to smoke. How could that not be the case?

[517] Consequently, there is a contravention of section 228 CPA here and the Members may claim moral and punitive damages pursuant to section 272 CPA, subject to the other holdings in the present judgment.

II.G.2.c THE ALLEGED CONTRAVENTION UNDER SECTION 219 CPA

[518] Section 219 reads as follows:

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

[519] Section 218 is also relevant for these purposes. It reads:

> **218.** To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.

[520] With respect to the general impression mentioned there, it is "the impression of a commercial representation on a credulous and inexperienced consumer".[267]

[521] The Plaintiffs argue at paragraph 154 of their Notes that "Throughout the class period, (the Companies) contrived and executed an elaborate strategy that used affirmations, behaviour, and omissions to deny the true nature of their toxic, useless product or mislead consumers about these important facts". In paragraph 155, they add:

> **155.** Throughout the class period, the Defendants not only failed to inform consumers but also used every form of public interaction available to them to deny the harms and extent of risk associated with cigarette consumption. In the rare circumstances where they acknowledged that cigarettes could be dangerous or harmful, the Defendants trivialized those harms and the intensity of the risk. They further falsely represented cigarettes as providing smokers with benefits when they knew that were selling a pharmacological trap.

[522] For reasons that are not clear, the Plaintiffs do not focus on marketing activities under this section of the CPA, reserving that for their arguments under section 220(a). In our view, that discussion should occur in the present section, and we shall proceed accordingly.

[523] The extent of the Companies' representations to consumers during the part of the Class Period when this provision was in force was to advertise their products between 1980 and 1988, as well as between 1995 and 1998, and to print Warnings on the packages. This was the period of their Policy of Silence, so they were making no direct comments about smoking and health.

[524] In section II.E.6 of the present judgment, we found no fault on the Companies' part with respect to conveying false information about the characteristics of their products. That is relevant to this question but, in light of sections 216 and 218, it is not conclusive. A different test is called for under the CPA.

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

[525] In similar fashion, our rulings in section II.B.1 that the Companies' faults with respect to the obligation to inform about safety defects ceased as of January 1980 for the Blais File and March 1996 for the Létourneau File is not relevant to the CPA-based claims. Under the CPA, the consumer's knowledge of faulty representations does not exculpate the merchant.

[526] As stated in *Turgeon*, the CPA is "a statute of public order whose purpose is to restore the contractual [balance] between merchants and their customers".[268] Its method is to sanction unacceptable behaviour on the part of merchants, regardless of the effect on the consumer[269]. Hence, the defence of consumer knowledge open to a manufacturer under article 1473 of the Civil Code is not available.

[527] Even though the Companies' ads did not convey false information, since they conveyed essentially no information, under the CPA the question is whether their representations would have given a false or misleading impression to a credulous and inexperienced consumer. For that, it would not be necessary for them to go so far as to say that smoking was a good thing. The test is whether the general impression is true to reality[270]. It would be enough if they suggested that it was not harmful to health.

[528] ITL and RBH plead a lack of proof, coupled with a complaint about overly general allegations and lack of interest. JTM argues in its Notes as follows:

> **215.** As will be demonstrated below, there is nothing misleading or inappropriate with lifestyle advertising. The methods used by JTIM for its marketing were legitimate and similar to those used by other companies in other areas. JTIM's advertisements did not make any implicit or explicit health claims, and there is no evidence whatsoever that any class member was misled by any of JTIM's advertisements.

[529] JTM cites a 2010 Court of Appeal decision dealing with the purchase of a motor home that supports the position that banal generalities in advertising do not constitute false or misleading representations.[271] Although not directly on point, that reasoning is relevant here.

[530] The Companies' argument about overly general allegations is well founded. The Plaintiffs point to few if any specific incidents in support of their argument. Their reference to paragraph 18.12 of Professor Pollay's report does them little good. We have already concluded that it is unconvincing on this question.

[531] The Plaintiffs accuse the Companies of using "labelling and lifestyle advertising to create a 'friendly familiarity' with (the Companies') product in order to falsely convince consumers that cigarette smoking was consistent with a healthy, successful lifestyle"[272], without explaining

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268 *Op. cit., Turgeon*, Note 259, at paragraph 36.

269 *Op. cit., Time*, Note 20, at paragraph 50.

270 In *Time*, the Supreme Court calls for a two-step analysis for questionable representations: describe the general impression on a credulous and inexperienced consumer and then determine whether that general impression is true to reality: *Op. cit.*, Note 20, at paragraph 78.

271 *Martin v. Pierre St-Cyr auto caravans ltée*, EYB 2010-1706, at paragraphs 24 and 25.

272 Plaintiffs' Notes at paragraph 157.

how they see that process working. In the absence of further explanation, the Court does not see the evidence as supporting this general statement.

[532] All this seemingly leads to a conclusion that the Companies did not violate section 219. The problem is that none of it looks directly at the evidence in the record, i.e., the typical ads used by the Companies since 1980. It is by viewing them – through the eyes of a credulous and inexperienced consumer – that the Court can assess whether there is a contravention of this provision.

[533] It should not be controversial to assert that every single cigarette ad since 1980 for every single brand of the Companies' products attempted to portray those cigarettes in a favourable light. That does not necessarily mean that they all suggested that smoking was not harmful to health.

[534] A good example of a "neutral" ad is Exhibit 40480. It simply shows the packages of the three sub-brands of Macdonald Select cigarettes, with a short message aimed at "those who select their pleasures with care". There are other ads of this sort and none of them constitute violations of section 219 CPA. They, however, are the exception.

[535] As a general rule, the ads contain a theme and sub-message of elegance, adventure, independence, romance or sport. As well, they use attractive, healthy-looking models and healthy-looking environments, as seen in the following exhibits:

- Exhibit 1381.9 – Macdonald Select ad of 1983 showing an elegantly-dressed couple apparently about to kiss;
- Exhibit 1040B – Export A 1997 ad portraying extreme skiing
- Exhibit 1040C – Export A 1997 ad portraying mountain biking
- Exhibit 1381.33 – Belvedere 1988 ad showing young adults on a beach
- Exhibit 152 – two Player's Light 1979 ads[273] portraying horseback riding and canoeing in the Rockies
- Exhibit 1532.4 – Belvedere 1984 ad from *CROC* magazine showing a tanned couple on the beach
- Exhibit 243A – Vantage 1980 ad from *The Gazette*, text only, explaining how Vantage delivers taste but "cuts down substantially on what you may not want"
- Exhibit 40436 – two Export A 1980 ads showing loggers and truckers
- Exhibit 40479 – two Export A 1982 ads showing a mountain lake and a man on top of a mountain
- Exhibit 573C – Export A 1983 ad portraying a windsurfer
- Exhibit 771A – Player's Light 1987 ad seeming to portray a windsurfer in Junior Hockey Magazine
- Exhibit 771B – Export A 1985 ad in Junior Hockey Magazine portraying alpine skiing and Viscount 1985 vaunting it as the mildest cigarette

[273] Although this ad is from 1979, we assume it carried over at least into the next year.

[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]

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[274] The witnesses called by any of the parties who testified concerning matters relating to JTM are listed in Schedule E to the present judgment.

[275] This document is not an exhibit. In JTM's case, it is entitled: "JTIM'S RESPONSE TO THE COURT'S NOVEMBER 21, 2014 QUESTION".

[550] It added in the same series of admissions that "(i)n 2000, in a public statement before a Senate Committee, Mr. Poirier acknowledged the serious incremental risks to health from smoking and that different combination of risks can cause cancer, expressly acknowledging that smoking is one of those risks." This appears to be the first public admission by this Company that smoking can cause a Disease, putting aside the government-imposed Warnings of 1988 and 1994.

[551] Michel Poirier is JTM's current president and, before us, he made the following statements:

> ON SEPTEMBER 18, 2012:
>
> Q58: A- … because there is no such thing as a safe cigarette.[276]
>
> Q85: A- Since the year two thousand (2000), since I became president, I did say publicly that there's a long list of diseases associated or that consumers... Sorry, let me rephrase that. Smokers incur risk such as lung cancer, heart disease, et cetera. There's a long list.
>
> Q87: A- We've always said that there is risk attached with smoking. When I say "always"... you know, in my tenure anyway, we always said that there is risk attached to smoking and we do spell out that there is strong risk associated with lung cancer, et cetera. So there's a long list.
>
> Q120: A- Well, again, I... from my perspective, the health risks attached to smoking have been known since the early sixties (60s), even late fifties (50s). This was all over the media. I remember growing up in Montreal as a five (5)-year old, the expression at the time... – this is going back fifty (50) years now, or forty-nine (49) years - the expression at the time in Montreal, in my surroundings anyway, was that every cigarette is a nail in your coffin. So I think, from that, that people knew about the risks of smoking, that it was not good for your health.
>
> Q127: A- The position of our company: that there (are) serious risks and people should be informed of those risks, as adults, before they smoke.
>
> Q200: Do you agree that cigarette smoking causes cancer, lung cancer?
>
> A- I agree that it does, in some smokers, yes.
>
> Q201: What about heart conditions, do you agree that smoking causes heart attacks?
>
> A- It causes heart disease, heart attack, yes, in some of the smokers, yes.
>
> Q202: And what about emphysema, do you agree that smoking causes emphysema?
>
> A- In some smokers, yes.

[276] "There is no safe cigarette": Exhibit 562, the website of JTI.

> 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?

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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

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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.

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281 In *Hollis, op. cit.,* Note 281, at paragraphs 21 and 26, the Supreme Court comes to a similar conclusion with respect to relative level of knowledge, going so far as to qualify the difference in favour of the manufacturer as an "enormous informational advantage".

282 Exhibit 20063, at page 4.

III.D. DID JTM TRIVIALIZE OR DENY OR EMPLOY A SYSTEMATIC POLICY OF NON-DIVULGATION OF SUCH RISKS AND DANGERS?

III.D.1 THE OBLIGATION TO INFORM

[569] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.D.2 NO DUTY TO CONVINCE

[570] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

III.D.3 WHAT JTM SAID PUBLICLY ABOUT THE RISKS AND DANGERS

[571] In section II.D.4 of the present judgment, we analyze what ITL told the public about the risks and dangers of smoking. Given the dominant role of ITL in the CTMC, especially early on, we included a number of examples of public statements made by ITL executives on behalf of that trade association. In chapter II.F, we find that, in light of the clear and uncontested role of the CTMC in advancing the Companies' unanimous positions trivializing or denying the risks and dangers of smoking[283], the Companies conspired to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use.

[572] JTM played down its role on the Ad Hoc Committee, arguing that it made little if any input to its positions and that its representatives attended only one or two meetings[284]. Nevertheless, its Mr. DeSouza did attend the planning meeting for the LaMarsh Conference presentations at the Royal Montreal Golf Club in 1964 (see Exhibit 688B), Mrs. Stewart signed the 1962 Policy Statement (see Exhibit 154) and it never disassociated itself from anything either that committee or the CTMC ever said or did. As well, Messrs. Crawford and Massicotte, among others, played active roles in the CTMC.

[573] The Court thus rejects JTM's argument and finds that its ruling in chapter II.F of the present judgment applies to JTM. It follows that the factual analysis in section II.D.4 referring to representations by the Ad Hoc Committee or the CTMC also apply to it.

[574] In general, JTM followed the path of the industry-wide Policy of Silence. It confirms this in its Notes:

> **1347.** In fact, JTIM rarely communicated directly with the public on the subject of smoking, health or addiction, and generally expressed its positions and beliefs when requested to do so by the relevant authorities. Moreover, from 1972 to 1989, and again from 1995 until 2000, JTIM voluntarily included a Federal Government-approved warning on all of its packages sold in Quebec. This was also true for its advertising from 1973.

[575] We have dealt with all these arguments in the ITL Chapter of the present judgment and our findings there also apply here.

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283 We are not unaware of RBH's withdrawal from the CTMC for a short time during the Class Period but consider that immaterial for these purposes.

284 See paragraphs 1357-1358 of its Notes.

[576] Nevertheless, we must cite a glaring example of the attitude of the RJ Reynolds group towards the scientific controversy even quite late in the Class Period. In a 1985 memo, Mr. Crawford reported on a visit to RJRM by two of the head people in RJRUS's R&D Department. He states that they advised that one of the five goals of that department was "Promotion of all aspects that relate to the statement that "There is a body of information that is contrary to the hypothesis that smoking causes diseases."[285]

[577] That JTM's parent company's head scientists would sign on to such a mandate at that late date defies comprehension. Admittedly, this was not JTM directly, but the link was clear and strong, as was the controlling power that RJRUS wielded over its Canadian subsidiary.

III.D.4 WHAT JTM DID NOT SAY ABOUT THE RISKS AND DANGERS

[578] As JTM specifies above, it rarely said anything to the public about smoking's risks and dangers. It followed this practice in spite of its knowing more about that than either the public or the government throughout the Class Period.

[579] Within the company, the interest of upper management on this subject focused almost exclusively on how to stave off government measures that might threaten the bottom line. There appears to have been a total absence of concern over the fact that its products were harming its consumers' health.

[580] An example of this attitude appears in Exhibit 1564, a report by Derrick Crawford, RJRM's director of research and development, on a two-day meeting called by NHWCanada in June 1977 and attended by the CTMC member companies. The subject was Canada's efforts to develop a "less hazardous cigarette".

[581] The overall tone of the memo is one of ridicule and condescendence by the author, but that is not the point that most draws the Court's attention. What is of real concern is the fact that, after spending some seven pages detailing the inefficiency of Canada's efforts, he concludes as follows:

> 7. One had to leave this meeting with a sense of frustration — so much time spent and so little achieved. On the other hand it leaves one with a degree of optimism for the future as far as the industry is concerned. They are in a state of chaos and are uncertain where to turn next from a scientific point of view. They want to be seen to be doing the right thing, and to keep their Dept. in the forefront of the Smoking & Health issue. However it appears they simply do not have the funds to tackle the problem in a proper scientific manner. Our continuing dialogue can continue for a long time, as they feel meetings such as these are beneficial. Pressure must be off shorter butt lengths for a considerable time.
>
> I am far more optimistic in answering the Morrison technical questions in the way we have, as a result of this meeting. They have not presented any scientific evidence which need cause us concern, and I consider that the programme that all companies are pursuing, namely of more and more low tar brands is an adequate reflection of the moves we are making to satisfy the Dept of Health & Welfare and that they appreciate this. (The Court's emphasis)

[285] Exhibit 587.

[582] Admittedly, Canada wished to maintain its independence from the Companies on this project and would not have accepted strong participation on the tobacco industry's part, but that does not justify or explain the fact that JTM would essentially rejoice at the government's problems. JTM obviously felt that Canada was its adversary on this topic. But what was the topic? It was the programme to develop a less hazardous cigarette in order to protect the health of smokers: JTM's customers.

[583] One would have expected JTM to lament the fact that the development of a safer cigarette was not progressing well and that its customers would not have access to its possible benefits. In an environment of collaboration – and concern for one's customers - it would have been normal to search for ways to assist the process, for example, by offering to help, or at least by providing all the information in its possession. Instead, JTM expressed joy at the chaos within the project and relief that pressure was off shorter butt lengths! More importantly, it chose to keep to itself the broad range of relevant information in its possession.

[584] The gravity of such conduct is magnified by the reality that, at the time, everyone believed that this "safer-cigarette" project would likely have positive consequences for the health and well-being of human beings. Hence, the longer it took to progress toward that end, the longer smokers would be exposed to greater – and unnecessary - health risks. These are circumstances that must be considered in the context of assessing punitive damages.

[585] In summary, JTM argues that it had no legal obligation to say anything more than what it did. The Quebec public was aware of the risks and dangers of smoking, and "There is no obligation to warn the warned"[286]. As well, it alleges that it did not know any more than Canada did on that.

[586] We have rejected these arguments elsewhere in the present judgment and we reject them anew here.

III.D.5 COMPENSATION

[587] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.[287]

III.E. DID JTM EMPLOY MARKETING STRATEGIES CONVEYING FALSE INFORMATION ABOUT THE CHARACTERISTICS OF THE ITEMS SOLD?

[588] The analysis and conclusions set out in chapter II.E of the present judgment apply to all three Companies.

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286 See paragraph 1492 of its Notes.

287 An indication of JTM's level of knowledge about compensation is found in the 1972 confidential "Research Planning Memorandum on a New Type of Cigarette Delivering a Satisfying Amount of Nicotine with a Reduced "Tar"-to-Nicotine Ratio": Exhibit 1624, in particular, at PDF 8.

III.F. DID JTM CONSPIRE TO MAINTAIN A COMMON FRONT IN ORDER TO IMPEDE USERS OF ITS PRODUCTS FROM LEARNING OF THE INHERENT DANGERS OF SUCH USE?

[589] The analysis and conclusions set out in chapter II.F of the present judgment apply to all three Companies.

III.G. DID JTM INTENTIONALLY INTERFERE WITH THE RIGHT TO LIFE, PERSONAL SECURITY AND INVIOLABILITY OF THE CLASS MEMBERS?

[590] The analysis and conclusions set out in chapter II.G of the present judgment apply to all three Companies.

IV. ROTHMANS BENSON & HEDGES INC.[288]

[591] RBH was created in 1986 by the merger of Rothmans of Pall Mall Canada Inc. ("**RPMC**"), a subsidiary of the Rothmans group of companies based in London, England, and Benson & Hedges Canada Inc. ("**B&H**"), a subsidiary of the Philip Morris group of companies based in New York City. Through the balance of the Class Period, the Rothmans interests owned 60% of the shares of RBH, while the Philip Morris group owned 40%[289].

[592] As well, we note that RPMC began doing business in Canada in 1958, some eight years after the beginning of the Class Period. For its part, B&H had apparently been doing business in Canada since before 1950.

IV.A. DID RBH MANUFACTURE, MARKET AND SELL A PRODUCT THAT WAS DANGEROUS AND HARMFUL TO THE HEALTH OF CONSUMERS?

[593] As mentioned earlier, none of the Companies today denies that smoking can cause disease in some people, although each steadfastly denies any general statement that it is the major cause of any disease, including lung cancer.

[594] In section II.A, we explain our interpretation of what is a "dangerous" product. We conclude that a product that is "harmful to the health of consumers" means that it would cause either the Diseases in the Blais Class or tobacco dependence in the Létourneau Class. We also conclude that tobacco dependence is dangerous and harmful to the health of consumers. These rulings apply to all three Companies.

[595] In its Notes, RBH sums up its position on this Common Question as follows:

> **686.** RBH did not manufacture, market, and sell a product that was more dangerous than class members were entitled to expect in light of all the circumstances because:
>
> - Knowledge of the health risks from smoking, including the difficulty of quitting, has been widely known and common knowledge since at least when the class period began, and RBH does not have any legal duty to inform those who already knew of the risks, and indeed overestimated them;

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288 The witnesses called by any of the parties who testified concerning matters relating to RBH are listed in Schedule F to the present judgment.

289 Since 2008, the Philip Morris group, as a result of the acquisition by Philip Morris International Inc. of Rothman's Inc., controls all the shares of RBH.

- The level of safety that the class members were entitled to expect was set by their government – a government that has understood the health risks from smoking since at least the 1950s or early 1960s and with that knowledge decided that, instead of banning cigarettes, the risk was acceptable so long as (1) the government informed the public of those risks so that individuals could decide whether or not to accept those risks (and the class members chose to do so), and (2) the government worked to develop a safer alternative traditional cigarette, which occurred in the form of lower tar cigarettes manufactured by Defendants;
- RBH's has always complied with the government's requests and direction relating to the smoking and health issue, including voluntary restrictions, legislative-mandated warnings, and the manufacturing and promotion of a lower tar cigarette – and the government commended RBH for doing so;
- RBH developed and implemented product modifications to reduce the health risks posed by smoking, primarily by producing lower and lower tar cigarettes, and reduction of TSNAs; and
- Plaintiffs have conceded that there is nothing RBH could have done to make its product safer.

687. RBH sold a legal product heavily regulated by the government and for which the risks were known, or should have been known, by the class members. The court has been told of no practical way in which these risks could likely have been reduced further. RBH's manufacturing, marketing and selling of cigarettes is not – in light of the circumstances – a civil fault.

688. The government agreed that smokers were responsible for their own behaviour. According to former Health Minister Lalonde, "*en autant que la cigarette n'était pas déclarée un produit illégal, les citoyens finalement étaient responsables de leur propre conduite à ce sujet.*"[657] The law in Québec does not permit consumers knowingly to take a risk to health and then, when the foreseen risk materializes, (with or without a backward look over half a century) sue the manufacturer on the ground the risk should not have been offered.

[596] These representations go well beyond the scope of Common Question A and are dealt with in other parts of the present judgment.

[597] In its response as to when it first admitted that smoking caused a Disease, it asserted that "It has been RBH's publicly disclosed position since 1958 that smoking is a risk factor for lung cancer and other serious diseases and that the more one smokes the more likely one is to get such diseases". It is referring to a 1958 incident created by Patrick O'Neill-Dunne, the president of Rothmans of Pall Mall Canada Limited. We look at that in the following section.

[598] Getting to the substance of Common Question A, as with the other Companies, the Court considers the testimony of their top executives to be conclusive.

[599] John Barnett, RBH's current president and CEO, testified before the Court on November 19, 2012. At that time, the following exchange took place:

72Q- It says on your website[290] that cigarettes are dangerous and addictive; correct?

A- Yes.

73Q- Do you have any reason to believe that cigarettes are less dangerous or less addictive than they were in the nineteen sixties (1960s)?

A- I've got no basis for saying that they are less dangerous or less addictive today than they were in the sixties (60s), no.

74Q- In the second sentence, under the "Smoking and Health" paragraph it states - for the record, I'm always referring to the same exhibit, Your Lordship - that, "There is overwhelming medical and scientific evidence that smoking causes lung cancer, heart disease, emphysema, and other serious diseases". Let's deal first with that part of the sentence that says there is overwhelming medical and scientific evidence that smoking causes lung cancer; do you have any reason to believe that smoking, which causes lung cancer today according to the statement on your website, did not cause lung cancer in the nineteen sixties (1960s)?

A- No, I don't. I started smoking when I was in England. I started smoking in front of my parents when I was seventeen (17), when I started to work, and incurred the wrath of my mother …

And cigarettes were known as coffin nails and cancer sticks in England in nineteen sixty-one (1961) when I started smoking. That was my basis of saying that I don't believe there was any difference in nineteen sixty-one (1961) as towards today.

77Q- And would your answer be the same... with respect to overwhelming medical and scientific evidence that smoking causes heart disease, emphysema and other serious diseases, it would have been the same in the nineteen sixties (1960s) as it is today according to your website statement?

A- Yes, sir.

[600] Mr. Barnett's candid testimony, coupled with the contents of the website, provide a clear answer to the first Common Question. RBH clearly did manufacture,

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290 The document referred to is Exhibit 834, which is actually the RBH page from the website of Philip Morris International as at October 22, 2012. The copyright information on it appears to date from 2002, four years after the end of the Class Period. The text referred to reads as follows:

Smoking and Health - Tobacco products, including cigarettes, are dangerous and addictive. There is overwhelming medical and scientific evidence that smoking causes lung cancer, heart disease, emphysema and other serious diseases.

Addiction - All tobacco products are addictive. It can be very difficult to quit smoking, but this should not deter smokers who want to quit from trying to do so.

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

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[291] Proof of the likelihood that smoking causes the Diseases was discussed in the chapter of the present judgment examining the case of ITL. That analysis and our conclusions apply to all three Companies.

Rothmans of Pall Mall Canada Limited started doing business in Canada, Rothmans International Research Division issued at least one press release and published several full-page "announcements of major importance" in Canadian publications. They speak volumes of what the Rothmans group of companies knew of the risks and dangers associated with smoking at that time and it is worth quoting from them at length.

[607] In one advertisement, which ran in *Readers' Digest* (Exhibit 536A), the following appears:

> On July 6-12th in London, England, 2,000 scientists from 63 countries attending the 7th International Cancer Congress - an event held every four years - were given the latest data on cancer and smoking by the world's foremost cancer experts. Rothmans Research scientists were also there and have examined the papers submitted along with their own findings,
>
> 1. Rothmans Research accepts the statistical evidence linking lung cancer with heavy smoking. This is done as a precautionary measure in the interest of smokers.
> 2. The exact biological relationship between smoking and cancer in mankind is still not known and a direct link has not been proved.
>
> …
>
> 9. Some statistical studies indicate a higher mortality rate from lung cancer among cigarette smokers than among smokers of cigars and pipes. However, in laboratory experiments, the carcinogenic activity from cigar and pipe smoke was found to be greater than in cigarette smoke, because, burning at a high temperature for a longer time, combustion is more complete in cigars and in pipes.
> 10. The tobacco-cancer problem is difficult and nebulous. It has brought forth many conflicting theories and evidences. But great knowledge and a better understanding have been gained through research. The controversy is a matter of public interest. The tar contents of the world's leading brands of cigarettes are today under the scrutiny of medical and independent research.
>
> Rothmans Research Division welcomes this opportunity to reiterate its pledge:
>
> (1) to continue its policy of all-out research,
>
> (2) to impart vital information as soon as it is available, and
>
> (3) to give smokers of Rothmans cigarettes improvements as soon as they are developed.
>
> In conclusion, as with all the good things of modern living, Rothmans believes that with moderation smoking can remain one of life's simple and safe pleasures.
>
> (The Court's emphasis)

[608] In another advertisement published in *The Globe and Mail* on June 21, 1958 (Exhibit 536), one finds the following statements:

> On June 18th, at Halifax, N.S., 1500 delegates attending the annual meeting of the Canadian Medical Association were shown a graphic display which suggested a link between smoking and lung cancer.

> THIS IS NOT the first time that a warning has been issued by Canadian doctors but, hitherto, it appears to have gone comparatively unheeded by Canadian smokers and the Canadian tobacco industry.
>
> Since 1953, similar pronouncements of varying intensity have also been made by medical associations in Britain and in the U.S.A., where such warnings have been more generally accepted.
>
> Rothmans would like it known that the problem of the relationship between cancer and smoking has for many years engaged the attention of the Research Division or its world-wide organization.
>
> Several years ago the Rothmans Research Division had already accepted the thesis that:
>
> "*The greater the tars reduction in tobacco smoke, the greater the reduction in the possible risk of lung cancer."*
>
> Therefore, as an established and leading member of the industry, Rothmans accepts that it is its duty to find a solution to the problem, either through co-operation with independent medical research-or, if necessary, alone.
>
> …
>
> Finally, if in addition to all the foregoing, smokers will practise moderation, Rothmans Research Division believes that smoking can still remain one of life's simple and safe pleasures. (The Court's emphasis)

[609] In an August 1958 letter to Sydney Rothman, the chairman of the Rothmans board in London[292], Patrick O'Neill-Dunne defended the audacious statements of Rothmans of Pall Mall Canada:

> The upshot of my recent P.R. release, however irritating it might have been to you, Plumley and Irish, has made front-page news in certain British papers, most of the Canadian and Australian papers and front page, second section in the New York Times. You cannot buy this for any money. …
>
> I am certain that the stand I have chosen will be copied by the leading U.S.A. manufacturers shortly as the only way of getting themselves out of the rat race of deceit into which they have plunged themselves at a cost of $30 million per annum in advertising per brand to remain alive as a major seller. (The Court's emphasis)

[610] As alluded to in the letter, Rothmans' announcements raised the ire of a number of tobacco executives and led to a colourful exchange of correspondence between some of them and Mr. O'Neill-Dunne that, in earlier times, could likely have culminated in duelling pistols at dawn[293].

[611] Although it is not clear what happened to Mr. O'Neill-Dunne as a result of his campaign of candour, the proof indicates that for the rest of the Class Period Rothmans, and later RBH, never reiterated the position Rothmans so famously took in 1958. Thereafter, it toed the industry line, crouching behind the Carcassonnesque double wall of

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292 Exhibit 918.
293 Exhibits 536C through 536H.

the Warnings, backed up by the "scientific controversy" of no proven biological link and the need for more research.

[612] Nonetheless, based on Rothmans' 1958 announcements and Mr. O'Neill-Dunne's comments, it is clear that the company knew of clear risks and dangers associated with the use of its products and that this knowledge was gained well before 1958, in all probability going back to at least the beginning of the Class Period. That answers this Common Question, but there is more to be learned from this incident.

[613] It demonstrates that by 1958 RBH was able to accept publicly "the statistical evidence linking lung cancer with heavy smoking" even though "the exact biological relationship between smoking and cancer in mankind is still not known and a direct link has not been proved"[294]. This is significant. It shows that the lack of a complete scientific explanation was not an impediment to admitting – publicly - that smoking is dangerous to health.

[614] In any case, incomplete scientific knowledge of such a danger is no defence to a failure to warn. Once again, the *Hollis* breast implant case provides guidance on the point:

> … "unexplained" ruptures, being unexplained, are not a distinct category of risk of which they could realistically have warned. In my view, these arguments fail because both are based upon the assumption that Dow only had the obligation to warn once it had reached its own definitive conclusions with respect to the cause and effect of the "unexplained" ruptures. This assumption has no support in the law of Canada. Although the number of ruptures was statistically small over the relevant period, and the cause of the ruptures was unknown, Dow had an obligation to take into account the seriousness of the risk posed by a potential rupture to each user of a Silastic implant. Indeed, it is precisely because the ruptures were "unexplained" that Dow should have been concerned.[295]

[615] Nonetheless, all three Companies rely on the scientific uncertainty as to how smoking specifically causes disease as a justification for not saying more about the risks and dangers of their products[296]. The Rothmans announcements of 1958 puncture the hull of that argument. What sinks the ship is the admission by all the current company presidents that cigarettes are dangerous, and they admit this in spite of the fact that, even today, the exact biological cause has still not been identified.

[616] In summary, there is no reason to believe that Mr. O'Neill-Dunne, in spite of what appears to have been a prodigious ego, knew any more about the question – or knew it any earlier - than other tobacco executives of the time. In that light, his characterization of the American position in 1958 as a "rat race of deceit" leads one to

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294 Exhibit 536A.

295 *Op. cit.*, *Hollis*, Note 40, at paragraph 41.

296 An example of this for RBH is presented in Exhibit 758.3. There, citing the "latest figures" of the American Cancer Society, Mr. O'Neill-Dunne in the conclusions to his "Sales Lecture No. 3" under the heading "What is known", notes that studies show that the death rate from lung cancer is 64 times greater among heavy smokers than among nonsmokers, and that a nonsmoker has 1 chance in 275 of getting lung cancer, whereas a heavy smoker has 1 chance in 10. Under "What is not known" he lists "the exact relationship between smoking and lung cancer". A year later, he did not let the latter impede him from issuing the statements we have already seen.

presume that the industry insiders were far from ignorant of the dangers of their products as early as the beginning of the Class Period in 1950.

[617] The Court thus concludes that at all times during the Class Period RBH knew of the risks and dangers of its products causing one of the Diseases.

IV.B.1.b AS OF WHAT DATE DID THE PUBLIC KNOW?

[618] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

IV.B.1.b.1 THE EXPERTS' OPINIONS: THE DISEASES AND DEPENDENCE

[619] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

IV.B.1.b.2 THE EFFECT OF THE WARNINGS: THE DISEASES AND DEPENDENCE

[620] The analysis and conclusions set out in the corresponding section of Chapter II of the present judgment concerning ITL apply to all three Companies.

IV.B.2 THE LÉTOURNEAU FILE

IV.B.2.a AS OF WHAT DATE DID RBH KNOW: TOBACCO DEPENDENCE?

[621] In the chapter of the present judgment analyzing the case of ITL, we cited Professor Flaherty to the effect that since the mid-1950s it was common knowledge that smoking was difficult to quit, and that by that time "the only significant discussion in the news media on this point concerned whether smoking constituted an addiction, or whether it was a mere habit"[297].

[622] Consistent with our reasoning throughout, we conclude that if the Companies believed that the public knew of the risk of dependence by the 1950s, each of the Companies had to have known of it at least by the beginning of the Class Period.

IV.B.2.b AS OF WHAT DATE DID THE PUBLIC KNOW: TOBACCO DEPENDENCE?

[623] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.C. DID RBH KNOWINGLY PUT ON THE MARKET A PRODUCT THAT CREATES DEPENDENCE AND DID IT CHOOSE NOT TO USE THE PARTS OF THE TOBACCO CONTAINING A LEVEL OF NICOTINE SUFFICIENTLY LOW THAT IT WOULD HAVE HAD THE EFFECT OF TERMINATING THE DEPENDENCE OF A LARGE PART OF THE SMOKING POPULATION?

[624] The analysis and conclusions set out in chapter II.C of the present judgment apply to all three Companies.

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[297] Exhibit 20063, at page 4.

IV.D. DID RBH TRIVIALIZE OR DENY OR EMPLOY A SYSTEMATIC POLICY OF NON-DIVULGATION OF SUCH RISKS AND DANGERS?

IV.D.1 THE OBLIGATION TO INFORM

[625] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.D.2 NO DUTY TO CONVINCE

[626] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.D.3 WHAT RBH SAID PUBLICLY ABOUT THE RISKS AND DANGERS

[627] Similar to the case for JTM, the factual analysis in section II.D.4 referring to representations by the Ad Hoc Committee and the CTMC applies to RBH.[298]

[628] The other evidence reveals precious few public pronouncements by RBH about the risks and dangers of smoking. RBH does shine much light on the 1958 hiccup emanating from Mr. O'Neill-Dunne, but we have already said what we have to say on that. Otherwise, it expends most of its energy denying that it officially and publicly said anything that could be misleading or false. In its conclusion to this section in its Notes, RBH puts it succinctly:

> After 1958, RBH did not make any statements intended for the public, did not publish any statements and did not run any marketing campaigns on the smoking and health issue;[299]

[629] Recognizing that this is true, its near-perfect silence on the issues does not assist RBH in defending against the principal faults we find that it committed. It is revealing, however, to note the manner in which that silence was broken in a 1964 speech by its then-president, Mr. Tennyson, to the Advertising and Sales Association in Montreal. It is difficult, and demoralizing (among other sensations), to read his concluding remarks:

> As tobacco people, we have a three-fold interest in this matter.
>
> 1. As human beings, we are, of course, concerned with the health of our fellow man and we would certainly voluntarily refrain from contributing to their detriment.
>
> 2. But, as citizens, we have a natural interest in protecting the economic welfare of the many people who are dependent on tobacco, from irresponsible and hasty actions on the part of well-meaning but misguided people.
>
> 3. As businessmen, we have a responsibility to our personnel and to our shareholders and l do not think that we may sacrifice their interests on the flimsy evidence which has thus far been presented.
>
> [...]

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298 We are not unaware of RBH's withdrawal from the CTMC for a short time during the Class Period but consider that immaterial for these purposes.

299 At paragraph 895.

> The good things in life are simple. A variety of small pleasures make up living, as one learns to recognize and enjoy them. Smoking has been and will continue to be one of these uncomplicated and simple pleasures of life.[300]

[630] Spoken only six years after the company's "coming-out" under Mr. O'Neill-Dunne, these comments smack of hypocrisy, dishonesty and blind self-interest at the expense of the public. They are typical of what the Companies were saying throughout most of the Class Period and show why punitive damages are warranted here.

IV.D.4 WHAT RBH DID NOT SAY ABOUT THE RISKS AND DANGERS

[631] In its Notes, RBH essentially lauds its compliance with the Policy of Silence.

> **886.** RBH's policy to refrain from making statements directly to the public about smoking and health cannot be deemed a trivialization or denial of health risks where those risks have been common knowledge since the early 1950s and where the government occupied the field on whether, when, and what information of health risks was disseminated to the public. If RBH had made any statements to the public about the smoking and health issue after 1958, Plaintiffs surely would contend that those statements were insufficient or otherwise trivialized the risks. Plaintiffs cannot have it both ways.
>
> **889.** […] there is no civil fault for not warning of risks that are already generally known ... the best, and only available course of action, was not to say anything to the public which might muddy the waters of the clear and dire warnings preferred by government and public health authorities.

[632] This reflects the defence enunciated in the first paragraph of article 1473 of the Civil Code: consumer knowledge. We have previously held that this is a valid argument as of January 1, 1980 for the Blais File, and March 1, 1996 for Létourneau, but only insofar as the fault with respect to a safety defect is concerned. It is not a full defence to the other three faults.

IV.D.5 COMPENSATION

[633] The analysis and conclusions set out in the corresponding section of chapter II of the present judgment concerning ITL apply to all three Companies.

IV.E. DID RBH EMPLOY MARKETING STRATEGIES CONVEYING FALSE INFORMATION ABOUT THE CHARACTERISTICS OF THE ITEMS SOLD?

[634] The analysis and conclusions set out in chapter II.E of the present judgment apply to all three Companies.

IV.F. DID RBH CONSPIRE TO MAINTAIN A COMMON FRONT IN ORDER TO IMPEDE USERS OF ITS PRODUCTS FROM LEARNING OF THE INHERENT DANGERS OF SUCH USE?

[635] The analysis and conclusions set out in chapter II.F of the present judgment apply to all three Companies.

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300 Exhibit 687, at pdf 21.

IV.G. DID RBH INTENTIONALLY INTERFERE WITH THE RIGHT TO LIFE, PERSONAL SECURITY AND INVIOLABILITY OF THE CLASS MEMBERS?

[636] The analysis and conclusions set out in chapter II.F of the present judgment apply to all three Companies.

[637] In its Notes, RBH sums up its position on this question as follows:

> **1071.** Nothing RBH did was intentional inference with the right to life, personal security and inviolability of the class members, and all of it was at the behest or with the approval of the government. As already explained, simple proof of erroneous statements or sales of a dangerous product is not sufficient to prove the element of fault under the Charter. As the Supreme Court stated in *Bou Malhab*, "conduct that interferes with a right guaranteed by the Charter does not necessarily constitute civil fault. The interference must also violate the objective standard of conduct of a reasonable person under art. 1457 CCQ." Intent alone cannot be the basis for liability, and as already shown, RBH's conduct does not satisfy the fault element of any conceivable cause of action or claim.
>
> **1072.** No industry has ever been more tightly regulated and closely scrutinized or done more to comply with every law, voluntary and legislated, and to remain out of sight and mind, while researching ways to make a safer product. Plaintiffs have offered no evidence that the class members were even exposed to RBH's alleged misconduct – let alone that such exposure caused an infringement of their right to life under Section 1 or dignity under Section 4.

[638] The Court has dealt with these arguments earlier in the present judgment and there is nothing new to add. There is, however, an additional factual element that should be considered in the present context: the timing of RBH's use of "indirect-cured" tobacco.

[639] In indirect curing, the tobacco does not come into contact with heat-generating elements, as is the case for direct curing. By this "new" technique, the heat comes from a heat exchanger, so no combustion residue touches the tobacco, as compared to direct curing.

[640] Mr. Chapman testified that near the end of the Class Period it was discovered that indirect curing dramatically reduced the presence of carcinogenic nitrosamines in tobacco, often called "TSNA". The reduction of TSNA was in the order of 87%.[301] Later the same day, he replied to the Court's questions as follows:

> 752Q- But don't I have to assume that, by your going full blown to indirect-cured tobacco at some point, the company made the decision that this was going to reduce the nitrosamines in its cigarettes; is that not a fair assumption?
> A- We did do that for that reason, absolutely.
>
> 753Q- And therefore, it's a less hazardous cigarette as a result; is that a fair statement?
> A- We had no way to know, sir. But it was just the right thing to do, because it had been identified as a component of smoke that could be...

[301] Transcript of October 23, 2013, at page 21.

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.

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303 See Didier LLUELLES et Benoît MOORE, *Droit des obligations*, 2nd édition, Montréal, Éditions Thémis, 2012, paragraph 2031, page 1159.

304 *National Bank v. Soucisse et al.,* [1981] 2 SCR 339 at p. 358.

305 Articles 6 and 1375 of the Civil Code.

VI.A. WERE THE MORAL DAMAGES IN THE BLAIS FILE CAUSED BY THE DISEASES?

[654] Let us start by noting that causation relates only to compensatory and not to punitive damages. The latter need not be shown to have been caused to a plaintiff.

[655] We also note that the Plaintiffs' proof of the nature and the degree of the general prejudice suffered by victims of the Diseases was not contradicted by the Companies, nor was the causal link between those injuries and the various Diseases. Hence, the Court need not go into a detailed analysis of each aspect of the evidence in this regard.

[656] This said, in spite of the Companies' assertions that there is no proof on an individual basis, the Court is satisfied that the uncontradicted evidence of the Plaintiffs' experts as to the injuries typically suffered by a person having one of the Diseases or tobacco dependence corresponds to the injuries claimed by the Plaintiffs in each file. The value to be placed on those injuries is a separate issue and will be dealt with in a later section of the present judgment.

[657] As noted earlier, the moral damages claimed in the Blais File are for loss of enjoyment of life, physical and moral pain and suffering, loss of life expectancy, troubles, worries and inconveniences arising after having been diagnosed with one of the Diseases. To prove the occurrence of such moral damages among the victims of the Diseases, the Plaintiffs turned to experts.

[658] In a later section, we look in detail at these experts' reports with respect to the effect of each Disease and tobacco dependence on their victims. That level of detail is not necessary for the specific issue being dealt with at this stage, since we need ascertain nothing more than the causal link between the type of damages claimed and the Diseases or dependence.

[659] For lung cancer, the Plaintiffs filed the expert's report of Dr. Alain Desjardins (Exhibit 1382 - 1382.2 is the English translation). At pages 72 through 79, he describes in detail the physical and mental prejudice typically suffered by persons with lung cancer. As is the case for all the Diseases, the prejudice caused by the treatment itself, both curative and palliative, is a major factor in the diminution of quality of life and in the physical and emotional suffering of the victim. His evidence is uncontradicted and the Court holds that the causal link between that prejudice and lung cancer is established.

[660] For throat and larynx cancer, the Plaintiffs filed the expert's report of Dr. Louis Guertin (Exhibit 1387). It is true that his report considers cancers of the oral cavity, as well as of the larynx and pharynx, while the amended Class description in Blais is restricted to cancers of the larynx, the oropharynx and the hypopharynx. Nevertheless, the Court does not hesitate to apply his broader analysis to the more limited definition. His explanation of the troubles and inconveniences of victims at pages 5 through 8 makes it clear that the nature of the prejudice is similar in all cases.

[661] In that section, Dr. Guertin describes in detail the physical and mental prejudice typically suffered by persons with cancer of the larynx or pharynx, covering both treatable and untreatable cases, and the suffering and loss of quality of life resulting from the

various treatments. His evidence is uncontradicted and the Court holds that the causal link between that prejudice and those cancers is established.

[662] For emphysema, the Plaintiffs again counted on the report of Dr. Desjardins (Exhibit 1382 - 1382.2 in English). As with Dr. Guertin's report, Dr. Desjardins' opinion covers a broader scope than the Disease at issue. He analyzed the case of COPD, Chronic Obstructive Pulmonary Disease, which includes both emphysema and chronic bronchitis. As with the case of throat cancer, based on his explanation of the troubles and inconveniences of COPD victims, the Court does not hesitate to apply his broader analysis to the specific case of emphysema.

[663] Dr. Desjardins describes in detail the physical and mental prejudice typically suffered by persons with emphysema and the suffering and loss of quality of life resulting from the various treatments. He uses what is known as the "GOLD Guidelines" to rank the impact on the quality of life to the relative gravity of the sickness.

[664] His evidence is uncontradicted and the Court holds that the causal link between that prejudice and emphysema is established.

VI.B. WERE THE MORAL DAMAGES IN THE LÉTOURNEAU FILE CAUSED BY DEPENDENCE?

[665] In Létourneau, the moral damages claimed are for an increased risk of contracting a fatal disease, reduced life expectancy, social reprobation, loss of self esteem and humiliation. Here, too, the Plaintiffs relied on an expert to make their proof and filed two reports by Dr. Juan Negrete (Exhibit 1470.1 and 1470.2). The description of the damages is contained in the latter document of some five pages in length and, as above, both that description and the causal link between those damages and tobacco dependence are uncontradicted.

[666] Dr. Negrete describes the physical and mental prejudice suffered by dependent smokers, including that related to the problems typically encountered when trying to break that dependence. He is of the view that the effect of tobacco dependence on one's daily life and lifestyle is such that it can be said that the state of being dependent is, in and of itself, the principal problem caused by smoking.[306]

[667] His evidence is uncontradicted and the Court holds that the causal link between that prejudice and tobacco dependence is established.

VI.C. WERE THE DISEASES CAUSED BY SMOKING?

[668] This is generally known as "medical causation". Given its scientific base, this question must be answered at least in part through experts' opinions. To that end, the Plaintiffs relied on two types of experts: specialists on each Disease and an epidemiologist. They also sought assistance through Quebec's *Tobacco-Related Damages and Health Care Costs Recovery Act* of 2009 (the "**TRDA**")[307], a law created especially for tobacco litigation.

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306 "*L'état de dépendance est, en soi même, le trouble principal causé par le tabagisme*": Exhibit 1470.2, page 2

307 RSQ, c. R-2.2.0.0.1.

[669] On medical causation between both smoking and lung cancer and smoking and emphysema, the Plaintiffs made their proof through Dr. Alain Desjardins. For smoking and throat and larynx cancer, the Plaintiffs relied on Dr. Louis Guertin.

VI.C.1 THE EVIDENCE OF DRS. DESJARDINS AND GUERTIN

[670] At page 62 of his report (Exhibit 1382 - 1382.2 in English), Dr. Desjardins notes that epidemiological studies report that smoking is the cause of 85 to 90 percent of new lung cancer cases. He also cites the Cancer Prevention Study of the American Cancer Society that states that smoking is responsible for 93 to 97% of lung cancer deaths in males over 50 and 94% in females. As we discuss further below, figures of this magnitude are either admitted or not contested by two of the Companies' experts.

[671] Based on Dr. Desjardins' full opinion, and in the absence of convincing proof to the contrary, the Court is satisfied that the principal cause of lung cancer is smoking at a sufficient level. Determining that "sufficient level" for lung cancer, as for the other Diseases, was the mandate of the Plaintiffs' epidemiologist. We examine his opinion below.

[672] For cancer of the larynx, the oropharynx and the hypopharynx, Dr. Guertin states the following at page 24 of his report (Exhibit 1387):

> For all these reasons, it is clear that the cigarette is the principal etiological agent causing the onset of about 80 to 90 percent of (throat cancers). Moreover, for a number of reasons, it results in an unfavourable prognostic in a great number of patients. Finally, some 50% of patients with a throat cancer will eventually die from it. Those who are cured will undergo a significant change in their quality of life before, during and after treatment.[308]

[673] Based on Dr. Guertin's full opinion, and in the absence of convincing proof to the contrary, the Court is satisfied that the principal cause of cancer of the larynx, the oropharynx and the hypopharynx is smoking at a sufficient level, to be determined through epidemiological analysis.

[674] Dr. Desjardins deals with emphysema in his report through an analysis of COPD, which includes both emphysema and chronic bronchitis. He justifies that approach by noting that a high percentage of individuals with COPD have both diseases, but not all[309]. He opines that "among the risk factors known for COPD, smoking is by far the most important"[310].

[675] Based on Dr. Desjardins' full opinion, and in the absence of convincing proof to the contrary, the Court is satisfied that the principal cause of emphysema is smoking at a sufficient level, to be determined through epidemiological analysis.

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308 Dr. Guertin's report is in French. Although this English citation from it is accurate, the Court must admit that it has no idea whence it comes.

309 Exhibit 1382, at page 12.

310 Exhibit 1382, at page 14: "*Parmi les facteurs de risque établis de la MPOC, le tabagisme est de loin le plus important, […]*".

[676] As indicated, these opinions are not effectively contradicted by the Companies, who religiously refrain from allowing their experts to offer their own views on medical causation between smoking and the Diseases. In spite of that, the Plaintiffs did manage to squeeze certain admissions out of Doctors Barsky and Marais with respect to lung cancer. In and of themselves, however, these opinions are but a first step to proving the Plaintiffs' case.

[677] It remains to determine what "smoking" means in this context, i.e., how many cigarettes must be smoked to reach the probability threshold on each of the Diseases. For that, the Plaintiffs turn to their epidemiologist, Dr. Jack Siemiatycki. However, before going there, it is necessary to deal with two arguments advanced by the Companies: that section 15 of the TRDA does not apply to these cases and that the Plaintiffs failed to make evidence for each Member.

VI.C.2 SECTION 15 OF THE TRDA

[678] This provision is designed to facilitate a plaintiff's burden in proving causation in tobacco litigation. It reads as follows:

> **15.** In an action brought on a collective basis, proof of causation between alleged facts, in particular between the defendant's wrong or failure and the health care costs whose recovery is being sought, or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling.

[679] Although it appears to be made directly applicable to class actions by the last paragraph of section 25, which states that "Those rules (including section 15) also apply to any class action based on the recovery of damages for the (tobacco-related) injury", ITL submits that section 15 does not apply at all in these files.

[680] It points out that the TRDA creates an exception to the general rule and, therefore, must be interpreted restrictively. Based on that, it argues that section 15 cannot apply to a class action pending on June 19, 2009 because that provision does not contain language similar to that of section 27, which states that it (that section) applies to a class action "in progress on June 19, 2009"[311]. ITL would thus convince the Court that the only provisions of the TRDA that can apply to a class action pending on that date, as are these, are those that specifically say so. Section 15 does not say so.

[681] The Court rejects this submission for five reasons.

[682] On the one hand, it confronts and contradicts the clear intention of section 25 that the rules in question should assist "any" such class action, which we take to mean "all" such class actions. This interpretation is bolstered by the French version, which

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[311] **27.** An action, including a class action, to recover tobacco-related health care costs or damages for tobacco-related injury may not be dismissed on the ground that the right of recovery is prescribed, if it is in progress on 19 June 2009 or brought within three years following that date.

speaks of "*tout recours collectif*"[312]. To override such otherwise unequivocal language would take an even more unequivocal indication of a contrary intention, a test that ITL's "nuancical" reasoning fails to meet.

[683] As well, section 25 opens with the words "Despite any incompatible provision". This is a further indication that the legislator intended that no argument or belaboured interpretation should stand in the way of the application of these rules to all actions to recover damages for a tobacco-related injury.

[684] In addition, the purpose of section 27 is to establish new rules for the prescription of tobacco-related claims, as the title of Division II of the act indicates. To do that, it had to specify the date from which prescription would henceforth run for such actions. That appears to be the sole reason for mentioning that date and it is obvious that it is not meant to serve as a restriction on the application of the other provisions.

[685] Moreover, dates are not mentioned in any other relevant provision of the act. In light of that, to accept ITL's argument would be to strip the TRDA of any effect with respect to actions in damages. This would be a nonsensical result.

[686] Finally, there is the not inconsequential fact that the Court of Appeal has already stated that it applies to these cases at paragraph 48 of its judgment of May 13, 2014[313].

VI.C.3 EVIDENCE FOR EACH MEMBER OF THE CLASSES

[687] The Companies characterize the Plaintiffs' decision not to establish causation for each member of the Classes as a fatal weakness. The case law is to the effect that, for both medical causation and conduct causation (discussed below), "(i)n order to make an order for collective recovery, both of these causal elements (medical and conduct) must be demonstrated with respect to each member of the class".[314] On that basis, the Companies insist that the Plaintiffs had to prove that each and every Member of a Class had suffered identical damages to those of the other Members of that Class.

[688] Taken to the degree that the Companies would impose, essentially each Class member would have had to testify in one way or another in the file. For them, the fact that no Members of either Class testified means that it is impossible to conclude that adequate proof of Class-wide damages has been made.

[689] It is not difficult to see how this approach is totally incompatible with the class action regime. Nevertheless, at first glance the case law appears to favour that position.

[690] The Companies omitted, however, to discuss the effect of the statement that opens paragraph 32 in the *St-Ferdinand* decision. We cite it below in both languages for the sake of greater clarity, noting that, in that Québec-based case, the judgment of the Court was delivered by L'Heureux-Dubé, J. We thus assume that it was originally drafted in French.

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312 *Ces règles s'appliquent, de même, à tout recours collectif pour le recouvrement de dommages-intérêts en réparation d'un tel préjudice.*

313 *Imperial Tobacco v. Létourneau*, 2014 QCCA 944.

314 Notes of JTM at paragraph 2367. See, for example, *Bou Malhab c. Métromédia C.M.R. Montréal inc.*, [2011] 1 SCR 214 and *Bisaillon c. Université Concordia*, [2006] 1 SCR 666.

32. These general rules of evidence are applicable to any civil law action in Quebec and to actions under statutory law of a civil nature, unless otherwise provided or indicated.[315]

(The Court's emphasis)

32. Ces règles générales de preuve sont applicables à tout recours de droit civil au Québec ainsi qu'aux recours en vertu du droit statutaire de nature civile, à moins de disposition ou mention au contraire.

(The Court's emphasis)

[691] In none of the Supreme Court decisions cited by the Companies did the TRDA apply. That distinction is critical, since section 15 thereof appears to correspond to what Judge L'Heureux-Dubé envisioned when she wrote of a "*disposition ou mention au contraire*"[316]. As such, and in light of the fact that the TRDA does apply here, the Plaintiffs may prove causation solely through epidemiological studies.[317] This has a direct impact on the need for proof for each class member, given that epidemiology deals with causation in a population and not with respect to each member of it.

[692] The objective of the TRDA is to make the task of a class action plaintiff easier, *inter alia*, when it comes to proving causation among the class members[318]. When the legislator chose to favour the use of statistics and epidemiology, he was not acting in a vacuum but, rather, in full knowledge of the previous jurisprudence to the effect that each member of the class must suffer the same or similar prejudice. It thus appears that the specific objective of the act is to move tobacco litigation outside of that rule.

[693] The Court must therefore conclude that, for tobacco cases, adequate proof of causation with respect to each member of a class can be made through epidemiological evidence. The previous jurisprudence calling for proof that each member suffered a similar prejudice is overridden.[319]

[694] Although this rebuts the Companies' plaint over the use of epidemiological evidence to prove causation within the class, it does not relieve the Plaintiffs from making epidemiological proof that is reliable and convincing to a degree sufficient to establish probability. This brings us to an analysis of Dr. Siemiatycki's work and an assessment of the degree to which it is reliable and convincing.

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315 *Québec (Curateur public) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211.

316 Those words can also be translated as "a provision of law or indication to the contrary".

317 We must point out that, even without section 15 of the TRDA, we see no obstacle to considering statistical and epidemiological studies in ascertaining causation in these files. ITL concurs with this position at paragraph 1015 of its Notes, while correctly cautioning that "this evidence still needs to be reliable and convincing".

318 See: Lara KHOURY, *« Compromis et transpositions libres dans les législations permettant le recouvrement du coût des soins de santé auprès de l'industrie du tabac »*, (2013) 43 R.D.U.S. 611, at page 622: "*En d'autres termes, les gouvernements n'ont qu'à démontrer que, selon les données de la science, le tabagisme peut causer ou contribuer à la maladie, et non qu'il l'a fait dans le cas particulier de chaque membre de la collectivité visée. Il s'agit donc d'une preuve allégée de la causalité, confirmant ainsi la perspective collectiviste adoptée pour ces recours*.
Pursuant to section 25 of the TRDA, these provisions apply equally to class actions.

319 It will be interesting to see if the National Assembly eventually chooses to broaden the scope of this approach to have it apply in all class actions. Although such a move would inevitably be challenged constitutionally, its implementation would go a long way towards removing the tethers currently binding class actions in personal injury matters.

VI.C.4 THE EVIDENCE OF DR. SIEMIATYCKI

[695] Dr. Siemiatycki is a highly-respected member of the world scientific community. A professor of epidemiology at both McGill University and l'Université de Montréal, he has published nearly 200 peer-reviewed articles and is ranked at the top of "Canadian public health research"[320]. He has served in various capacities with the International Agency for Research on Cancer of the WHO in France and sat on the boards of directors of both the American College of Epidemiology and the National Cancer Institute of Canada.

[696] His research areas make his opinions particularly valuable to the Court, since he has worked on a number of studies dealing with smoking-caused cancers over the past twenty years, including an oft-cited 1995 study of the Quebec population[321].

[697] Here, he did not have the luxury of being able to apply standard epidemiological techniques. In his report (Exhibit 1426.1), he describes his mandate as follows:

> The overall purpose of this report is to provide evidence and expert opinion regarding the causal links between cigarette smoking and each of four diseases: lung cancer; larynx cancer; throat cancer; and emphysema. For each disease, the following questions will be addressed:
>
> - Does cigarette smoking cause the disease?
> - How long has it been known in the scientific community that cigarette smoking causes the disease?
> - What is the risk of the disease among smokers compared with non-smokers?
> - What is the dose-response relationship between smoking and the disease?
> - At what level of smoking does the balance of probabilities exceed 50% that smoking played a contributory role in the etiology of an individual's disease?
> - Among all smokers who got the disease in Quebec since 1995, for how many did the balance of probabilities of causation exceed 50%?

[698] He admits that he was obliged to develop a "novel" approach by which he sought to calculate the "critical dose" of smoking at which it is probable that a Disease contracted by the smoker was caused by his or her smoking. At page 33 of his report he describes his methodology in general terms:

> "Using all the studies that provided results according to a given metric of smoking (e.g. pack-years), we needed to derive a single common estimate of the dose-response relationship between this metric and disease risk. There is no standard textbook method for doing this; we had to innovate."

[699] The Companies argue that Dr. Siemiatycki's analysis is insufficient and unreliable because it does not meet recognized scientific standards. Here are some of JTM's comments from its Notes:

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320 See exhibit 1426, page 2.

321 J. SIEMIATYCKI, D. KREWSKI, E. FRANCO and M. KAISERMAN (1995), *Associations between cigarette smoking and each of 21 types of cancer: a multi-site case-control study*, International Journal of Epidemiology 24(3): 504-514.

> **2426.** No court of which JTIM is aware has ever accepted epidemiological evidence alone, whether in the form offered by Dr. Siemiatycki or some analogous form, as sufficient proof of specific causation. As the cases referenced above demonstrate, the courts approach epidemiological evidence with caution.
>
> **2427.** There is all the more reason to approach Dr. Siemiatycki's analysis with caution. Dr. Siemiatycki admitted in cross-examination that his method was "novel" and that the notion of a "critical amount" of smoking was previously unknown in the literature. He invented it, and a method of deriving it, for the purposes of this case. Neither Dr. Siemiatycki's "critical amount" nor his "legally attributable fraction" is part of received scientific methodology. It is a novel science devised exclusively for the purposes of these proceedings.

[700] Although much of what JTM says above is accurate, it appears to go too far in the following paragraphs when it asserts:

> **2429.** There is an additional reason to approach Dr. Siemiatycki's analysis with real caution. Not only was Dr. Siemiatycki's "critical amount" method novel, he had no experience in the techniques required to carry it out. Indeed, Dr. Siemiatycki had to admit on cross examination that he had virtually no experience with meta-analysis - the very technique upon which he relied to produce his critical amount.
>
> **2430.** In short, Dr. Siemiatycki was not an expert, either in the specific method that he employed in the techniques he used to employ the method (sic). That being so, as Dr. Marais pointed out, Dr. Siemiatycki lacked the experiential basis upon which to assess, even subjectively, what he later called his "plausible ranges of error".

[701] Dr. Siemiatycki's cross examination on this point does not lead the Court to the same conclusion with respect to his expertise in applying meta-analyses, to the contrary:

> I would say that, compared to ninety-nine point nine nine nine percent (99.999%) of the world, I'm an expert in meta-analyses. And, that there are people who have more experience in that particular procedure, I would not deny, it's absolutely true, some people spend their careers just doing that now, but I know how to carry one out.[322]

[702] In any event, in their numerous criticisms of Dr. Siemiatycki's methodology, the Companies focused especially on what they saw as omissions.

[703] For example, they chide him for not attempting to show a possible causal connection between a fault by the Companies and the onset of a Disease in any Member, what ITL qualified as a "fatal flaw" (Notes, paragraph 1027). With due respect, as far as Dr. Siemiatycki's work is concerned, this is neither fatal nor a flaw. Although it is a critical issue, it is not something than can be evaluated using epidemiology, nor was it part of his mandate. The Plaintiffs choose to deal with that through other means, as we analyze further on.

[704] The Companies also criticize his work because it does not constitute proof with respect to each member of the Class. The Court has already dismissed that argument.

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

[705] With respect to the other omissions raised by the Companies, such as the failure to account for genetics, the occupational environment, age at starting, intensity of smoking and the human papillomavirus[323], the evidence is to the effect that, although these might have some effect on the likelihood of contracting a Disease, they all pale in comparison with the impact of having smoked cigarettes. As such, the fact that Dr. Siemiatycki does not build them into his model is not a ground for rejecting his analysis outright.

[706] There remains, however, what the Court considers the most important "omission" from his analysis, what we call the "**quitting factor**". This refers to the salutary effect of quitting smoking and its increasing benefit the longer the abstinence.

[707] The proof is convincing that the quitting factor can significantly reduce the likelihood of contracting a Disease by allowing the body to heal from the smoking-related damage it has suffered. And the longer the abstinence, the greater the recovery. In fact, after a number of smokeless years, in many cases there remain practically no traces of smoking-related damage to the body and no Disease will likely be caused by the previous smoking.

[708] No one denies that. Accordingly, the Companies make much of the fact that Dr. Siemiatycki's model does not take such an important element into account. They would have the Court reject his opinion, *inter alia*, for that reason.

[709] Although it is true that his model ignores the quitting factor, it is not completely omitted from his overall calculations. It is indirectly, but effectively, accounted for through the second condition of the Blais Class definition: to have been diagnosed with one of the Diseases.

[710] The principal use of Dr. Siemiatycki's model is to identify the amount of smoking necessary to contract one of the Diseases. This is then used to determine the number of persons in the Class. To that end, he uses the *Registre des tumeurs du Québec* as a base.

[711] It is there, in the make-up of that registry, that the quitting factor has its effect. Former smokers whose quitting has allowed their bodies to heal won't be counted in the *Registre des tumeurs* because they will never have been diagnosed with a Disease. *Ergo*, they won't be included in the Blais Class.

[712] Thus, the requirement of diagnosis with a Disease as a condition of eligibility for the Blais Class assures that the quitting factor is taken into account. Accordingly, the Companies' criticism of the Siemiatycki model on that point is ungrounded and does not present an obstacle to using his work for the purposes proposed by the Plaintiffs.

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[323] Dr. Barsky, an expert in pathology and cancer research called by JTM, noted that the latest studies indicate that the human papillomavirus is present in two to five percent of lung cancers, but with a much higher presence in head and neck cancers, including at the back of the tongue (Transcript of February 17, 2014, page 148). Dr. Guertin for the Plaintiffs stated that where HPV is present in a smoker, the primary cause of any ensuing throat cancer is the smoking (Transcript of February 11, 2013, pages 108 ff.). Dr. Barsky's long comment on that (pages 144-147) does not seem to contradict Dr. Guertin's opinion on that.

[713] This still leaves the question of whether his "novel" analysis is sufficiently reliable and convincing for it to be adopted by the Court.

VI.C.5 THE USE OF RELATIVE RISK

[714] Dr. Siemiatycki's thesis is that, by determining the critical amount of smoking for which the relative risk of contracting a Disease is at least 2, one can conclude that the probability of causation of a Disease meets the legal standard of "probable", i.e., greater than 50%. Perhaps the Court should defer to Dr. Siemiatycki's own language:

> The mandate that I received was to estimate under what smoking circumstances we can infer that the balance of probabilities was greater than 50% that smoking caused these diseases. It turns out that this is equivalent to the condition that PC (probability of causation) > 50%, and that there is a close relationship between PC and RR, such that PC > 50% when RR > 2.0. This means that in order to answer the mandate, it is necessary to determine at what level of smoking the RR > 2.0. This is not a well-known question with a well-known answer. It required some original research to put together the available published studies on smoking and these diseases in a way to answer the questions.[324]

[715] The Companies wholeheartedly disagree with such an approach, with ITL citing a judgment by Lax J. of the Ontario Superior Court of Justice that supposedly rejects "the concept that a RR (sic) in excess of 2.0 necessarily translates to a probability of causation greater than 50%".[325]

[716] With respect, the Court searched in vain for such rejection.

[717] What we did find was the judge adopting an RR of 2.0 as a presumptive threshold in favour of the claimant in that case:

> [555] […] It is apparent to me, as the plaintiffs point out, that the WSIAT (Ontario Workers Safety and Insurance Tribunal) employs a risk ratio of 2.0[326] as a presumptive threshold, as opposed to a prescriptive threshold, for individual claimants.
>
> [556] Where the epidemiological evidence demonstrates a risk ratio above 2.0, then individual causation has presumptively been proven on a balance of probabilities, absent evidence presented by the defendant to rebut the presumption. On the other hand, where the risk ratio is below 2.0, individual causation has presumptively been disproven, absent individualized evidence presented by the class member to rebut the presumption. That is, whether or not the risk ratio is above 2.0 determines upon whom the evidentiary responsibility falls in determining individual causation. […]
>
> ...
>
> [558] This approach is entirely consistent with the case law. The defendants did not present any case law that supported their contention that I should use a risk ratio of 2.0 as a prescriptive standard without regard to the potential for

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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.

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[327] See the magisterial analysis of the issue done by Silcoff J. in his judgment in *Churchill Falls (Labrador) Corporation Ltd. v. Hydro Québec*, 2014 QCCS 3590, at paragraphs 276 and following, wherein he analyzes Quebec, Canadian common law and British precedents on the point.

[724] The Court recognizes that sound practice in scientific research rightly imposes strict rules for carrying out experiments and arriving at verifiable conclusions. The same standards do not, however, reflect the rules governing a court in a civil matter. Here, the law is satisfied where the test of probability is met, as recognized in Québec by article 2804 of the Civil Code:

> **2804**. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.

[725] Here, there is clear demonstration that smoking is the main cause of the Diseases. We have also found fault on the Companies' part. Given that, and the fact that the law does not require "more convincing proof" in this matter, we must apply the evidence in the record to assess causation on the basis of juridical probability, using article 2804 as our guidepost.

[726] Baudouin notes that a plaintiff is never required to prove the scientific causal link, but need only meet the simple civil law burden.[328] He further notes that the requirements of scientific causality are much higher than those for juridical causality when it comes to determining a threshold for the balance of probabilities.[329]

[727] In the case of *Snell c. Farrell*, Sopinka J. of the Supreme Court of Canada provided valuable guidance in this area:

> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. […] It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.[330]

[728] Hence, it is not an answer for the experts to show that the Plaintiffs' evidence is not perfect or is not arrived at by "a method of analysis which has been validated by any scientific community" or does not conform to a "standard statistical or epidemiological method"[331].

[729] Given its unique application, Dr. Siemiatycki's system has never really been tested by others and thus cannot have been either validate or invalidated by any scientific community. He, on the other hand, swore in court that its results are probable, even to the point of being conservative. We place great confidence in that.

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328 Jean-Louis BAUDOUIN and Patrice DESLAURIERS, *La responsabilité civile (7th Édition)*, Wilson & Lafleur, Montréal, at pages 635-636: "*le demandeur n'est jamais tenu d'établir le lien causal scientifique et qu'il suffit pour lui de décharger le simple fardeau de la preuve civile*".

329 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile, Op. cit*, Note 62, at page 105: "*la jurisprudence actuelle éprouve de sérieuses difficultés à distinguer causalité scientifique et causalité juridique, la première ayant un degré d'exigence beaucoup plus élevé quant à l'établissement d'un seuil de balance de probabilités*".

330 *Snell v. Farrell*, [1990] 2 S.C.C. 311, page 330 ("***Snell***"). See also: *Laferrière v. Lawson*, [1991] 1 SCR, 541, at paragraph 156.

331 Expert report of Dr. Marais, Exhibit 40549, at pages 12 and 18.

[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.

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[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

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[333] *Op. cit.*, *Snell*, Note 330, at page 330. Lax J. is of the same view in *Andersen, op. cit,* Note 325.

[334] In his testimony on March 18, 2014, he stated that he accepts that, based on the Surgeon General's conclusions, smoking causes the Diseases (Transcript at pages 212-213). The next day, he admitted that, with respect to the proportion of all lung cancers for which smoking is responsible, "the estimates that one sees are in the upper eighties (80s) to ninety percent (90%)", adding that, although he

remedied had he been allowed to perform the type of study that he said Dr. Siemiatycki should have done[335]. That page, however, was left blank.

[748] For all these reasons, the Court finds no use for Dr. Price's evidence.

[749] Dr. Mundt, called by RBH, was the sole epidemiologist who testified for the Companies. In his report (Exhibit 30217), he describes the two main aspects of his mandate as being:

- to evaluate Dr. Siemiatycki's report in which he attempts to estimate the number of people in Quebec who between 1995 and 2006 developed lung cancer, laryngeal cancer, throat cancer and emphysema 1 specifically caused by smoking cigarettes and
- to offer his opinion on Dr. Siemiatycki's approaches, methods and conclusions, based on his review of Dr. Siemiatycki's reports and testimony and his own review and synthesis of the relevant epidemiological literature.

[750] He feels that Dr. Siemiatycki's approach and methods are "substantially flawed" and that the probability of causation estimates that he claims to derive are "unreliable for their intended purpose, and cannot be scientifically or convincingly substantiated"[336]. Summarily, his specific conclusions are:

a. Dr. Siemiatycki's model and conclusions are wrong because they do not adequately take account of sources of bias;

b. Dr. Siemiatycki's conclusions are wrong because his model over-simplifies scientific understanding of the impact of risk factors other than smoking, such as smoking history, including the quitting factor, occupational exposures and lifestyle factors;

c. Dr. Siemiatycki's rationale for selection of the published epidemiological studies used in his meta-analysis is not clearly explained and, in any event, few of the ones he relied upon included Quebecers and he made no attempt to assure that the assumption of comparability was valid;

d. Dr. Siemiatycki's results cannot be tested in accordance with standard scientific methodology and good practices;

e. Dr. Siemiatycki uses COPD statistics rather than those specifically for emphysema and very few of those describe COPD in terms of relative risk and, as well, he fails to take account of other risk factors;

f. Dr. Siemiatycki's reliance on 4 pack-years as the critical value for balance of probabilities[337] is contrary to the scientific literature, which shows little to no

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accepts the numbers as calculated, he does not see that as determining causality (Transcript at pages 70-71).

335 See Transcript of March 19, 2014, at pages 41 and following.

336 See paragraph 112 of his report.

337 The Plaintiffs "round off" their critical dose at five pack years, but this does not counter the criticism made here.

> 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

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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

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343 Transcript of March 12, 2014 at pages 128-129.

344 Ian BINNIE, "*Science in the Courtroom: the mouse that roared*", University of New Brunswick Law Journal, Vol. 56, at page 312.

345 By moving from 5 pack years to 12, the number of eligible class members is reduced by about 25,000 persons: see Tables D1.1 through D1.4 in Exhibit 1426.7,

Judgment's attempt to fill that void does not spare the Court from having to evaluate it in light of the proof adduced. ITL explains its view on the matter in its Notes as follows:

> **1086.** Despite its central importance to their case, Plaintiffs have not proffered a clear and objective, scientifically-accepted definition of addiction that would allow the Court to determine on a class-wide basis that smoking caused all Class Members to become addicted. ITL submits that no such definition is available.
>
> **1087.** Nor have Plaintiffs advanced any meaningful theory or methodology for determining who is "addicted" and what injury follows from any such determination. Instead, Plaintiffs have variously attempted to extrapolate statistics and averages from sources not intended for the purposes they now advance (as discussed below), with no guidance as to how these would be applied to determine liability even if they were reliable.

[771] It is essential to have a "workable definition" of tobacco dependence (or addiction) in order to decide several key questions, not the least of which being how to determine who is a Class Member. Individuals must be able to self-diagnose their tobacco dependence and, consequently, their possible membership in the Class. As the Supreme Court has noted: "It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria"[346].

[772] With this goal in mind, when amending the Class description the Plaintiffs adopted criteria mentioned in the testimony of their expert on dependence, Dr. Negrete[347]. The criteria they favour are:

1) To have smoked for at least four years;
2) To have smoked on a daily basis at the end of that four-year period.[348]

[773] The four-year gestation period is not mentioned in either of Dr. Negrete's reports[349] but, rather, came from his testimony in response to a question as to how long it takes for a person to become tobacco dependent. Commenting on an article on which Dr. Joseph Di Franza[350] was the lead author (Exhibit 1471), he opined that the first verifiable symptoms of dependence, according to clinical diagnostic criteria, appear within three-and-a-half to four years of starting to use nicotine.[351]

[774] The Companies objected to the filing of the DiFranza article, complaining that Dr. Negrete should have produced it with one of his reports. They argued that the Plaintiffs' attempts to file it in this manner, after having sent an email that very morning

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346 *Western Canadian Shopping Centres c. Dutton*, [2001] 2 R.C.S. 534, at paragraph 138.

347 We discuss his qualifications and our evaluation of his evidence in Chapter II.C.

348 The third condition found in the amended definition, that of smoking on February 21, 2005 or until death, is not technically part of the "medical" definition proffered by Dr. Negrete.

349 Dr. Negrete filed two reports in this file, one in 2006: Exhibit 1470.1, and one in 2009: Exhibit 1470.2. Unless otherwise indicated, where we speak of his "report", we will be referring to the first report.

350 Di Franza is a specialist in the area of tobacco dependence and the creator of the *"Hooked on Nicotine Checklist"*, commonly known as the HONC!

351 Transcript of March 20, 2013 at pages 115-118. See also Dr. Negrete's second report, which cites a study at page 3 where, after only two years of smoking, 38.2% of children who started smoking around 12 years old met the criteria for a clinical diagnosis of dependence.

advising the Companies of their intention to use it, equated to producing a new (third) expert report by Dr. Negrete without prior notice, something that should not be allowed.

[775] The Court dismissed the Companies' objections and permitted the Plaintiffs to file and use the DiFranza report. In doing so, it noted that the Companies would have all the time necessary for their experts to review the report and counter it, since those experts would probably not be testifying for another year or so.[352] The Court's prediction turned out to be uncharacteristically accurate. The Companies' experts on dependence testified in January 2014, some ten months later.

[776] Returning to the four-year initiation period to nicotine dependence, the Court accepts Dr. Negrete's opinion on that. In fact, on all matters dealing with dependence, the Court prefers his opinions to those of the two experts in this area called by the Companies.

[777] As pointed out earlier, one of them, Dr. Bourget, had little relevant experience in the field and had, for the most part, simply reviewed the literature, much of which was provided to her by ITL's lawyers. The other, Professor Davies, was on a mission to change the way the world thinks of addiction. The torch he was carrying, despite its strong incendiary effect, cast little light on the questions to be decided by the Court.

[778] Getting back to Dr. Negrete, he did identify daily smoking as being one of two essential conditions for dependence, with lighting the first cigarette within 30 minutes of waking as the other.[353] That said, neither his report nor his testimony in court directly define what constitutes daily smoking, much less that it constitutes smoking the "at least one cigarette a day" required by the current class definition.

[779] It remains to be seen whether smoking one cigarette a day was sufficient to constitute daily smoking for dependence purposes in September 1998. If one-a-day cannot be the test, then we must see if there is adequate proof to determine what other level of consumption should be taken as the 1998 threshold of daily smoking.

[780] As for the one-a-day smoker, Dr. Negrete, himself, does not appear to consider such a low level of smoking as being enough to constitute dependence. At numerous places in his report, he refers to a level of smoking that obviously exceeds one a day: "smoking a higher number of cigarettes a day", at page 6 and "progressively increasing his consumption", at page 12 and "the need to increase the quantity consumed", at page 13 and "the daily total of cigarettes consumed is a direct measure of the intensity of the compulsion to smoke", at page 17.

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352 Transcript of March 20, 2013, at page 122.

353 At pages 19-20, in commenting on the Fagerstrom Test for Nicotine Dependence: "*Toutefois, ce sont les questions No 1 et 4 (of the Fagerstrom Test) celles qui semblent définir le mieux les fumeurs dépendants, car elles évoquent parmi eux le plus haut pourcentage de réponses à haut pointage. Pratiquement toute personne (95%) qui fume de façon quotidienne présente une dépendance tabagique à des différents degrés; mais le problème est le plus sévère chez les fumeurs qui ont l'habitude d'allumer la première cigarette du jour dans les premières 30 minutes après leur réveil. C'est le critère adopté par Santé Canada dans les enquêtes de prévalence de la dépendance tabagique dans la population générale.*"

[781] Although he does not pinpoint what he considers to be the average number of daily cigarettes required to constitute dependence, a useful indication of that comes from his references, in particular, from a 2005 survey by Statistics Canada[354]. It shows that Canadian smokers self-reported consuming an average of 15.7 cigarettes a day between February and December 2005, up from 15.2 cigarettes a year earlier (at page 4 PDF). For Quebec, the figure was 16.5 cigarettes a day in 2005, with no information for 2004.

[782] Can such information be reasonably translated into a number of cigarettes that would constitute a threshold for persons dependent on nicotine on September 30, 1998? The Court believes it can, in spite of the fact that these figures do not deal with the exact time period in issue or with the specific topic of tobacco dependence.

[783] Almost never does a court of civil law have the luxury of a record that is a perfect match for every issue before it. Nevertheless, it must render justice. Thus, where there is credible, relevant proof relating to a question, it may, and must, use that in a logical and common-sense manner to arbitrate a reasonable decision.

[784] What is the average number of cigarettes a tobacco-dependent smoker in Quebec smoked on September 30, 1998? In that regard, we know that:

a. Tobacco dependence results from smoking;

b. It is a function of time and amount smoked;

c. 95% of daily smokers are nicotine dependent, albeit to differing degrees;

d. The average daily smoker in Quebec smoked around 16 cigarettes a day in 2005;

e. In general, smokers were cutting back on their consumption in the period we are examining[355].

[785] It is probable, therefore, that Quebecers who smoked an average of 16 cigarettes a day in 2005 were nicotine-dependent. That said, it appears likely that dependency sets in before a smoker reaches "average consumption".[356] Given the absence of direct proof on the point, the Court must estimate what that figure should be.

[786] Based on the above, the Court holds that the threshold of daily smoking required to conclude that a person was tobacco dependent on September 30, 1998 is an average of at least 15 cigarettes a day. The Companies steadfastly avoided making any evidence at all on the point, so there is nothing to contradict such a finding.

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354 Exhibit 1470.10. This is footnote 27 to Dr. Negrete's report. Note that there is a typographical error at page 20 that indicates that this is footnote 26. The error was corrected at trial.

355 Overall smoking prevalence dropped from about 25% to below 20% in that period (Exhibit 40495.33). See also: Exhibit 1550-1984, at PDF 45. In 1984 average cigarette consumption in the United States was estimated at between 18.9 and 24.2 cigarettes and declining annually. The evidence shows that, in general, smoking trends in Canada were similar to those in the United States.

356 At page 21 of his report, Dr. Negrete associates simple "smoking every day" ("*fument tous les jours*") with tobacco dependence. This indicates to the Court that he supports something less than average daily smoking as a minimum for dependence.

[787] There remains the third criterion set out in the Class description: "They were still smoking the defendants' cigarettes on February 21, 2005, or until their death, if it occurred before that date".[357] This raises the questions of how many cigarettes a day is meant by "smoking the defendants' cigarettes", a question that our previous reasoning makes relatively easy to answer. We have determined that tobacco dependence means daily consumption of 15 cigarettes and logic compels that this threshold should apply to this condition as well.

[788] Consequently, the Court finds that medical causation of tobacco dependence will be established where Members show that:

a. They started to smoke before September 30, 1994 and since that date they smoked principally cigarettes manufactured by the defendants; and

b. Between September 1 and September 30, 1998, they smoked on a daily basis an average of at least 15 cigarettes manufactured by the defendants; and

c. On February 21, 2005, or until their death if it occurred before that date, they were still smoking on a daily basis an average of at least 15 cigarettes manufactured by the defendants.[358]

[789] The Class description will be amended accordingly. We should also point out here that, in light of the manner in which the Plaintiffs cumulate the criteria in this description, most eligible Létourneau Members will have smoked for all or the greater part of 10 years and five months: September 30, 1994 to February 21, 2005. Although there will inevitably be some quitting periods for certain people, it would be hard even for the Companies to assert that smokers meeting these criteria are not dependent.

[790] As important as this is, it relates only to medical causation. The effect of legal causation and, should it be the case, prescription is not yet taken into account. That will occur in the following sections.

VI.E. WAS THE BLAIS MEMBERS' SMOKING CAUSED BY A FAULT OF THE COMPANIES?[359]

[791] The Companies embrace the "but-for-never" approach, arguing that the Plaintiffs should have to prove that, but for the Companies' faults, the Members would never have started or continued to smoke. As such, they would take issue with the title of this section. They would argue that the expression "a fault of the Companies" should be replaced by "the sole fault of the Companies".

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357 The Plaintiffs explain that this third condition is necessary in order to comply with the conditions of the original Class definition.

358 The qualification that the cigarettes must be those made by the Companies is meant to tie any damages to acts of the Companies and exclude those caused by other producers' cigarettes.

359 This is often called "conduct causation", although, in the annals of tobacco litigation, it apparently has become known as "wrongfully induced smoking causation" or, simply, "WIS causation". As well, there is a third type of causation that must be proved: "abstract" or "general" causation: See ITL's Notes at paragraphs 971 and following. This amounts to a type of preliminary test to prove that smoking cigarettes may cause cancer, emphysema and addiction (in the abstract). This is not disputed by the Companies – paragraph 1020 of ITL's Notes. Hence, the Court will not deal further with that element.

[792] The Plaintiffs do not see it that way. Seeking to make their proof by way of presumptions, they prefer the "it-stands-to-reason" test. This would have the Court presume, in light of the gravity of the Companies' faults, that it stands to reason that such faults were the cause of people's starting or continuing to smoke, even if there is no direct proof of that.

[793] This opens the question of whether the Companies' fault must be shown to have been "the cause" of smoking or merely "a cause" and, if the latter, how important a cause must it be compared to all the others. In the first case, it comes down to determining whether it is probable that the Members would not have smoked had they been properly warned. The second requires more an appreciation of whether their smoking is a logical, direct and immediate consequence of the faults[360].

[794] Proving a negative, as the first case would require, is never an easy task and the Court does not believe that it is necessary to go that far in a claim for tobacco-related damages. If there is reason to conclude that the Companies' faults led in a logical, direct and immediate way to the Members' smoking, that is enough to establish causation, even if those faults coexist with other causes. Professor Lara Khoury provides a useful summary of the process in this regard:

> This theory (adequate causation) seeks to eliminate the mere circumstances of the damage and isolate its immediate cause(s), namely those event(s) of a nature to have caused the damage in a normal state of affairs (*dans le cours habituel des choses*). This theory necessarily involves objective probabilities and the notions of logic and normality. The alleged negligence does not need to be the sole cause of the damage to be legally effective however.[361]

[795] Where the proof shows that other causes existed, it might be necessary to apportion or reduce liability accordingly[362], but that does not automatically exonerate the Companies. We consider that possibility in a later section of the present judgment.

[796] JTM argues that the Plaintiffs' claim for collective recovery in Blais should be dismissed for a number of reasons.

- lack of proof that each Member's smoking was caused by its actions;
- lack of proof that the smoking that caused by JTM was actually the smoking that caused the Diseases;
- lack of proof of the number of disease cases caused;

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360 Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 1-683.

361 Lara KHOURY, *Uncertain causation in medical liability*, Oxford, Hart Publishing, 2006, at page 29. See also Jean-Louis BAUDOUIN, Patrice DESLAURIERS and Benoît MOORE, *La responsabilité civile*, 8ème éd., *op. cit.*, Note 62, at paragraph 1-687: "*Dans l'esprit des tribunaux, cette demarche n'implique pas nécessairement la découverte d'une cause unique, mais peut les amener à retenir plusieurs faits comme causals*".

362 See article 1478 C.C.Q., which foresees the possibility of contributory negligence and an apportionment of liability.

- lack of proof in Professor Siemiatycki's work of the number of Members for whom all three elements of liability apply;
- lack of proof of the quantum of individual damages for each Class Member.[363]

[797] Of these, we shall deal with the first one in this section. The second is countered by the condition in the Class definition that the pack years of smoking must be of cigarettes "made by the defendants". The final three arguments are responded to in other sections of the present judgment.

[798] The Plaintiffs readily admit that they did not even try to prove the cause of smoking on an individual basis, recognizing that that would have been impossible in practical terms. Thus, they turn to presumptions of fact in order to make their proof.

[799] They point out that the Court has a large discretion in tobacco cases to apply factual presumptions arising from statistical and epidemiological data in deciding a number of points. Although the Court does not disagree, it does not see this as a matter of exercising judicial discretion. Presumptions are a valid means of making evidence in all cases, as article 2811 of the Civil Code makes clear. That said, certain conditions must be met before they can be accepted.

[800] Article 2846 of the Civil Code describes a presumption as being an inference established by law or the court from a known fact to an unknown fact. Here, the known facts is the Companies' faults in failing to warn adequately about the likelihood of contracting one of the Diseases through smoking - and going further by way of creating a scientific controversy over the dangers - and then enticing people to smoke through their advertising. The unknown fact is the reasons why Blais Members started or continued to smoke.

[801] The inference the Plaintiffs wish to be drawn is that the Companies' faults were one of the factors that caused the Members to start or continue to smoke.

[802] Article 2849 requires that, to be taken into consideration, a presumption must be "serious, precise and concordant[364]" (in French: *graves, précises et concordantes*). The exact gist of this is not immediately obvious and we are fortunate to have some enlightenment on the subject in the reasons in *Longpré v. Thériault*[365]. The Court takes the following guidance from that judgment:

- Serious presumptions are those where the connections between the known fact and the unknown fact are such that the existence of the former leads one strongly to conclude in the existence of the latter;
- Precise presumptions are those where the conclusion flowing from the known fact leads directly and specifically to the unknown one, so that it

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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

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366 The third condition does not apply here since there is not more than one presumption to be drawn.

367 Les présomptions sont **graves**, lorsque les rapports du fait connu au fait inconnu sont tels que l'existence de l'un établit, par une induction puissante, l'existence de l'autre [...]
*Les présomptions sont **précises**, lorsque les inductions qui résultent du fait connu tendent à établir directement et particulièrement le fait inconnu et contesté. S'il était également possible d'en tirer les conséquences différentes et mêmes contraires, d'en inférer l'existence de faits divers et contradictoires, les présomptions n'auraient aucun caractère de précision et ne feraient naître que le doute ou l'incertitude.*
*Elles sont enfin **concordantes**, lorsque, ayant toutes une origine commune ou différente, elles tendent, par leur ensemble et leur accord, à établir le fait qu'il s'agit de prouver […] Si elles se contredisent […] et se neutralisent, elles ne sont plus concordantes, et le doute seul peut entrer dans l'esprit du magistrat.* (The Court's emphasis)

368 Léo DUCHARME, *Précis de la preuve*, 6th édition, Montréal, Wilson & Lafleur, 2005, para. 636: *Il faut bien remarquer qu'une simple probabilité est suffisante et qu'il n'est pas nécessaire que la présomption soit tellement forte qu'elle exclue toute autre possibilité.*

Members to smoke. This, however, does not automatically sink the Companies' ship. It merely causes, if not a total shift of the burden of proof, at least an unfavourable inference at the Companies' expense.[369]

[808] The Companies were entitled to rebut that inference, a task entrusted in large part to Professors Viscusi and Young. We have examined their evidence in detail in section II.D.5 of the present judgment and we see nothing there, or in any other part of the proof, that could be said to rebut the presumption sought.

[809] Consequently, the question posed is answered in the affirmative: the Blais Members' smoking was caused by a fault of the Companies.

VI.F. WAS THE LÉTOURNEAU MEMBERS' SMOKING CAUSED BY A FAULT OF THE COMPANIES?

[810] Much of what we said in the previous section will apply here. The only additional issue to look at is whether the presumption applies equally to the Létourneau Class Members.

[811] In its Notes, ITL pleads a total lack of proof on this aspect:

> **1128.** Plaintiffs have not even attempted to connect the addiction (however defined) of any Class Member, or any alleged injury, to any fault or wrongful conduct of ITL. In particular, Plaintiffs have made no attempt to establish a causal link between any acts or omissions of ITL and the smoking behaviour of any Class Members (or any alleged injuries). This alone is fatal to their entire addiction claim.

[812] RBH, with JTM adopting similar points[370], raises three arguments in opposition:

> **1099.** […] First, Plaintiffs failed to prove that a civil fault of the Defendants caused all – or indeed any – of the class members to start or continue smoking. Second, Plaintiffs failed to prove that each member of the *Létourneau* class has the claimed injury of addiction. Third, they failed to prove that this alleged addiction necessarily entails any injurious consequences given that addicted smokers may not want to quit smoking, may not have ever tried to quit, or may not have any difficulty in quitting if they do try. Certainly, there is no proof of anyone's humiliation or loss of self-esteem or of the gravity of either. Thus, the class will include people who are not smoking because of any wrong committed by the Defendants, who are not addicted to nicotine, and who, even if they are addicted, have not, and will not, necessarily suffer any cognizable injury as a result of their alleged "state of addiction."

[813] The first point is rebutted on the basis of the same presumption we accepted with respect to the Blais Class in the preceding section, i.e., that the Companies' faults were indeed one of the factors that caused the Members to smoke. Our conclusions in that regard apply equally here.

[814] As for the second, sufficient proof that each Class Member is tobacco dependent flows from the redefinition of the Létourneau Class in section VI.D above. Dr. Negrete

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369 Jean-Claude ROYER, *La preuve civile*, 3rd édition, Cowansville, Québec, Éditions Yvon Blais, 2003, pages 653-654, para. 847.

370 See paragraphs 2676 and following of JTM's Notes.

opined that 95% of daily smokers are nicotine dependent and the new Class definition is constructed so as to encompass them. This makes it probable that each Member of the Létourneau Class is dependent.

[815] We recognize that there might be some individuals in the Class who are not tobacco dependent in light of this new definition. We consider that to be *de minimis* in a case such as this where, in light of the number of Class Members, a threshold of perfection is impossible to cross. Such a minor discrepancy can be adjusted for in the quantum of compensatory damages, thus permitting "the establishment with sufficient accuracy of the total amount of the claims of the members"[371], with no injustice to the Companies. In fact, the Plaintiffs reduce the size of the Létourneau Class accordingly in the calculation of the class size done in Exhibit 1733.5.

[816] As for "entailing injurious consequences", the arguments RBH raises are covered by Dr. Negrete's opinion concerning the damages suffered by dependent smokers. The Companies made no proof to contradict that and the Court finds Dr. Negrete's testimony to be credible and dependable. We reject the third point.

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

VI.G. THE POSSIBILITY OF SHARED LIABILITY

[818] The Civil Code foresees a possible sharing of liability among several faulty persons, including the victim of extracontractual fault:

> **Art. 1477.** The assumption of risk by the victim, although it may be considered imprudent having regard to the circumstances, does not entail renunciation of his remedy against the person who caused the injury.
>
> **Art. 1478.** Where an injury has been caused by several persons, liability is shared by them in proportion to the seriousness of the fault of each.
>
> The victim is included in the apportionment when the injury is partly the effect of his own fault.

[819] We must, therefore, consider whether the Companies' four faults were the sole cause of the Members' damages at all times during the Class Period.[372]

[820] In Blais, we found that the public knew or should have known of the risks and dangers of contracting a Disease from smoking as of the knowledge date: January 1, 1980. We have held that it takes approximately four years to become dependent, so persons who started smoking as of January 1, 1976 (the "**smoking date**" for the Blais File) were not yet dependent when knowledge was acquired in 1980. Hence, they would not have been unreasonably impeded by dependence from quitting smoking as of the knowledge date.

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371 Article 1031 CCP.

372 The general rules of the Civil Code apply to cases under the Quebec Charter and the Consumer Protection Act, unless overridden by the terms of those statutes.

[821] Similar reasoning applies in Létourneau, albeit with different dates. The public knew or should have known of the risks and dangers of becoming tobacco dependent as of the knowledge date: March 1, 1996. Hence, Létourneau Class Members who started to smoke as of March 1, 1992 (the "**smoking date**" for the Létourneau File) were not yet dependent when knowledge was acquired in 1996. They, too, would not have been unreasonably impeded by dependence from quitting smoking as of the knowledge date.

[822] This points to a sharing of liability and an apportionment of the damages for some of the Members.

[823] In that perspective, the Plaintiffs seek total absolution for the Members in any apportionment of fault:

> **134.** In the case at bar, the Defendants, who create a pharmacological trap and invite children into it, have committed faults whose gravity exceeds by orders of magnitude that of any fault committed by a victim of that trap. It offends public order and common decency for a manufacturer to claim that using its product as intended is anywhere near as grave as its fault of designing, marketing and selling its useless, toxic product without adequate warnings or instructions and while constantly lying about its dangers. Even if the members committed a fault, its gravity is overwhelmed by the egregious faults committed by the Defendants and should attract no liability.[373]

[824] The Companies are correct in contesting this, but only with respect to the fault under article 1468. There, article 1473 creates a full defence where the victim has sufficient knowledge[374]. The case is different for the other faults here.

[825] Pushing full bore in the opposite direction from the Plaintiffs, JTM cites doctrine[375] to argue in favour of a plenary indulgence for the Companies on the basis that "a person who chooses to participate in an activity will be deemed to have accepted the risks that are inherent to it and which are known to him or are reasonably foreseeable"[376]. That article of doctrine, however, does not support this proposition unconditionally.

[826] There, the author's position is more nuanced, as seen in the following extract:

> *Dès qu'une personne est informée de l'existence d'un risque particulier et qu'elle ne prend pas les précautions d'usage pour s'en prémunir, elle devra, en l'absence de toute faute de la personne qui avait le contrôle d'une situation, assumer les conséquences de ses actes.*[377] (The Court's emphasis)

[827] As we have shown, the Companies fail to meet this test of "absence of all fault" and thus must share in the liability under three headings of fault. This seems only reasonable and just. It is also consistent with the principles set out in article 1478 and with the position supported by Professors Jobin and Cumyn:

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373 Plaintiffs' Notes, at paragraph 134.
374 See JTM's Notes, at paragraphs 135 ff.
375 P. DESCHAMPS, "*Cas d'exonération et partage de responsabilité en matière extracontractuelle*" in JurisClasseur Québec: *Obligations et responsabilité civile*, loose-leaf consulted on July 25, 2014 (Montréal : LexisNexis, 2008) ch. 22.
376 JTM's Notes, at paragraph 138.
377 JTM's Notes, at paragraph 39.

> **212.** […] *On notera uniquement que la responsabilité du fabricant, telle que définie par le législateur lors de la réforme du Code civil, s'écarte, sur ce point, du régime général de responsabilité civile, dans lequel la connaissance du danger d'accident par la victime constitue habituellement une faute contributive conduisant, non à l'exonération de l'auteur, mais à un partage de responsabilité*.[378]

[828] Based on the preceding, we find that any Blais Class Member who started to smoke after the smoking date in 1976 and continued smoking after the knowledge date assumed the risk of contracting the Diseases as of the knowledge date[379]. This constitutes a fault of a nature to call in the application of articles 1477 and 1478 of the Civil Code, resulting in a sharing of liability for those Members.[380]

[829] We should underline a basic assumption we make in arriving at this ruling. It is true that, as of the knowledge date, even smokers who were then dependent should have tried to quit smoking, and this in both files. While recognizing that, we do not attribute any fault to dependent smokers who did not quit for whatever reason.

[830] The evidence shows that for the majority of such smokers it is quite difficult to stop and that they need several tries over many months or years to do so – and even then. It also shows that some long-time smokers are able to quit fairly easily. Some of these might have chosen not even to try to stop and, for that reason, should be considered to have committed a fault leading to a sharing of liability. It is not possible to carve them out from the dependent Members who could not be blamed for continuing to smoke.

[831] In any event, it makes little difference in light of our calculating the amount of the Companies' initial deposit at 80% across the board, as explained further on. In addition, in Blais, many would have already accumulated 12 pack years of smoking by the knowledge dates and, in Létourneau, by being dependent they would have already suffered the moral damages claimed.

[832] For the Létourneau Class, we find that any Member who started to smoke after the smoking date in 1992 and continued smoking after the knowledge date assumed the

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[378] P-G JOBIN and Michelle CUMYN, *La Vente*, 3rd Edition, 2007, EYB2007VEN17, para. 212. The Court agrees that the present situation is not one where a *novus actus interveniens* can arise.

[379] This is based on what the authors qualify as "implicit consent". Professor Deslauriers notes that this is essentially a question of fact and presumption: "*Comme l'explique la doctrine, le consentement est 'implicite lorsque l'on peut présumer qu'un individu normal aurait eu conscience du danger avant l'exercice de l'activité'*" (reference omitted): Patrice DESLAURIERS et Christina PARENT-ROBERTS, *De l'impact de la création d'un risque sur la réparation d'un préjudice corporel*, Le préjudice corporel (2006), Service de la formation continue du Barreau du Québec, 2006, EYB2006DEV1216, at page 23. This notion of acceptance of the risk is raised by the Companies in their arguments regarding the autonomy of the will of Canadians who chose to smoke in spite of the dangers. It is true that Canadians have the right to smoke even if they choose to do so unwisely, but this does not excuse certain of the Companies' faults.

[380] Given the long gestation period for the Diseases, it is highly unlikely that a person who started after January 1976 could have contracted one of the Diseases before January 1, 1980. He would have had to have smoked 12 pack years within those four years. The Court therefore discards this possibility. Concerning the longer gestation period, see the report of Dr. Alain Desjardins (Exhibit 1382) at pages 26, 62 and 68.

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.

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381 ITL's Notes, at paragraph 1411.
382 See Exhibit 1426.7.
383 See Plaintiffs' Notes, at paragraph 2169 and footnote 2592.
384 See, for example, *Bouchard* c. *Abitibi-Consolidated Inc.,* REJB 2004-66455 (C.S.Q.)

[849] We shall thus maintain this part of the class definition as it stands and allow any Blais Member who meets those criteria to make a claim.

[850] As for the Plaintiffs' preliminary arguments, they would have the effect that, even if the TRDA is ultimately declared invalid and the general rules of prescription apply, none of the claims in these files would be prescribed. Their points in this regard come under the following headings:

a. the effect of article 2908 C.C.Q. and the definition of the Blais Class;

b. the principle of *fin de non recevoir;*

c. the Companies' continuing and uninterrupted faults over the entire Class Period.

[851] Before examining those points, a quick word on terminology. In this judgment, we use the terms "moral damages" and "compensatory damages" interchangeably. That is because, at the Class level, the only compensatory damages claimed are in the form of moral damages. That would not be the case, however, at the individual level. There, Class Members would necessarily have to be claiming compensatory damages other than moral, since the latter are covered by this judgment.

[852] Therefore, where this judgment speaks of "moral damages", that will apply to all forms of compensatory damages.

VII.A. ARTICLE 2908 C.C.Q. AND THE DEFINITION OF THE BLAIS CLASS

[853] Occupying a privileged status on several points, a class action also benefits from special rules relating to prescription. Those are set out in article 2908 of the *Civil Code*:

Art. 2908. A motion for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the motion. (The Court's emphasis)	**Art. 2908.** La requête pour obtenir l'autorisation d'exercer un recours collectif suspend la prescription en faveur de tous les membres du groupe auquel elle profite ou, le cas échéant, en faveur du groupe que décrit le jugement qui fait droit à la requête. (Le Tribunal souligne)
The suspension lasts until the motion is dismissed or annulled or until the judgment granting the motion is set aside; however, a member requesting to be excluded from the action or who is excluded therefrom by the description of the group made by the judgment on the motion, an interlocutory judgment or the judgment on the action ceases to benefit from the suspension of prescription.	Cette suspension dure tant que la requête n'est pas rejetée, annulée ou que le jugement qui y fait droit n'est pas annulé; par contre, le membre qui demande à être exclu du recours, ou qui en est exclu par la description que fait du groupe le jugement qui autorise le recours, un jugement interlocutoire ou le jugement qui dispose du recours, cesse de profiter de la suspension de la prescription.
In the case of a judgment, however, prescription runs again only when the judgment is no longer susceptible of appeal.	Toutefois, s'il s'agit d'un jugement, la prescription ne recommence à courir qu'au moment où le jugement n'est plus susceptible

d'appel.

[854] The class definition thus plays a critical role in determining prescription in a class action and it was amended for the Blais Class some eight years after the Authorization Judgment[385]. This opens the door to the Companies' argument that claims accruing in the gap between the authorization and three years prior to the Class Amending Judgment, a period that we shall call the "**C Period**"[386], are prescribed. If correct, this would result both under the normal rules and under the TRDA.

[855] ITL captures the essence of the issue in its supplemental Notes on prescription when it queries how an individual, who was diagnosed with lung cancer during the year 2008 and who was not a class member as per the Motion for Authorization filed in 1998, could benefit from the suspension of prescription provided by Article 2908.

[856] The only case submitted that was directly on point is the Superior Court judgment of Gascon, J. (now at the Supreme Court of Canada) in *Marcotte v. Fédération des caisses Desjardins du Québec*.[387] Although that case ultimately made it to the Supreme Court of Canada, its holdings with respect to the effect of article 2908 were challenged neither before the Court of Appeal nor before the country's highest court.

[857] In that file, an identical situation to ours arose when a period corresponding to the C Period occurred as a result of a modification of the class description. The Defendants there, like here, contended that the claims of the new members that accrued during their C Period were prescribed. Gascon J. rejected that argument based on article 2908 and on an analysis of "the group described in the judgment granting the motion", as mentioned in that provision.

[858] That class description in *Marcotte*, like the one for Blais, contained no closing date for class eligibility. The judge there reasoned that, since (a) such an omission should not prejudice the class members and (b) prescription is a ground of defence and, thus, up to the defendant to prove and (c) any doubt should be resolved in favour of the class members and (d) the original class had no closing date, then the "ambiguity" resulting from the absence of a closing date in the original description does not lead to a conclusion that the C Period claims are prescribed.[388]

[859] ITL argues that Gascon J. erred in this holding in that he "ignored the fundamental consideration of legal interest to sue contained in Art. 55 CCP, and failed to consider the Court's holding, undisturbed by the Court of Appeal, in *Billette* and *Riendeau*. This constituted an error."[389]

[860] The cases there cited can be distinguished from *Marcotte* and ours on two grounds. The class descriptions were never amended and both plaintiffs argued that the

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385 This discussion applies only to the Blais File.

386 This term comes from the diagrams that we later use to analyze the situation in the Blais File. As explained below, the Court prefers to calculate the upper date based on the date of service of the Motion to Amend the Class rather than the Class Amending Judgment that came several months later.

387 2009 QCCS 2743.

388 *Ibidem*, paragraphs 427-434.

389 At paragraph 28 of its supplemental Notes.

closing date should be the date of final judgment, which would have had the effect of depriving potential members of their right to request exclusion from the class.

[861] In *Billette*[390], an amendment was, in fact, requested with the objective of closing the class as of the final judgment. It was refused because it sought to include persons who, at the time of the amendment, had not then financed their automobile through one of the defendants. This is far from the situation in the Blais File, where we allowed an amendment to add a closing date as of the start of the trial in first instance, which was over a year before the motion to amend.[391]

[862] In *Riendeau*[392], where the class definition omitted a closing date, the absence of an amendment seemed to be central to the judge's reasoning, as she stated:

> *[85] Il n'est pas dans l'intérêt de la justice d'exiger le dépôt de nouvelles procédures judiciaires concernant des situations similaires au seul motif que de nouveaux membres ont acquis l'intérêt nécessaire pour poursuivre entre la requête pour autorisation et le jugement d'autorisation ou le jugement du fond. Par ailleurs, il faut respecter les exigences du Code de procédure civile relatives à l'existence d'un intérêt et à la possibilité de s'exclure.*
>
> *[86] La procédure d'amendement s'avère le moyen approprié pour pallier à cette difficulté.*[393]

[863] In line with that, ITL admits that "it is always possible post-authorization to extend the class definition to include members who have gained a legal interest. However, the only way to do so is by amendment." It adds that the normal rules of prescription would apply to the members added by the amendment, with the result that three-year prescription could render some of the claims inadmissible.

[864] That argument overlooks the effect of article 2908. It also overlooks the policy considerations referred to in paragraph 85 of *Riendeau*: it is in the interest of justice that people who subsequently acquire the necessary interest to sue before the final judgment be added to an existing class action rather than being forced to institute separate proceedings. The same view is reflected in the Court of Appeal's judgment in the *Loto* Québec class action where the court emphasized the need to favour access to justice and to avoid the unnecessary multiplication of suits[394].

[865] This said, if prescription applies to disqualify some original class members' claims, why should it not apply to disqualify the otherwise prescribed claims of persons added subsequently?

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390 *Billette v. Toyota Canada Inc.*, 2007 QCCS 319.

391 This is a similar situation to that in a third case cited by ITL: *Desgagné v. Québec (Ministre de l'Éducation, du Loisir et du Sport)*, 2010 QCCS 4838. There, as in *Riendeau (*2007 QCCS 4603, affirmed 2010 QCCA 366), the plaintiffs in an open-ended class asked the judge to close the class as of the date of judgment on the merits. The judge refused, principally because to do so would be to deprive new members of their right of exclusion – see paragraphs 63 and 64.

392 *Riendeau c. Brault & Martineau inc., Ibidem*.

393 Faced with the plaintiff's inaction on the point, the judge amended the class of her own accord, to close it as of the date of the authorization judgment.

394 *La Société des loteries du Québec c. Brochu*, 2007 QCCA 1392, at paragraph 8. See also: *Marcotte v. Banque de Montréal* 2008 QCCS 6894, at paragraphs 49-53.

[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

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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]

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397 See Jean-Louis BAUDOUIN, *Les obligations*, 7th edition, *op. cit.,* Note 328, at paragraph 730, page 854-855; Didier LLUELLES et Benoît MOORE, *Droit des obligations, op. cit.*, Note 303, at paragraph 2032, page 1160; *Fecteau c. Gareau*, [2003] R.R.A. 124 (rés.), AZ-50158441, J.E. 2003-233 (C.A.); *Loranger c. Québec* (Sous-ministre du Revenu), 2008 QCCA 613, paragraph 50.

398 *Ibidem, Loranger*.

399 *Ciment du Saint-Laurent inc.* v. *Barrette,* [2008] 3 S.C.C. 392, at paragraph 105.

400 *Ibidem*. *Ciment du Saint-Laurent inc.,* citing Jean-Louis BAUDOUIN and Patrice DESLAURIERS, *La Responsabilité Civile*, 7th edition, vol. 1, *op. cit.,* Note 328, paragraph 1-1422, *"Dommage continu – Il s'agit en l'occurrence d'un même préjudice qui, au lieu de se manifester en une seule et même fois, se*

[879] The fact that a fault and a prejudice might be continuing does not automatically make the case subject to a daily restart of prescription, what we shall call "daily prescription". For that to occur, there must not only be a continuing fault, but, more to the point, that fault must cause additional or "new" damage that did not exist previously: in essence.

[880] Seen from a different perspective, daily prescription will occur in cases where the cessation of the fault would result in the cessation of new or additional damages. In such cases, the continuation of the fault on Day 2 causes separate and distinct damages from those caused on Day 1, damages that would not have resulted had the fault ceased on Day 1. It is as if a new cause of action were born on Day 2[401].

[881] On the other hand, where the damage has already been done, in the sense that it is not increased or created anew by the continuing fault, daily prescription is not appropriate. This is logical. Most damages are continuing, in that they are felt every day, but that does not call daily prescription into play. If that were the case, daily prescription would apply in almost all cases.

[882] In the Blais File, the Plaintiffs rightly do not allege that daily prescription applies, since those damages were crystallized at the moment of diagnosis of a Disease. The fact that the fault and the moral damages continued thereafter, literally until death, does not open the door to daily prescription.

[883] Is the situation any different in the Létourneau File? There, the crystallization of the Companies' faults might be harder to pinpoint in time but, in light of the Class definition, it is no less determinable.

[884] By that definition, a Member must be "addicted" to the nicotine in the Companies' cigarettes as of September 30, 1998, meaning that he started to smoke those cigarettes at least four years earlier and, during the 30 days preceding September 30, 1998, he smoked at least one cigarette a day[402]. This formula thus determines the date at which a Member's dependence was established.

[885] By meeting the criteria for dependence, the Létourneau Member is in the same situation as the Blais Member at the moment of diagnosis. Once a person is dependent on nicotine, the damage resulting from that would not cease were the Companies to correct their failure to inform. Accordingly, daily prescription does not apply and the Court rejects Plaintiffs' argument in this regard.

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perpétue, en général parce que la faute de celui qui le cause est également étalée dans le temps. Ainsi, le pollueur qui, par son comportement, cause un préjudice quotidiennement renouvelé à la victime".

401 In *Ciment St-Laurent*, *ibidem*, where the plaintiffs complained of air pollution caused by the operation of a cement factory near where they lived, there was no fault present, given that the cement plant was operating legally. Nevertheless, that case is still useful as an example of a situation where the damages complained of would have ceased had the defendant ceased its offending behaviour.

402 This is the definition in place before we amend it in the present judgment. The amendment does not affect the present analysis. The third wing of that test, that of still smoking those cigarettes as of February 21, 2005, is not relevant for the analysis of prescription.

[886] Before conducting a detailed review of the effect of prescription, first under and then outside of the TRDA for the Blais File, we shall look first at the Létourneau File in light of the knowledge date there.

VII.D. THE LÉTOURNEAU FILE

[887] Since this action was taken on September 30, 1998, under the normal rules a Member's cause of action must have arisen after September 30, 1995 in order not to be prescribed. This must be viewed in light of the knowledge date there, which is March 1, 1996.

[888] The knowledge date is the earliest date at which a Member is deemed to have known that smoking the Companies' products caused dependence. Such knowledge is an essential factor to instituting a claim. Consequently, no Létourneau cause of action could have arisen before the knowledge date. Since it is after September 30, 1995, it follows that none of the Létourneau claims are prescribed, and this, whether under the normal rules or under the special rules of the TRDA.

[889] We have not forgotten that during oral argument the Plaintiffs admitted that claims for punitive damages arising before September 30, 1995 were prescribed. That, however, does not affect this finding, which is predicated on the fact that the claims did not arise before March 1, 1996.

[890] As for the Blais Class, the knowledge date of January 1, 1980 falls well before the date the action was taken in 1998. As a result, there is a possibility of prescription, a question we examine in the following sections of the present judgment.

VII.E. THE BLAIS FILE UNDER THE TRDA

VII.E.1 MORAL/COMPENSATORY DAMAGES

[891] For this analysis, we have expanded on a diagrammatic format relating to the Blais File first developed by RBH in Appendix F to its Notes and later expanded at the Court's request to cover all cases. For Blais, those diagrams use the following dates, keeping in mind that the beginning of the Class Period is January 1, 1950:

a. November 20, 1995: three years prior to the institution of the action;

b. February 21, 2005: the date of the Authorization Judgment;

c. July 3, 2010: three years prior to the Class Amending Judgment;

d. March 12, 2012: the end date for membership in the Class (the first day of trial);

e. July 3, 2013: the date of the Class Amending Judgment.

[892] For points "c" and "e", the Court prefers the date that the Motion to Amend the Classes was served by the Plaintiffs over the date of the resulting Class Amending Judgment. Prescription is interrupted by the service of an action and the service of that type of motion can be likened to that[403]. It was first served on April 4, 2013, so three

[403] See *Marcotte v. Bank of Montreal* [2008] QCCS 6894, at paragraph 39.

years prior to that is April 4, 2010. These are the dates the Court will use for this analysis, with the C Period becoming the time between February 21, 2005 and April 4, 2010.

[893] Diagram I depicts the prescription scenario for the claim for moral damages in the Blais File under the TRDA.

I - BLAIS FILE: COMPENSATORY DAMAGES - WITH THE TRDA

1950	1995/11/20	2005/02/21	2010/04/04	2012/03/12	2013/04/04
I-A	I-B	I-C	I-D	I-E	
not prescribed	not prescribed	**contested**	not prescribed	outside the Class	

[894] The only contestation relates to the I-C Period. The Companies argue that the TRDA has no application to any of the claims added by the Class Amending Judgment and that the normal rules of prescription apply to those. As such, claims accruing in period I-C would be prescribed because suit was not brought within three years.

[895] Although the TRDA might not cover this period, article 2908 of the Civil Code does. Accordingly, for the reasons set out in Section VII.A above, the Court rejects the contestation and reiterates that claims accruing in the C Period are not prescribed.

[896] As a result, under the TRDA none of the Blais Class claims for moral damages are prescribed.

VII.E.2 PUNITIVE DAMAGES WITH THE TRDA — AND WITHOUT IT

[897] The Companies argue that the TRDA has no impact on punitive damages. The Plaintiffs do not contest that position and neither does the Court. The use of the term "to recover damages" (In French: "*pour la réparation d'un préjudice*") in section 27 indicates that this provision does not encompass punitive damages, since they are not meant to compensate for injury suffered. Hence, claims for those fall outside the ambit of section 27 and will be governed by the normal rules of prescription.

[898] In that light, Diagram II depicts the situation with respect to claims for punitive damages in the Blais File in all cases, i.e., whether or not the TRDA applies.

II - BLAIS FILE: PUNITIVE DAMAGES – IN ALL CASES

1950	1995/11/20	2005/02/21	2010/04/04	2012/03/12	2013/04/04
II-A	II-B	II-C	II-D	II-E	
prescribed	not prescribed	**contested**	not prescribed	outside the claim	

[899] The only contestation relates to the C Period. The parties' arguments with respect to that period are the same now as under Diagram I for moral damages and the Court's ruling is also the same. Applying article 2908, we rule that the claims in period III-C are not prescribed, irrespective of the application of the TRDA.

[900] Consequently, whether or not the TRDA applies, Blais claims for punitive damages in period II-A are prescribed, whereas those arising in periods II-B, II-C and II-D are not.

[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

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[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

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[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

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406 In light of our decision on the Létourneau Class's claims for moral damages, we shall deal with this class first.

407 See section II.C.1 in the ITL chapter of this judgment.

408 *Face à cette évidence, on doit conclure que le risque accru de morbidité et mort prématurée constitue le plus grave dommage subi par les personnes avec dépendance au tabac*: at page 2

life, both with respect to physical and social aspects.[409] He opined that the mere fact of being dependent on tobacco is, itself, the principal burden caused by smoking, since dependence implies a loss of freedom of action and an existence chained to the need to smoke – even when one would prefer not to[410].

[944] Thus, based on Dr. Negrete's second report, we hold that dependent smokers can suffer the following moral damages:

- The risk of a premature death is the most serious damage suffered by a person who is dependent on tobacco (Exhibit 1470.2, page 2);
- The average indicator of quality of life is lower for smokers than for ex-smokers, especially with respect to mental health, emotional balance, social functionality and general vitality (page 2);
- There is a direct correlation between the gravity of the tobacco dependence and a lower perception of personal well-being (page 2);
- Dependence on tobacco limits a person's freedom of action, making him a slave to a habit that permeates his daily activities and restricts his freedom of choice and of decision (pages 2-3);
- When deprived of nicotine, a dependent person suffers withdrawal symptoms, such as irritability, impatience, bad moods, anxiety, loss of concentration, interpersonal difficulties, insomnia, increased appetite and an overwhelming desire to smoke (page 3).

[945] What is more difficult to discern from the evidence, however, is the extent to which all dependent smokers suffer all these damages and to what degree.[411]

[946] Based on the first report of Dr. Negrete, the Plaintiffs estimate the number of Létourneau Class Members at 1,200,000 people in the first half of 2005 (Exhibit 1470.1, page 21). By the end of the trial, that number had been reduced to about 918,000[412]. In such a large group, the Companies see wide variation in the nature and degree of moral damages that will be incurred. The Court does, as well.

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409 *Une moindre qualité de vie - tant du point de vue des limitations physiques que des perturbations dans les fonctions psychique et sociale - doit donc être considérée comme un des inconvénients majeurs associes avec la dépendance tabagique*: at page 2.

410 *La personne qui développe une dépendance a la nicotine, même sans être atteinte d'aucune complication physique, subit l'énorme fardeau d'être devenue l'esclave d'une habitude psychotoxique qui régit son comportement quotidien et donne forme à son style de vie. L' état de dépendance est, en soi même, le trouble principal causé par le tabagisme.*
Cette dépendance implique une perte de liberté d'action, un vivre enchainé au besoin de consommer du tabac, même quand on préférerait ne pas fumer: at pages 2-3.

411 The Court of Appeal judgment in *Syndicat des Cols Bleus Regroupés de Montréal (SCFP, section locale 301) v. Boris Coll*, 2009 QCCA 708, points out the difficulty of analyzing moral damages across a large number of class members, in that case, caused by a time delay resulting from an illegal strike: see paragraphs 90 and following, especially paragraphs 99, 103 and 105.

412 Exhibit 1733.5. It is possible that the amendment to the Létourneau Class description ordered in the present judgment could affect this number, although the Court is not of that opinion. This, in any event, becomes moot in light of our decision to dismiss the claim for compensatory damages in Létourneau and to refuse to proceed with distribution of punitive damages to the individual Members.

[947] As witness to that, the proof indicates that the level of difficulty experienced by smokers attempting to quit varies greatly, with some people succeeding with little or no difficulty and others repeatedly failing. Spread over more than a million people, that will affect the intensity, and even the existence, of several of the potential damages identified by Dr. Negrete.

[948] In its Notes, RBH pounds home the point that "Plaintiffs have not given the Court sufficient evidence from which it could conclude that all class members have suffered substantially similar injuries, such that it could award moral damages on a collective basis".[413] In other words, as they say later, there is no evidence that "all class members are similarly situated such that the court could select a common dollar amount to fairly compensate every class member"[414].

[949] The Court agrees to a large extent. It also agrees in principle with the Companies' point that a grant of moral damages on a collective level would require proof that all Class Members actually wanted to quit and suffered humiliation as a result of not being able to do so. The record is devoid of proof of that, as well. This is a critical element and neither can it be assumed nor can the Court see any basis on which to draw a presumption in that respect.[415]

[950] Despite the presence of fault, damages and causality, the Court must nevertheless conclude that the Létourneau Plaintiffs fail to meet the conditions of article 1031 for collective recovery of compensatory damages. Notwithstanding our railing in a later section against the overly rigid application of rules tending to frustrate the class action process, we see no alternative. The inevitable and significant differences among the hundreds of thousands of Létourneau Class Members with respect to the nature and degree of the moral damages claimed make it impossible to establish with sufficient accuracy the total amount of the claims of the Class. That part of the Létourneau action must be dismissed.

[951] There is an additional obstacle. Even if we were able to award compensatory damages to the Létourneau Class, it would be "impossible or too expensive" to administer the distribution of an amount to each of the members[416]. Proof of dependence would almost always be subjective, with little or no independent substantiation available, and, therefore, open to potentially rampant abuse. Moreover, the relatively modest amount that could be awarded to any individual Member[417] would rival the cost of administering the distribution process for that person. It would simply not make sense to undertake such an exercise.

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413 At paragraph 1207.

414 At paragraph 1211.

415 As discussed in the case of *Infineon Technologies AG v. Option consommateurs*, [2013] SCR 600, at paragraph 131, some types of damages are more easily assessed class wide, than others. Moral damages for tobacco dependence fall more in the latter category, as were those for defamation in the case of *Bou Malhab*, [2011] 1 SCR 214.

416 Article 1034 CCP.

417 Were we to grant moral damages in Létourneau, we would have opted for an amount in the vicinity of $2,000 per Member.

[952] Article 1034 of the Code of Civil Procedure grants the Court the discretion to refuse to proceed with the distribution of an amount to each of the members in such circumstances and that is what we would have done in Létourneau had we been able to order collective recovery.

[953] For punitive damages, since they are not tied to the effect on the victim, the wide diversity among the Létourneau Members' situations does not pose a problem. This is a start, but it does not alleviate the concern raised under article 1034.

[954] For the same reasons mentioned with respect to compensatory damages, we must refuse to proceed with the distribution of punitive damages to the Létourneau Members. That does not mean, however, that we cannot condemn the Companies to such damages on a collective basis. We shall do so and, as foreseen in that article, shall provide for the distribution of that amount after collocating the law costs and the fees of the representative's attorney. We look into the distribution question in a later section.

[955] Dealing with what has now become a moot issue, at least with respect to moral damages, we would have declared Mme. Létourneau eligible to collect damages on the same basis as any other eligible Member of the Létourneau Class. The Code of Civil Procedure makes it clear that the judgment in Small Claims Court refusing her action for reimbursement of certain expenses related to her attempts to break her tobacco dependence has no relevance to the present case[418].

[956] Finally, where the Court rejects a claim for which fault and damages have been proven, it would normally proffer its best estimate of the amount it would have granted in the event of a different opinion in appeal. Here, we are unable to do that. To attempt to put a number to the moral damages actually suffered by the Létourneau Class would be pure conjecture on our part.

VIII.B THE BLAIS FILE

[957] We shall follow Dr. Siemiatycki's segregation of the Diseases in his work and, thus, analyze the case of each Disease subclass separately.

[958] Before going there, let us say a word about the Plaintiffs' argument in favour of using an "average amount" of moral damages within a class or subclass. In their Notes, they submit:

> **2039.** In a class action, the quantum of damages can be evaluated based upon a presumption of fact, itself based upon an average, as long as it does not increase the debtor's total liability.[419]

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418 See article 985 CCP.

419 The following is the Plaintiffs' footnote #2493, which appears at the end of their paragraph 2039: *St. Lawrence Cement Inc. v. Barrette*, 2008 C.S.C. 64, at paras 115-116, referring to *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211; Denis FERLAND, Benoît EMERY et Kathleen DELANEY-BEAUSOLEIL, « *Le recours collectif – Le jugement* (art. 1027 à 1044 C.p.c.) » in *Précis de procédure civile du Québec,* Volume 2, 4e édition, (Cowansville : Éditions Yvon Blais, 2003) at para 133; *Conseil pour la protection des malades* c. *Fédération des médecins spécialistes du Québec*, EYB 2010-183460 (C.S), EYB 2010-183460, at para 115 reversed in part, but not on the question of evaluating moral injury by EYB 2014-234271 (C.A.), at paras 114-115.

> **2062.** As established by case-law, injuries of this nature are impossible to quantify in dollar amounts. Calculating moral damages thus remains an arbitrary exercise. The damages claimed, though insufficient in certain cases, represent an average amount accounting for the variations in symptoms and consequences of the disease on each class member.

[959] We agree with much of what is said there, but not all.

[960] Below, we opt to apply a "uniform amount" of moral damages across the Blais subclasses. This is not the same as an average, which evokes a mathematical calculation. We perform no such calculation in arriving at our uniform amount. It simply represents our best estimate of the typical moral damages that a Blais subclass Member suffered as a result of contracting the Disease in question.

[961] Let us now examine the personal claim of Mr. Blais.

[962] In Dr. Desjardins' examination of him, it is indicated that he smoked only JTM products[420]. Accordingly, the other Companies argue that his claim against them should be rejected. Since moral damages are awarded on a solidary basis, that argument fails. For punitive damages, however *de minimis* the amount, it has merit, but no effect. The amounts deposited as punitive damages for each subclass must be pooled for practical reasons, so it is not possible to isolate payments on a Company-by-Company basis.

[963] There is also the fact that Dr. Barsky identifies a number of mitigating factors with respect to the causes of Mr. Blais's lung cancer and emphysema. He notes that the type of emphysema could have been caused by other things than smoking and that there were several occupational factors besides smoking that could have led to his lung cancer[421].

[964] Nevertheless, although stating that "it cannot be said that Mr. Blais would not have developed lung cancer in the absence of cigarette smoking", he opines that "considering the magnitude of Mr. Blais' exposure to cigarette smoking, I cannot exclude it as having played a role in his lung cancer".[422] This does not contradict the opinions of Dr. Desjardins that the most probable cause of the Diseases in Mr. Blais was smoking[423]. We accept that opinion.

[965] Mr. Blais's estate will be eligible to collect damages on the same basis as any other eligible Member of the Blais subclasses.

VIII.B.1 LUNG CANCER

[966] Dr. Barsky contested Dr. Siemiatycki's methods and results. He opined that there were four different histological types of lung cancer tumours having varying degrees of association, and therefore relative risk, with smoking: small cell carcinoma, squamous cell carcinoma, large cell undifferentiated carcinoma and adenocarcinoma, which can be further subdivided into bronchioloalveolar lung cancer (BAC), and traditional adenocarcinoma (Exhibit 40504, page 5).

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420 Export A and Peter Jackson cigarettes: Exhibit 1382, at page 89.
421 Exhibit 40504, at page 32.
422 Exhibit 40504, at page 32.
423 Exhibit 1382, at pages 94 and 95.

[967] He cites studies to the effect that:

- small cell carcinoma bears a strong relationship with smoking;
- of the non small cell types, squamous cell carcinoma bears a strong association; large cell undifferentiated bears an inconsistent association, and adenocarcinoma, a less well defined and more complicated association;
- lymphoma, sarcoma, mucoepidermoid carcinoma, carcinoid, atypical carcinoid, bronchioloalveolar lung cancers have an uncertain association with smoking, while other types such as adenocarcinoma, large cell undifferentiated carcinoma, and adenosquamous carcinoma have weak to modest associations. Still other cell types, including squamous cell carcinomas and small cell carcinoma have strong to very strong associations;
- some other types of lung cancer appear not to be associated with smoking at all or do not have a consistent association with smoking. (Exhibit 40504, pages 6-7 and 19-20; references omitted)

[968] Dr. Barsky's evidence on these points, although not contradicted, does not take the Court very far. It is fine to say that certain cancers have "an uncertain association" or "weak to modest associations", but he does not specify what that means. Nor does he specify the percent of all lung cancers that each type of cancer represents. Nor, of course, does he do the calculations that logically are required so as to correct the figures advanced by Dr. Siemiatycki.

[969] The red flags he wishes to raise are of no use to the Court in the absence of presenting a way around those obstacles, something the Companies' experts, alas, never do. His testimony does not shake our confidence as to the accuracy of Dr. Siemiatycki's results.

[970] He also points out that there is "some evidence for the involvement of human papillomavirus in lung cancers"[424], estimating it to be a factor in about two to five percent of lung cancers but higher in oropharyngeal cancers[425]. The Court does not reject that opinion, but does not see that it has much effect on the acceptability of Dr. Siemiatycki's work. Smoking need not be the only cause of a Disease in order for it to be considered as a cause.

VIII.B.1.a THE SIZE OF THE SUBCLASS

[971] As for the size of the lung-cancer subclass, we have earlier indicated our confidence in Dr. Siemiatycki's work, and this includes his calculations with respect to these figures. As noted in section VI.C.6, Dr. Siemiatycki's original probability of causation figures for lung cancer were in accord with those published by the US National Cancer Institute, and several of the Companies' experts agreed that they were within a reasonable range. This supports our confidence in the quality of his work.

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424 Exhibit 40504, at pdf 22.
425 Transcript of February 18, 2014, at pages 47 and 108.

[972] In Table A.1 of Exhibit 1426.7[426], he sets out the probability of causation (PC) by smoking of each of the Diseases for both males and females at four different critical amounts (CA). At the CA that we have chosen, 12 pack years, the PC averaged for both sexes is remarkably similar among the Diseases, about 71%. We note, however, that Dr. Siemiatycki does not use the average for each Disease but does his calculation using the CA for each gender within each Disease.

[973] Anecdotally, his figure of 81% for male lung cancer victims goes well with the "85 Percent Formula" cited by Mr. Mercier, ITL's former president: 85% of lung cancers occur in smokers, but 85% of smokers do not have lung cancer[427].

[974] In his updated Tables D1.1, D1.2 and D1.3[428], Dr. Siemiatycki applies the CA to the total number of cases for the period claimed (1995-2011[429]) to establish the number of victims by gender of each of the Diseases. This is part of the equation for computing the number of Members in the Blais subclasses for the purpose of determining the size of the deposit to cover damages. In the absence of alternative estimates by the Companies, the Court accepts Dr. Siemiatycki's figures.

[975] We do, however, recognize that it is possible that under Dr. Siemiatycki's method some people might be included in the classes, and thus compensated, incorrectly. But should that be a concern with classes of the size here?

[976] The courts should not allow the spirit and the mission of the class action to be thwarted by an impossible pursuit of perfection. While respecting the general rules of the law, the courts must find reasonable ways to avoid allowing culpable defendants to frustrate the class action's purpose by insisting on an overly rigid application of traditional rules. This is particularly so where the fault, the damages and the causal link are proven, as they are here.

[977] In the instant case, the Companies will not be penalized by an adjustment of the size of the classes in the manner proposed. By assessing "uniform amounts" within the subclasses of Members in Blais, the total amount of damages will be "sufficiently accurate" after such an adjustment. The primary objective of civil liability is to compensate reasonably for damages incurred. This process satisfies that and also ensures that the Companies are paying no more than a fair amount.

[978] The lung-cancer subclass in Blais has 82,271 Members.

VIII.B.1.b THE AMOUNT OF DAMAGES FOR THE SUBCLASS

[979] The evidence of moral damages for the lung-cancer subclass is found in the report of Dr. Alain Desjardins (Exhibit 1382), recognized by the Court as an expert chest and lung clinician. He outlines the treatment options for the three types of cancer covered by the Class description in the Blais File, those options being surgery, radiation therapy, chemotherapy and long-term pharmacological treatment. The treatments are relevant

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426 This is an update to Table A in his original report using 12 pack years as the Critical Amount.

427 Transcript of April 18, 2012, at pages 303 and following.

428 Exhibit 1426.7. For lung cancer with a Critical Amount of 12 pack years, incident cases are: males 54,375, females 27,896, TOTAL = 82,271.

429 The period actually goes until March 12, 2012.

because, in addition to the damages caused by the cancer itself, the secondary effects of the treatments cause additional significant hardship that can last for years.

[980] Given that the same treatments are prescribed for each of the three cancers, the Court will assume that the same secondary effects from the treatments apply to each Disease. In addition, there will be other effects related to the location of the tumours in the body.

[981] In his report at pages 75 through 78, Dr. Desjardins describes the temporary secondary effects of radiation therapy and chemotherapy in the context of lung cancer as follows:

- headaches, nausea, vomiting, fatigue, sores in the mouth, diarrhoea, deafness;
- inflammation of the esophagus;
- skin burns;
- stiffness and joint pain;
- radical pneumonitis causing fever, coughing and los of breath;
- loss of body hair;
- swelling of the lower members;
- increased susceptibility to infection.

[982] As for lung cancer itself, at page 80 of his report he notes that a person living with cancer is affected both physically and psychologically, as well as spiritually, with certain patients experiencing significant stress as a result of being diagnosed with lung cancer. He goes on to cite the following specific affects:

- rapid fluctuations in the state of physical health;
- fatigue, lack of energy and weakness;
- loss of appetite;
- pain;
- loss of breath;
- paralysis in one or more members;
- depression.

[983] The Companies did not challenge the Plaintiffs' characterization of the moral damages, nor the amount claimed for each Member in the most serious cases of any of the Diseases. The contestation in this area was directed more at the Plaintiffs' use of one single amount for such damages across the subclasses for each Disease.

[984] The evidence of Drs. Desjardins and Guertin convinces us that few cases of lung and throat cancer fall below very serious. As well, the amount proposed is not excessive in the context of life-threatening, and life-ruining, illnesses. Accordingly, we accept a

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*

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430 The theoretical maximum allowed for moral damages was set at $100,000 in 1981 by the Supreme Court. The actualized value of that is $356,499 as of January 1, 2012: Plaintiffs' Notes, at paragraph 2042.

431 Dr. Siemiatycki updated his figures to the end of 2011 for 12 pack years in Exhibit 1426.7.

432 Siemiatycki Table D1.1 in Exhibit 1426.7.

433 Tables D1.2 and D1.3 of Exhibit 1426.7.

434 Dr. Guertin analyzes cancers he calls "CE des VADS", which can be loosely translated as: "epidermoidal carcinoma of the upper aero-digestive paths", and includes cancers of the larynx, oropharynx, hypopharynx and the oral cavity. In our decision on the amendment of the class descriptions, we excluded cancer of the oral cavity from consideration in this file.

435 Exhibit 1387.

> *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

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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).

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439 Exhibit 40549, at page 23.
440 See section VI.C.6 of the present judgment.
441 Exhibit 1426.7, Table D3.1.

[1002] In an attempt to simplify the file, the Plaintiffs amended the amount claimed for the emphysema subclass to a universal amount of $30,000, arguing that such a compromise was most conservative and ensured that the award would not unfairly penalize the Companies. This seems reasonable. In fact, if the Court had to arbitrate an amount for this subclass, it would likely have landed a bit higher.

[1003] Another advantage to adopting such a low figure is that it serves to correct the distortion in this analysis caused by using COPD statistics, which include chronic bronchitis and emphysema, in lieu of figures for emphysema alone.

[1004] Consequently, we accept a uniform figure of $30,000 for individual moral damages for the emphysema subclass. The total moral damages for the subclass are calculated as follows:

Members[442]	-12% for immigration	Total moral damages	80% of total
23,086	20,316 x $30,000 =	$609,480,000	$487,584,000

VIII.B.4 APPORTIONMENT AMONG THE COMPANIES

[1005] Table 1005 shows the amount of moral damages in the Blais File for all subclasses, based on 80%. It comes to $6,858,864,000[443].

TABLE 1005

Disease	Moral Damages for subclass at 80%
Lung Cancer	$5,791,840,000
Throat Cancer	$579,440,000
Emphysema	$487,584,000
TOTAL	$6,858,864,000

[1006] Since the Companies are solidarily liable for moral damages, it is necessary to determine the share of each therein for possible recursory purposes[444]. This will also indicate the amount to be deposited initially by each Company.

[1007] The Plaintiffs propose dividing this total among the Companies according to their respective average market shares over the Class Period. That would result in the following percentage share for each Company:

- ITL: 50.38%
- RBH: 30.03%
- JTM: 19.59%

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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.

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[445] We take this item to include the efforts made not to warn the public of the health risks.

[1012] As for the other Companies, we see nothing that justifies varying from the logical basis of market share for this apportionment. Since RBH's share was slightly more than one and one-half times that of JTM's, we shall round their respective shares to 20% and 13%.[446]

[1013] Table 1013 summarizes the condemnation of each Company for moral damages in the Blais file, at 80%[447].

TABLE 1013

COMPANY	TOTAL DAMAGES x %	PRE-INTEREST AWARD
ITL	$6,858,864,000 x 67%	$4,595,438,800
RBH	$6,858,864,000 x 20%	$1,371,772,800
JTM	$6,858,864,000 x 13%	$891,652,400

[1014] To calculate the actual value of the condemnation, however, it is necessary to increase the figures in the third column by interest and the additional indemnity. Given the lifespan of these files to date, that total surpasses the 15 billion dollar mark[448]. This brings us to consider the amount of the initial deposit for moral damages in Blais.

[1015] Normally, we would simply order the Companies to deposit the full amount into some sort of trust account and that would be that. In the instant case, however, this would be counter-productive to the principal objective of compensating victims. We do not see how the Companies could come up with such amounts and stay in business. Moreover, to risk the Companies' demise to that degree would be something of a pointless exercise. As mentioned earlier, it is unlikely that actual claims will come to anything more than a fraction of the total amount and our goal is not to maximize the *reliquat*.

[1016] The Code of Civil Procedure provides for a high degree of flexibility when it comes to issues relating to the execution of the judgment in a class action[449]. On that basis, we shall set the total initial deposit for all the Companies at what appears to be the "manageable amount" of one billion dollars ($1,000,000,000), i.e., approximately one year's average aggregate before-tax profit, a calculation we make in the following chapter

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446 The Plaintiffs seek solidary condemnations for the compensatory damages. We deal with that issue in Chapter VIII of the present judgment.

447 Although specified by Company, the moral damages in Blais will be awarded on a solidary basis among the Companies for reasons we have explained above. We also remind the reader that the total moral damages for the Class will actually be higher, since some Members will have the right to claim them at 100%.

448 Since 1998, combined interest and additional indemnity averaged approximately 7.5% a year. Since these amounts are not compounded, i.e., there is no interest on the interest, the base figure is increased by about 127% over the seventeen-year period.

449 See articles 1029 and 1032, in part, which read;

1029. The court may, *ex officio* or upon application of the parties, provide measures designed to simplify the execution of the final judgment.

1032. […] The judgment may also, for the reasons indicated therein, fix terms and conditions of payment.

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]

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450 [1995] 2 S.C.R. 1130, at para. 196.
451 *Whiten v. Pilot Insurance Co.*, [2002] S.C.R. 595, at para. 36.
452 2011 QCCA 1361, at paragraph 236 ("***Cinar***").
453 *Op. cit., Time*, Note 20, at paragraph 180.

[1021] The faults committed by each Company conform to those criteria. The question that remains is to determine the amount to be awarded in each file for each Company and the structure to administer them, should that be the case.

[1022] We should point out that the considerations leading to the 67/20/13 apportionment for moral damages also have relevance for the amount of punitive damages for each Company. Other factors could also affect those amounts, as mentioned in article 1621 of the Civil Code. We shall analyze that aspect on a Company-by-Company basis below.

IX.A THE CRITERIA FOR ASSESSING PUNITIVE DAMAGES

[1023] Article 1621 sets out guidelines for an award of punitive damages in Quebec. It reads:

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.	**1621.** Lorsque la loi prévoit l'attribution de dommages-intérêts punitifs, ceux-ci ne peuvent excéder, en valeur, ce qui est suffisant pour assurer leur fonction préventive.
Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.	Ils s'apprécient en tenant compte de toutes les circonstances appropriées, notamment de la gravité de la faute du débiteur, de sa situation patrimoniale ou de l'étendue de la réparation à laquelle il est déjà tenu envers le créancier, ainsi que, le cas échéant, du fait que la prise en charge du paiement réparateur est, en tout ou en partie, assumée par un tiers.

[1024] Quebec law provides for punitive damages under the Quebec Charter and the CPA and we have ruled that in these files such damages are warranted under both. We recognize that neither one was in force during the entire Class Period, the Quebec Charter having been enacted on June 28, 1976 and the relevant provisions of the CPA on April 30, 1980. Consequently, the punitive damages here must be evaluated with reference to the Companies' conduct only after those dates.

[1025] Admittedly, this excludes from 50 to 60 percent of the Class period but, barring issues of prescription, it makes little difference to the overall amount to be awarded. The criteria of article 1621 are such that the portion of the Class Period during which the offensive conduct occurred is sufficiently long so as to render the time aspect inconsequential.

[1026] On another point, the amount of punitive damages to be awarded would not necessarily be the same under both statutes. The very different nature of the conduct targeted in one versus the other could theoretically give different results, in particular, with respect to the gravity and scope of the Companies' faults and the seriousness of the

infringement of the Members' rights[454]. In this instance, though, that distinction is not relevant.

[1027] The Companies' liability under both statutes stems from the same reprehensible conduct. True, it deserves harsh sanctioning, but it cannot be sanctioned twice with respect to the same plaintiffs. Given the gravity of the faults, the assessment process for punitive damages arrives at the same result under either law. Accordingly, it is neither necessary nor appropriate to analyze quantum separately by statute.

[1028] The same applies to a possible assessment between the two Classes. It is proper to assess one global amount of punitive damages covering both files, rather than separate assessments for each. Like for the statutes, the liability in both files results from the same conduct and faults. In fact, the connection between the two is such that the Létourneau class could have actually been a subclass of Blais.

[1029] As for the factors to consider in assessing quantum, the Supreme Court has made it clear that the gravity of the debtor's fault is "*undoubtedly the most important factor*"[455]. This is the element that the Plaintiffs emphasize, along with ability to pay.

[1030] That said, other criteria must also be factored into the calculation, including without limitation those mentioned in article 1621. We must also keep in view that the purposes for which punitive damages are awarded are "prevention, deterrence (both specific and general) and denunciation".[456] Hovering over all of these is 1621's guiding principle that "such damages may not exceed what is sufficient to fulfil their preventive purpose".

[1031] This guiding principle, as we shall see, is not unidimensional.

[1032] The Companies make much of the fact that, even if they had wanted to mislead the public about the dangers of smoking, which they assure that they did not, current governmental regulation of the industry creates an impermeable obstacle to any such activity. All communication between them and the public, in their submission, is prohibited, thus assuring that absolute prevention has been attained. It follows, in their logic, that there can be no justification for awarding any punitive damages.

[1033] They overlook the objectives of general deterrence and denunciation.

[1034] In paragraph 1460 of ITL's Notes, its attorneys reproduce part of a sentence from paragraph 155 in *Time*: "An award of punitive damages is based primarily on the principle of deterrence and is intended to discourage the repetition of similar conduct …". They stopped reading too soon. The full citation is as follows:

> An award of punitive damages is based primarily on the principle of deterrence and is intended to discourage the repetition of similar conduct both by the wrongdoer and in society. The award thus serves the purpose of specific and general deterrence.[457] (The Court's emphasis)

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454 *Op. cit., Time*, Note 20, at paragraph 200.
455 *Op. cit.*, *Time*, Note 20, at paragraph 200.
456 *Cinar*, *op. cit.*, Note 451, at paragraph 126 and 134.
457 *Op. cit.*, *Time*, Note 20, at paragraph 155.

[1035] The full text of this passage confirms that the deterrence effect of punitive damages is not aimed solely at the wrongdoer, but is equally concerned with discouraging other members of society from engaging in similar unacceptable behaviour. Similar reasoning is found in the Supreme Court's decision in *DeMontigny*[458].

[1036] A need for denunciation is clearly present in our files. The two final sentences of the same paragraph in *Time* make that clear:

> In addition, the principle of denunciation may justify an award where the trier of fact wants to emphasize that the act is particularly reprehensible in the opinion of the justice system. This denunciatory function also helps ensure that the preventive purpose of punitive damages is fulfilled effectively.[459]

[1037] Over the nearly fifty years of the Class Period, and in the seventeen years since, the Companies earned billions of dollars at the expense of the lungs, the throats and the general well-being of their customers[460]. If the Companies are allowed to walk away unscathed now, what would be the message to other industries that today or tomorrow find themselves in a similar moral conflict?

[1038] The Companies' actions and attitudes over the Class Period were, in fact, "particularly reprehensible" and must be denounced and punished in the sternest of fashions. To do so will be to favour prevention and deterrence both on a specific and on a general societal level. We reject the Companies arguments that there is no justification to award punitive damages against them.

[1039] On another point, it seems evident that the nature of the damages inflicted in Blais versus Létourneau is not the same. The harm suffered by dependent persons is serious, but it is not on a level of that experienced by lung and throat cancer patients, nor by persons suffering from emphysema. Hence, the gravity of the fault is not the same in both files.

[1040] It is also relevant to note that we refuse moral damages in the Létourneau File, whereas in Blais we grant nearly seven billion dollars of them, plus interest. Thus, the reparation for which the Companies are already liable is quite different in each and a separate assessment of punitive damages must be done for each file, as discussed further below.

[1041] As for which periods of time the Court should consider the Companies' conduct, the Plaintiffs argue at paragraph 2158 of their Notes that "even if claims for punitive damages in respect of conduct prior to 1995 were prescribed, the Court's award of punitive damages would still have to reflect the Defendants' egregious misconduct throughout the entire class period". They cite the *Time* decision in support:

> 174. […] it is our opinion that the decision to award punitive damages should also not be based solely on the seriousness of the carelessness displayed at the time of

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458 *Op. cit.*, Note 20, at paragraph 49.

459 *Op. cit.*, *Time*, Note 20, at paragraph 155.

460 As stated below, ITL and RBH have each earned close to half a billion dollars a year before tax in the past five years, while JTM's figure is around $100,000,000. We discuss the issue of "disgorgement" of profits further on.

> the violation. That would encourage merchants and manufacturers to be imaginative in not fulfilling their obligations under the *C.P.A.* rather than to be diligent in fulfilling them. As we will explain below, our position is that the seriousness of the carelessness must be considered in the context of the merchant's conduct both before and after the violation[461].

[1042] The Plaintiffs would thus have us consider the Companies' conduct not only before the violation of the CPA, but also before the CPA came into force - and in spite of the prescription of some of the claims. Their position is similar with respect to the Quebec Charter.

[1043] Strictly speaking, we cannot condemn a party to damages for the breach of a statute that did not exist at the time of the party's actions. That said, this is not an absolute bar to taking earlier conduct into account in evaluating, for example, the defendant's general attitude, state of awareness or possible remorse[462].

[1044] In any event, it is not necessary to go there now. The period of time during which the two statutes were in force during the Class Period and the gravity of the faults over that time obviate the need to look for further incriminating factors.

[1045] The final argument we shall deal with in this section is ITL's submission that deceased Class Members' claims for punitive damages cannot be transmitted to their heirs under the rules of either Civil Code in force during the Class Period.

[1046] Concerning the "old" code, the CCLC, which was in force until January 1, 1994, at paragraph 184 of its Notes, ITL cites the author Claude Masse to assert that the CCLC "did not provide for a claim for punitive damages for a breach of a personality right to be transmitted to the heirs of a deceased plaintiff. As a result, the heirs of the Class Members who died before January 1, 1994 of both Classes cannot assert such a claim in this proceeding." Although the first sentence is technically not incorrect, ITL's use of it is misleading.

[1047] Professor Masse merely states that the transmissibility of that right was not "clearly established" prior to the "new" CCQ[463]. This is not particularly surprising. Punitive damages were a relatively recent addition to Quebec law at the time the Civil Codes changed and it is possible that the question had not yet been answered in our courts.

[1048] Whatever the case, given that the doctrine cited does not stand for the principle advanced, ITL offers no relevant authority to support its position. We reject its argument with respect to the CCLC both for that reason and for the policy consideration mentioned in the following paragraphs. The claims for punitive damages of Members who passed away before January 1, 1994 are transmissible to their heirs.

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461 *Op. cit*, *Time*, Note 20, paragraph 174.

462 See Claude DALLAIRE and Lisa CHARMANDY, *Réparation à la suite d'une atteinte aux droits à l'honneur, à la dignité, à la réputation et à la vie privée*, JurisClasseur Québec, coll. "Droit Civil", Obligations et responsabilité civile, fasc. 27, Montréal, LexisNexis Canada, at paragraphs 74 and 75.

463 "*clairement établie*": Claude MASSE, « *La responsabilité civile* », dans La réforme du Code civil - Obligations, contrats nommés, vol. 2, Les Presses de l'Université Laval, 1993, at page 323.

[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

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464 *Op. cit.,* Note 20, at paragraph 46.

465 *DeMontigny* is often cited as authority for the position that punitive damages can be granted even where there are no compensatory damages. This situation does not arise in Létourneau, although no compensatory damages are granted, because we hold that the Members did, in fact, suffer moral damages on the basis of fault and causality. We refuse to award any for reasons related strictly to the requirements for collective recovery.

466 *Op. cit., Cinar*, Note 451, at paragraph 127.

seriousness of the infringement of the victim's rights'"[467]. The presence of a multitude of co-plaintiffs is something that can affect both of those.

[1055] There is also the fact that there are about nine times as many persons affected in Létourneau than in Blais: 918,218[468] compared to 99,957[469]. Since we calculate a total amount of punitive damages covering both files, this arithmetic could have an influence on the division of that total between the files.

[1056] The combined effect of the above factors requires the Court not only to judge each Company separately, but also to assess the punitive damages in each file separately. The same logic could be seen to apply to the three subclasses in Blais, but we do not believe that to be the case.

[1057] The Companies' wrongful conduct for all the Blais subclasses was similar. They were knowingly harming smokers' quality and length of life. The fact that one victim might survive longer than the other, or be less visibly mutilated by surgery, makes little difference as to the gravity of the fault and the infringement of the Members' rights. In all cases, the Companies' conduct is inexcusable to the highest degree and to try to draw distinctions among such situations would be to overly fine-tune the process.

[1058] As for the total amount of punitive damages to be granted, during oral argument, the Plaintiffs adjusted their aim to claim a level of $3,000,000,000 globally, described as being between $2,000 and $3,000 a Member. Following on what we discussed above, it is not appropriate to approach this question on a "per class member basis".[470] The analysis must be individually tailored to each Company. We must establish the appropriate Company amounts and add them up to arrive at the total, as opposed to starting from the total and dividing that among the Companies.

[1059] As well, the Companies correctly insist that, since article 1621 requires the Court to take into consideration "the extent of the reparation for which (the debtor) is already liable to the creditor", we cannot order collective recovery of punitive damages until the amount of compensatory damages is known, including those resulting from the adjudication of all the individual claims.

[1060] That may be true, but the Members of both Classes have renounced their individual claims and are content to be compensated solely under a collective order. As a result, having determined the amount of collective recovery of moral damages in both Files, we are thus in a position to order collective recovery of punitive damages.

[1061] Finally, we take note of the Supreme Court's message in *Time* with respect to the limits of our discretion in this matter:

> [190] It should be borne in mind that a trial court has latitude in determining the quantum of punitive damages, provided that the amount it awards remains within rational limits in light of the specific circumstances of the case before it. […] An

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467 *Op. cit., Time*, Note 20, at paragraph 200.
468 Exhibit 1733.5.
469 After reduction of 12% for immigration: 72,398 + 7,243 + 20,316 = 99,957.
470 See: *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333, at paragraph 127.

> assessment will be wholly erroneous if it is established that the trial court clearly erred in exercising its discretion, that is, if the amount awarded was not rationally connected to the purposes being pursued in awarding punitive damages in the case before the court (…).[471]

IX.C THE COMPANIES' "PATRIMONIAL SITUATION"

[1062] For the purpose of evaluating the Companies' "patrimonial situation" as mentioned in article 1621, the Plaintiffs agreed to limit their proof to summaries of each Company's before-tax earnings taken from the financial statements filed and later withdrawn from the record. Five or seven-year summaries of both before and after-tax earnings were filed for each Company, which we shall refer to as the "**Summaries**".[472]

[1063] All the Summaries were preliminarily declared to be confidential. In Sections XI.C.2 and XI.D.2 of the present judgment, we rule that the Summaries corresponding to the earnings category on which we choose to base our analysis of the Companies' patrimonial situation will become public.

[1064] The Companies' position is that, should there be an award of punitive damages against them, their patrimonial situation should be based on their after-tax earnings. They also feel that those amounts for fiscal year 2008 should be reduced by the hundreds of millions of dollars of fines they paid to the federal government for what RBH euphemistically characterized as the "mislabelling" of their products.

[1065] The Plaintiffs insist on before-tax earnings and refuse to accept granting any consideration for the fines. Like them, the Court is not inclined to allow the Companies to benefit from the fines they were obliged to pay in 2008 for breaking the law. That, however, is not a factor here, as explained below.

[1066] As for the choice of earnings, we shall use before-tax figures, since they more accurately reflect the reality of a party's patrimonial situation[473]. GAAP-compliant accounting allows access to perfectly legal tax operations that can skew a company's financial portrait. A good case in point is the deductibility of the 2008 fines by the Companies. Such "adjustments" should not be allowed to reduce a defendant's patrimonial situation.

[1067] There is also the possible deductibility of amounts paid pursuant to this judgment, whether for moral or punitive damages or for costs. Article 1621 already takes account of those expenses in its mention of the reparation due under other heads.

[1068] On a related point, it makes good sense to base the assessment of punitive damages on average earnings over a reasonable period, because they reflect on a defendant's capacity to pay. We keep in mind that the objective is not to bankrupt the wrongdoer, in spite of the Plaintiffs' cry for the Companies' heads. Nevertheless, within that limit, the award should hurt in a manner as much as possible commensurate with the

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471 *Op. cit*, *Time,* Note 20, paragraph 190.

472 Exhibits 1730-CONF 1730A-CONF and 1730B-CONF for ITL and Exhibits 1732-CONF, 1732A-CONF and 1730B-CONF for RBH and Exhibit 1747.1, Annexes A, C and D for JTM.

473 The corresponding exhibits are Exhibits 1730A, 1732A and Annex A to Exhibit 1747.1.

gravity of the ill deed and the need for specific and general deterrence, as well as the other applicable criteria.

[1069] Concerning the period of averaging, we have ITL's earnings for seven years: 2007 through 2013, so we are able to do either a seven-year or a five-year average. ITL's five-year average of $483,000,000 is some $22 million a year less than the seven-year one of $505,000,000. This might sound like a lot, but it is not. It represents a little over 4% of ITL's half-billion dollars in annual before-tax earnings.

[1070] As a general rule, we are inclined to use five-year averages. In addition, the figures filed for JTM cover only the five years of 2009 through 2013, inclusively, and the Plaintiffs do not contest that filing. We shall therefore base the average on those five fiscal years. Hence, the "fine-reduced" year of 2008 does not come into play.

[1071] For ITL, the five-year average of before-tax earnings between 2009 and 2013 is $483,000,000. For RBH, it is $460,000,000. JTM's "Earnings from operations" for the period average $103,000,000.

[1072] Another factor to consider is the extent to which a defendant benefited from his actions. A violator of either the CPA or the Quebec Charter who deserves to be condemned to punitive damages should not be allowed to profit from his wrongdoing. This principle is embraced by the Supreme Court in a number of decisions, including *Cinar* (at paragraph 136) and *Whiten* (at paragraph 72). Here, we quote from *Time*:

> [206] Also, in our opinion, it is perfectly acceptable to use punitive damages, as is done at common law, to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than an expense paid to earn greater profits while flouting the law (*Whiten*, at para. 72).[474]

[1073] Average earnings are relevant in the context of disgorging ill-gained profits. Here, those profits were immense to the point of being inconceivable to the average person. ITL and RBH earned nearly a half billion dollars a year over the past five years, with ITL earning over $600 million in 2008. The $200 million dollar fine it paid that year looks almost like pocket change.

[1074] Over the averaging period alone, the Companies' combined before-tax earnings totalled more than five billion dollars ($5,000,000,000). Recognizing that a dollar today is not worth what it was in 1950 or 1960, or even 1998, we still must assume that the profits earned by them over the 48 years of the Class Period were massive[475].

[1075] That said, and although one view of justice might require it, it is not possible to disgorge all that profit by way of punitive damages here. Nonetheless, the objective of disgorgement is compelling. It inspires us to adopt as a base guideline that, other things being equal, each Company should be deprived of one year's average before-tax profits. Working from that base, we shall adjust the individual amounts depending on the particular circumstances of each Company.

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474 *Op. cit*, *Time*, Note 20, paragraph 206.

475 The fact that Quebec sales likely represented from 20 to 25 percent of those earnings is not relevant to the Companies' overall patrimonial situation.

IX.D ITL'S LIABILITY FOR PUNITIVE DAMAGES

[1076] In our preceding analysis, we have found that all three Companies were guilty of reprehensible conduct that warranted an award of punitive damages against them under both the Quebec Charter and the CPA. We also pointed out a number of elements that distinguish the case of ITL from that of the others.

[1077] In that analysis we referred to the guidelines set out in the section 23 of the TRDA for apportioning liability for compensatory damages among several defendants. There, we considered the following elements:

- Mr. Wood's 1962 initiatives with respect to the Policy Statement;
- the company's refusal to heed the warnings and indictments of Messrs. Green and Gibb, as described in section II.B.1.a of the present judgment;
- Mr. Paré's vigorous public defence over many years of the cigarette in the name of both ITL and the CTMC;
- the company's leading role in publicizing the scientific controversy and the need for more research;
- the extensive knowledge and insight ITL gained from its regular Internal Surveys such as the CMA and the Monthly Monitor;
- more specifically with respect to the Internal Surveys, its awareness of the smoking public's ignorance of the risks and dangers of the cigarette, and its absolute lack of effort to warn its customers accordingly; and
- ITL's bad-faith efforts to block court discovery of research reports by storing them with outside counsel, and eventually having those lawyers destroy the documents.

[1078] As well, there is ITL's "outlier" status throughout the Class Period. In spite of overwhelming scientific acceptance of the causal link between smoking and disease, ITL continued to preach the sermon of the scientific controversy well into the 1990's, as we saw earlier[476]. All these points are relevant to the assessment of punitive damages. They weigh heavily on the gravity of ITL's faults and require a condemnation higher than the base amount.

[1079] Exercising our discretion in the matter, we would have held ITL liable for overall punitive damages equal to approximately one and one-half times its average annual before-tax earnings, an amount of seven hundred twenty-five million dollars ($725,000,000).[477] As noted earlier, this covers both classes.

[1080] Let us immediately underscore that, not only is this amount within the rational limits that the Supreme Court rightly imposes on this process, but also, viewed in the perspective of these files, it is actually rather paltry.

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476 See Exhibit 20063.10, at pdf 154.

477 We should point out that our use of the conditional tense of the verb in this analysis is intentional, for reasons that we explain below.

[1081] Since there are about 1,000,000 total Members in both Classes, the average amount from ITL on a "per member" basis would be about $725. Adding in the awards from the other two Companies, as established below, the total punitive damages averaged among all Members would come to a mere $1,310, hardly an irrational amount. True, we do not assess punitive damages on the basis of an amount "per member", but viewing them from this perspective does provide a sobering sense of proportionality.

[1082] This global total must be divided between the two Classes and possibly among the Blais subclasses, a process that applies to the three Companies.

[1083] As between the Classes, the circumstances in Blais justify a much larger portion for its Members. In spite of the fact that there are about nine times more Members in Létourneau than in Blais[478], the seriousness of the infringement of the Members' rights is immeasurably greater in the latter. Reflecting that, the $100,000 of moral damages for lung and throat cancer in Blais is 50 times greater than what we would have awarded in Létourneau.

[1084] Consequent with the preceding, we shall attribute 90% of the total punitive damages to the Blais Class and 10% to Létourneau. Ten percent of ITL's share of $725,000,000 is $72,500,000.

[1085] Turning now to the Blais subclasses, the Court would have followed the pattern proposed for compensatory damages and award the Members of the emphysema subclass 30% of the amount of punitive damages granted to the lung and throat cancer subclasses. Given that punitive damages are not based on a per-member or per-class metric, this does not affect the amount of the deposit the Companies must make.

[1086] All this said, we must now ask to what degree the size of the award for compensatory damages in Blais should affect the amount to be granted for punitive damages[479]. The response is that it should affect it very much indeed.

[1087] We have condemned the Companies to almost seven billion dollars of moral damages, which comes to more than 15 billion dollars once interest and the additional indemnity are accounted for. That is a sizable bite to swallow, even for corporations as profitable as these. However much it might be deserved, we cannot see our way fit to condemn them to significant additional amounts by way of punitive damages.

[1088] What we feel we can and should do is to make a symbolic award in this respect. That is why we shall condemn each Company to $30,000 of punitive damages in the Blais File. This represents one dollar for each Canadian death this industry causes in Canada every year.[480]

[1089] The total of $90,000 represents less than one dollar for each Blais Member. Rather than foreseeing a payment of that amount to claiming Members, we shall order

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478 Parenthetically, it is probable that all the Blais Members would also belong to the Létourneau Class.

479 A reminder: since we have dismissed the claim for compensatory damages in Létourneau, this question is not relevant there.

480 See the reasons of Laforest, J. in *RJR-Macdonald Inc. v. A.G. Canada*, [1995] 3 S.C.R. 199, at pages 65-66.

that it be dealt with in the same manner as the punitive damages payable in the Létourneau File.

IX.E RBH'S LIABILITY FOR PUNITIVE DAMAGES

[1090] Concerning RBH, the only element that appears to stand out is Rothmans' efforts to stifle the initiative of Mr. O'Neill-Dunne in 1958, as discussed in section IV.B.1.a. That type of behaviour is not exclusive to RBH. It typifies what all the Companies and their predecessors were doing and is part of the fundamental reason for awarding punitive damages in the first place. As such, we do not see that it warrants a condemnation beyond the base amount.

[1091] We shall condemn RBH to punitive damages equal to its average annual before-tax earnings, an amount of $460,000,000. The division of this amount between the two files shall be the same as for ITL: The 10% for Létourneau represents $46,000,000.

IX.F JTM'S LIABILITY FOR PUNITIVE DAMAGES

[1092] As further discussed in section XI.D, JTM's situation takes a different turn as a result of the Interco Contracts. The Plaintiffs' position is the same with respect to using before-tax earnings as a base, but JTM's case differs from that of the other Companies.

[1093] It argues that the payments due under the Interco Contracts, totalling some $110 million a year in capital, interest and royalties (the "**Interco Obligations**"), should be accepted at face value. The result would be to reduce JTM's annual earnings to a deficit, since its average before-tax earnings are "only" $103 million. This would also have the advantage of rendering the choice between before and after-tax figures moot, although JTM favours the latter.

[1094] As a result of our approving the Entente in Chapter XI below, paragraphs 2138-2145 of the Plaintiffs' Notes become public[481]. There we find many of the relevant facts around how the Interco Contracts work to impose, artificially in the Plaintiffs' view, the Interco Obligations on JTM.

[1095] For example, the Japan Tobacco group caused JTM to transfer its trade marks valued at $1.2 billion to a new, previously-empty subsidiary, JTI-TM, in return for the latter's shares. This "Newco" charges JTM an annual royalty of some $10 million for the use of those trade marks. It is hard to conceive of a more artificial expense.

[1096] There is also a loan of $1.2 billion from JTI-TM to JTM for which JTM is charged $92 million a year in interest. One of the curious aspects of this loan is that JTM appears never to have received any funds as a result of it[482], although we must admit that Mr. Poirier's clear answer in this regard at page 115 of the transcript[483] became less clear later in his testimony.

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481 Paragraphs 2138-2145 of the Plaintiffs' Notes are reproduced in Schedule J to the present judgment.

482 Testimony of Michel Poirier, May 23, 2014, at page 115.

483 189Q-Is it not a fact, sir, that JTIM never received one dollar ($1) of a loan in respect of that one point two (1.2) billion dollars of debentures?
A- Yes, I think that's correct.

[1097] Our analysis of this matter leads us to agree with Mr. Poirier who, when reviewing some of the planning behind the Interco Contracts, was asked if "that sounds like creditor proofing to you". He candidly replied: "Yes".[484]

[1098] Shortly thereafter, the following exchange ensued in Mr. Poirier's cross examination:

> [172]Q." […]The modifications suggested will enhance our ability to protect our most valuable assets." Most valuable assets in this context are the trademarks valued at one point two (1.2) billion dollars?
>
> A- Yes. Yes.
>
> [173]Q-And it's to protect your most valuable assets from creditors, creditors like perhaps the plaintiffs in this lawsuit?
>
> A- Perhaps the plaintiffs. It's a tobacco company.
>
> [174]Q-It's a what?
>
> A- It's a tobacco company.[485]

[1099] To be clear, no one has attacked the validity or the legality of the tax planning behind the Interco Contracts, or the contracts themselves, for that matter. That is not necessary for the point the Plaintiffs wish to score. Because something might be technically legal for tax purposes, something on which we give no opinion, does not automatically mean that it cannot be one of "the appropriate circumstances" that article 1621 obliges us to consider.

[1100] The Interco Contracts affair is clearly an appropriate circumstance to consider when assessing punitive damages against JTM and we shall consider it, not once, but twice: quantitatively and qualitatively.

[1101] In the first, we cannot but conclude that this whole tangled web of interconnecting contracts is principally a creditor-proofing exercise undertaken after the institution of the present actions by a sophisticated parent company, Japan Tobacco Inc., operating in an industry that was deeply embroiled in product liability litigation. Even Mr. Poirier could not deny that. And on paper, the sham may well succeed.

[1102] Unless the Interco Contracts are overturned, something that is not the subject of the present files, JTM appears to be nothing more than a break-even operation. So be it, but that is an artificial state of affairs that does not reflect the company's true patrimonial situation. Absent these artifices, JTM is earning an average of $103,000,000 a year before taxes and that is the patrimonial situation that we will adopt for the purpose of assessing punitive damages.

[1103] Then there is the qualitative side. The Interco Contracts represent a cynical, bad-faith effort by JTM to avoid paying proper compensation to its customers whose health and well-being were ruined, and the word is not too strong, by its wilful conduct.

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

This deserves to be sanctioned and we shall do so by setting the condemnation for punitive damages above the base amount[486].

[1104] We shall thus condemn JTM to punitive damages equal to approximately 125% of its average annual before-tax earnings, an amount of $125,000,000.[487] The division of this amount between the two files shall be the same as for ITL: The 10% for Létourneau represents $12,500,000.

[1105] Before closing on JTM, the Court will deal with its argument that it never succeeded to the obligations of MTI, as set out in paragraphs 2863 and following of its Notes.

[1106] Summarily, it argues that, in light of the contracts signed when the RJRUS group acquired it in 1978 and of the dissolution of MTI in 1983, the provisions of the Quebec Companies Act and the applicable case law dictate that "Plaintiffs' right of action, assuming they have any, can only be directed at MTI's directors and not its successor".[488] This applies in its view to "any alleged wrongdoing that could have been committed on or before (October 27, 1978) by MTI".[489]

[1107] The Court does not see how this can assist JTM in avoiding liability under the present judgment, and this, for two reasons.

[1108] First, under a General Conveyancing Agreement of October 26, 1978 (Exhibit 40596), MTI "transfers, conveys, assigns and sets over" the essential parts of its business to an RJRUS-controlled company, RJR-MI. At page 4 of that agreement, RJR-MI "covenants and agrees to assume and discharge all liabilities and obligations now owing by MTI", which included specifically:

> (e) all claims, rights of action and causes of action, pending or available to anyone against MTI.

[1109] In connection with the phrase "now owing" in that contract, in 1983, both MTI and RJRUS had long known that MTI's customers were being poisoned by its products, as discussed at length above. As such, any reasonable executive of those companies had to realize that the other shoe would soon be dropping and lawsuits would start appearing in Canada, as had already happened in other countries. The future Canadian lawsuits can thus be seen to be part of the "claims, rights of action and causes of action … available to anyone against MTI" in 1978. These were assumed by RJR-MI.

[1110] Moreover, the General Conveyancing Agreement foresees the dissolution of MTI in its opening clause. The potential liability of the directors of a dissolved company would have been well known to MTI and its legal advisors. It could not have been the intention

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[486] See Claude DALLAIRE and Lisa CHARMANDY, *Réparation à la suite d'une atteinte aux droits à l'honneur, à la dignité, à la réputation et à la vie privée*, op. cit., Note 462, at paragraph 97, referring to *Gillette v. Arthur* and G.C. v. L.H. (references omitted).

[487] The fact that the sum of the condemnations for the three Companies comes to a round number of $1.3 billion is pure coincidence.

[488] Paragraph 2889 of JTM's Notes.

[489] Paragraph 2890 of JTM's Notes.

of the very people who were approving the deal to transfer the risk of inevitable and onerous product liability litigation to themselves.

[1111] In any event, even if JTM could escape liability for MTI's obligations, it makes no similar assertion with respect to RJRM's liability as of 1978. All of the faults attributed to the Companies in the present judgment continued throughout most of the Class Period, including the years where JTM was operating as RJRM.

[1112] We reject JTM's submissions on this point.

X. DEPOSITS AND DISTRIBUTION PROCESS

[1113] Table 1113 incorporates the deposits for moral damages in Blais with the condemnations for punitive damages in both files[490] to show the amounts to be deposited by each Company by file and by head of damage.

TABLE 1113

1 COMPANY	2 MORAL DAMAGES BLAIS	3 PUNITIVE DAMAGES BLAIS	4 PUNITIVE DAMAGES LÉTOURNEAU
ITL	$670,000,000	$30,000	$72,500,000
RBH	$200,000,000	$30,000	$46,000,000
JTM	$130,000,000	$30,000	$12,500,000

[1114] On the issue of interest and the additional indemnity, for punitive damages they run only from the date of the present judgment. They must be added to the deposits indicated in columns 3 and 4 of the table when the deposits are made. For the Blais moral damages, although they run from the date of service of the Motion for Authorization to Institute the Class Action, they do not affect the amount of the deposits indicated in column 2 for reasons already explained.

[1115] A question remains as to the possible effect of prescription on these amounts. Since we assume that the TRDA applies, there is no prescription of claims for moral damages. We have also held that the Létourneau claims for punitive damages are not prescribed. We shall therefore analyze this issue only with respect to punitive damages in Blais.

[1116] From Table 910 we see that Blais claims for punitive damages that accrued before November 20, 1995 are prescribed. This effectively "wipes out" 45 years of

[490] A reminder: punitive damages do not vary by subclass in Blais and no moral damages are awarded in Létourneau.

possible punitive damages, leaving 17 years of those claims in that file[491]. Should this affect the amount of global punitive damages to be assessed?

[1117] From a purely mathematical viewpoint, it should. From a common sense and legal viewpoint, it does not.

[1118] As pointed out by Laforest J. in his dissent in the first Supreme Court decision on the constitutionality of Canadian tobacco legislation, the educated view is that in 1995 tobacco was responsible for nearly 100 deaths a day in Canada, over 30,000 premature deaths annually[492]. This means that, during the 17 years while non-prescribed punitive damages were amassing in Blais, the Companies products and conduct ruined the lives of Blais Class Members and their families and, in the process, caused the death of more than half a million Canadians, of which we estimate that there were some 125,000 Quebecers.

[1119] If every life is priceless, what price 500,000 lives … or even "only" 125,000?

[1120] Our reply to that question is shown in columns 3 and 4 of Table 1113. We see no justification for reducing those amounts beyond the level to which they have already been reduced in light of the purposes and objectives of punitive damages and the remarkable profits made by the Companies every year.

[1121] In Table 1113, columns 2, 3 and 4 show the initial deposits to be made by each Company in each file in accordance with article 1032 CCP. Should these amounts not suffice to cover all claims made by eligible Members, the Plaintiffs may petition the Court to issue an order for the deposit of a further sum.

[1122] Finally in this area, in light of our rulings above, it will be necessary to foresee a method for distributing the amounts due to the Blais Members and to establish a practical and equitable plan of distribution of the punitive damages awarded but not distributed. We shall reconvene the parties at a later date to hear them on that.

[1123] In preparation, we shall order the Plaintiffs to submit a detailed proposal on all issues related to distribution of damages within sixty (60) days of the date of the present judgment, with copy to the Companies. Should they so desire, the Companies may reply in writing within thirty (30) days of their receipt of the Plaintiffs' proposal

XI. DECISIONS ON OBJECTIONS UNDER RESERVE AND CONFIDENTIALITY

[1124] During the course of the trial, the Court attempted to avoid taking objections under reserve, although certain exceptions were necessary. Even there, the Court advised counsel that, in order to obtain a ruling on an objection taken under reserve, they would have to argue it specifically in their closing pleadings, failing which the Court would assume that the objection was withdrawn.

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491 The amended class description in Blais "expanded" the class to include anyone who had been diagnosed with a Disease before March 12, 2012.

492 *RJR-Macdonald Inc. v. A.G. Canada*, [1995] 3 S.C.R. 199, at pages 65-66.

[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

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493 In its Notes, at paragraphs 1465 and following, ITL identifies a number of additional objections for which it requests a decision. Since nothing in those affects the present judgment and, in fact, several were decided during the trial, e.g., the relevance of diseases not covered by the class descriptions, the Court will not deal further with those.

494 In addition, the Companies objected to the production of a number of documents based on Parliamentary Privilege. Since their contents are not confidential, the Court allowed them to be produced under reserve with a "PP" annotation and stipulated that we would limit their use to that which is not prohibited by that privilege. Although the Plaintiffs refer to several of them in their Notes, the Court relies on none of them in the present judgment. Consequently, the question of whether the Plaintiffs' proposed use of such documents contravenes Parliamentary Privilege or not is moot and we shall say nothing further on the subject.

495 Exhibit 1702.1.

improper publication", i.e., one that was done without colour of right, and we shall maintain our silence on that now.

[1129] JTM chose to appeal the 1702R Judgment, a process that might have caused some delay in the present proceedings. To avoid that, the lawyers for JTM and the Plaintiffs applied their ingenuity to conceive an alternative process. The Plaintiffs desisted from the 1702R Judgment and JTM desisted from its appeal. They agreed to re-plead the point in their final arguments and asked that the Court reconsider the issue in the judgment on the merits. Since confidentiality of the document is not an issue, they agreed that, should the Court dismiss the objection, it could refer to the exhibit in the final judgment. The Court agreed to proceed in that manner.

[1130] We should add that, in light of our not referring to this exhibit in our judgment, the question borders on being moot. Nevertheless, we do not wish to impede any of the parties' strategies in appeal, should there be one, and we feel we must rule on the objection now.

[1131] On this subject, the parties signed a series of admissions relating to this exhibit, which were filed as Exhibit 1702.1. These admissions essentially confirm that, although the Colucci Letter is available on Legacy plus at least two RJRUS-related web sites "as compelled by court order", it was never disclosed voluntarily and the company never waived its claim of privilege with respect to it and continues to assert that claim at all times.

[1132] In its Notes, JTM argues as follows:

> **2953.** Accordingly it is respectfully submitted that the determinative factor to decide whether a document covered by professional secrecy of the attorney can be used in litigation should be whether its use has been authorized by the beneficiary (including through a waiver) or by an express provision of law. Whether the document has been seen by 1, 10, 1,000 or even 100,000 individuals is irrelevant, so long as no such authorization exists.

[1133] For their part, the Plaintiffs raise the following arguments against JTM's claim of professional secrecy:

a. The document was never covered by professional secrecy because of the nature of its contents and the status of its author, who appears not to have been a lawyer;

b. Even if it had been covered by professional secrecy originally, it lost that protection as a result of its being publicly available on the Internet for more than ten years.

[1134] Further to its argument that the involuntary or unauthorized disclosure of a privileged document to a third party does not result in the loss of privilege, JTM argues that "the fact that Exhibit 1702-R has been made accessible to the public as a result of U.S. Court orders does not affect its privileged nature under Quebec law, nor does it render it admissible into evidence in Quebec proceedings".

[1135] Concerning the US proceedings, it is not every day that one sees orders of this sort[496]. It is quite simply extraordinary for a court to require the worldwide publication of documents potentially covered by solicitor-client privilege. Yet, we understand that more than one US court has done so in the context of "tobacco litigation" in that country.

[1136] This Court need neither analyze nor comment on those orders. Our interest is to examine how they might affect the admissibility of a single document in this trial. We emphasize their exceptional nature solely to underline our conviction that, to our knowledge, this facet of solicitor-client privilege has no parallel in Canadian legal history. The only precedent in Canadian jurisprudence of which we are aware comes from our own previous judgments in relation to this and other documents published on the Legacy Tobacco Documents Library website.

[1137] We dealt with that question in a March 25, 2013 judgment[497], as well as in a May 17, 2012 judgment dealing with litigation privilege[498]. Analyzing the effect of the divulgation being made against the party's will, but licitly, as is the case with Exhibit 1702R, on both occasions we ruled that the document lost any right to professional secrecy. In doing so, we relied on simple common sense, as well as on an *obiter dictum* from the Court of Appeal. Here are the relevant passages of the more recent judgment wherein we explain our reasoning.

> [7] Though there might be other motives for refusing professional secrecy protection to the Documents, the Court sees no need to look beyond the fact that they are available on Legacy in compliance with valid American court orders. From a practical and common-sense point of view, such a widespread and licit publication empties the issue of professional secrecy of all its relevance.
>
> [8] In our judgment of May 17, 2012, we provided our view on the effect of a widespread publication of a document that would otherwise be subject to professional secrecy. There, albeit dealing with a document subject to litigation privilege and not, strictly speaking, professional secrecy, we wrote:
>
> > [11] In its decision in *Biomérieux*[499], the Court of Appeal clearly limited the future application of *Chevrier*[500]. Before doing that, however, it noted that in its 1994 decision in the case of *Poulin v. Prat*[501] it had clarified the role of article 9 of the *Quebec Charter of Human Rights and Freedoms*[502] in such questions. The *Poulin* judgment provides guidance here not so much for its recognition of the professional secret as a fundamental right but, rather, for the door that it opened, or perhaps left open, in cases "according to the circumstances, when the document or information is already in the hands of the adverse party"[503].

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496 Exhibit 1702.1 refers to the order of Madam Justice Kessler in the District of Columbia, file 99-CV-2496.
497 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2013 QCCS 4903.
498 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCCS 2181
499 *Biomérieux Inc. v. GeneOhm Sciences Canada Inc.,* 2007 QCCA 77.
500 *Chevrier v.Guimond*, [1984] R.D.J. 240, at page 242.
501 AZ-94011268; [1994] R.D.J. 301.
502 R.S.Q., ch. C-12.
503 Reference omitted.

> [12] Thirteen years later, the Court of Appeal in Biomérieux clarified what is meant by "the circumstances" in *Poulin v. Prat*. It said: "For example, if information subject to the professional secret has been divulged to the general public, I have difficulty in seeing how it could be protected by the court or otherwise. On the other hand, if its divulgation was of limited scope and the circumstances do not lead to the conclusion that the divulgation was done as the result of a waiver of privilege, it seems to me that the court must impose the measures necessary to ensure the protection of a fundamental right arising from article 9 of the Charter"[504].
>
> [13] It is paramount to note that the court made it clear that the qualification that the divulgation not be done as the result of a waiver of privilege applies only to the case of a limited divulgation. By isolating that mention in a sentence separate from the one dealing with a general divulgation, the Court of Appeal sets aside any consideration of waiver where there has been a broad divulgation of the document.
>
> …
>
> [15] Consequently, in circumstances such as these, particularly where the widespread divulgation was made legally (as the result of a court order), as opposed to by way of an illicit act, the common sense approach of the Court of Appeal is the only logical alternative available - even in the face of a rule of such importance as the one governing privilege. (The Court's emphasis)
>
> [9] We still favour the common sense approach of *Biomérieux*, and this, whether the document be subject to litigation privilege or to professional secrecy, provided that the divulgation has not been done improperly, i.e., illegally, unlawfully or illicitly. We need not and do not express any opinion on the effect of an improper publication of a document subject to professional secrecy, since the divulgations which concern us here were the result of court orders and, arguably, settlement agreements.
>
> [10] Consequently, professional secrecy does not apply to the Documents.[505]

[1138] We still adhere to this reasoning. Thus, we hold that Exhibit 1702R is not subject to professional secrecy and dismiss JTM's objection. It follows that the "R" should be removed from the exhibit number, which now becomes Exhibit 1702.

[1139] As a result, it is not necessary to deal with the Plaintiffs' first argument referring to the nature of the contents and the status of the document's author.

XI.B. THE ADMISSIBILITY OF "R" DOCUMENTS

[1140] At paragraphs 1481-1488 of its Notes, ITL requests the withdrawal from the record of all "R" exhibits that were allowed to be filed under reserve, subject to subsequent authorization as a result of testimony, a motion, an admission or otherwise[506].

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504 Reference omitted.

505 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, *op. cit.,* Note 491.

506 There is a second category of "R" documents, being ones filed subject to an objection based on relevance. The only documents in that category are those discussed in Section XI.D below. The Court

At the time of filing, and on subsequent occasions, the Court made it clear that, in the absence of such subsequent authorization, the document would be removed from the record. We have not changed our position on that.

[1141] Consequently, all "R" exhibits for which no authorization was obtained shall be struck from the evidentiary record. The struck exhibits include the five such documents mentioned in the Plaintiffs' Notes: Exhibits 454-R, 454A-R, 613A-R, 623A-R and 1571-R.[507]

[1142] In furtherance of that, we shall reserve the parties' rights to obtain a further judgment specifying the struck exhibits, should that be required.

XI.C. THE CONFIDENTIALITY OF CERTAIN INTERNAL DOCUMENTS:

[1143] The documents in question are marketing documents, such as consumer surveys, cigarette designs and recipes, insurance policies and financial statements.

[1144] Preliminary to analyzing the cases of the documents for which confidentiality is claimed by the Companies, it is useful to examine the state of the law on the subject of confidentiality orders with respect to documents.

[1145] In order to justify an infringement of the public's right to freedom of expression and grant a confidentiality order, the Supreme Court in its decision in *Sierra Club* expressed the view that the applicant has the burden of showing necessity and proportionality:

> a) Such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> b) The salutary effects of the confidentiality order, including the effects on the right or civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[508] (The Court's emphasis)

[1146] In the following paragraphs, the court underlined "three important elements" affecting the first branch of the test, i.e., necessity:

- The risk must be real, substantial and well grounded in the evidence and pose a serious threat to the commercial interest in question;
- The important commercial interest cannot merely be specific to the party but the confidentiality must be of public interest in the sense of representing a general principle;

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will not comment on ITL's paragraphs 1479 and 1480, since the issues there were resolved among the parties.

[507] ITL also makes submissions with respect to Exhibit 1740R. The Court has this exhibit as having been withdrawn. In any event, our general ruling on this matter would apply to it, if it is still in the record.

[508] *Sierra Club v. Canada (Minister of Finance),* [2002] 2 SCR 522, at paragraph 53.

- Reasonably alternative measures include the possibility of restricting the order as much as is reasonably possible while preserving the commercial interest in question.[509]

[1147] These are the principles that will guide our evaluation of the requests for confidentiality orders in this matter.

[1148] As well, we see no sense in analyzing the potential confidentiality of documents that are not referred to by any of the parties in their arguments[510]. Hence, we instructed counsel to limit their submissions to such documents, which ITL identified. We shall deal only with those documents now.

[1149] Finally, we analyzed this question in depth in our June 5, 2012 judgment in these files[511], where we refused to grant confidential status to a number of documents, *inter alia*, because they contained outdated information. We have not lost sight of what we ruled there, nor have we changed our view on that specific topic since then.

[1150] That said, we must point out that our 2012 judgment came after "only" three months of hearing, what for these files can be qualified as "very early on". More than two years of trial have followed and, at this juncture, the judgment is essentially written. Our current perspective thus provides us a complete view of the contents and the nuances of the evidence, something that we did not have in June 2012.

XI.C.1 GENERAL DOCUMENTS, INCLUDING CODING INFORMATION

[1151] In paragraphs 1506 and following of its Notes, ITL advises that eleven confidential documents of this type were referred to in Plaintiffs' argument, four of which are no longer confidential: Exhibits 1149-2M, 1196, 1258 and 1540.

[1152] Of the remaining seven "CONF" exhibits in issue, all appear to have been filed both in complete and in "redacted" form, i.e., where the confidential text is hidden. The first bears a "CONF" suffix, with the second having no "CONF". ITL also refers to one "CONF" document in its Notes.

[1153] Let us make it clear at the outset not only that we did not see the need to refer to a single one of these documents in the present judgment but also that the Plaintiffs did not see the need to refer to any of the redacted portions of these exhibits in their pleadings. The mere fact that a company is involved in litigation is no justification for rendering its entire corporate archives public. The public hearing rule should apply only to information that is relevant to the case.

[1154] On the other hand, as a general rule it is best not to carve up a document by nipping out bits and leaving in others[512]. That is a dangerous exercise, since one almost never knows what portions will eventually prove to be relevant. That becomes less dangerous, however, where the parties agree in advance to the portions to be exorcised, as is the case here.

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509 *Ibidem*, paragraphs 55-57.
510 It is not irrelevant to note in this context that over 20,000 exhibits were filed in these cases.
511 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCCS 2581.
512 The French term "*charcuter*" captures the essence of this process.

[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

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513 Exhibits 1753.1-CONF through 1753.81-CONF for RBH and 1754.1-CONF through 1754.60-CONF for ITL.

514 Plaintiffs' Notes, at paragraph 2134.

515 Plaintiffs' Notes, at paragraph 2135. Since article 1621 requires us to consider the extent of the reparation for which the Companies are already liable to the creditor, the fact that insurance covers compensatory damages is relevant to the assessment of punitive damages.

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.

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[516] Exhibit 1754-CONF for ITL, at paragraph 6; Exhibit 1753-CONF for RBH. The RBH affidavit is referred to in Plaintiffs' Notes, but it does not seem to deal with insurance coverage.

XI.D.1 OBJECTION AS TO RELEVANCE

[1183] The judgments mentioned above certainly do decide in final fashion the Motion for a Safeguard Order, but only for the questions raised therein and for the remedy sought by it. They do not purport to examine the amount of punitive damages to be awarded under a future judgment on the merits and cannot automatically have the effect of rendering all aspects of the Interco Contracts affair irrelevant for that purpose.

[1184] Article 1621 edicts that "Punitive damages are assessed in the light of all the appropriate circumstances, in particular …". The items that follow that phrase are not limitative. It thus stands to reason that the Interco Contracts affair will be relevant if we feel that it is an appropriate circumstance to consider in our adjudication on punitive damages, in which case we must consider it.

[1185] We do and we already have. The objection as to relevance is dismissed.

XI.D.2 CONFIDENTIALITY OF RELATED EVIDENCE

[1186] Earlier, we referred to JTM's practical and cooperative approach on this issue. In laudable, albeit labyrinthine fashion, it and the Plaintiffs arrived at an agreement settling many of the evidentiary aspects raised: the "*Entente sur la confidentialité de certaines informations entre les demandeurs et JTIM*" (the "**Entente**": Exhibit 1747.1). It deals mainly with the designation of a number of pieces of evidence relating to the Interco Contracts as being either confidential or not.

[1187] Subject to the Court's ratification of it, the Entente has JTM withdrawing its request for confidentiality for the redacted parts of paragraphs 2138 through 2144 of the Plaintiffs' Notes, previously under seal by consent. Notwithstanding the opening of those paragraphs to the public, JTM and the Plaintiffs request that the exhibits and the testimony referred to therein remain under seal. We note that, since those paragraphs reproduce and paraphrase parts of those exhibits and testimony, those portions could no longer be treated as confidential.[517]

[1188] In the end, the decision on the ratification of the Entente comes down to deciding whether or not the confidential status should be maintained as requested. This request, although technically made by JTM, is indirectly made jointly with the Plaintiffs, since they both request the Court to ratify the Entente. The effect of ratification would be to declare the testimony and the Annexe B documents confidential.

[1189] Annexe B is comprised of a series of some 40 exhibits filed under reserve of JTM's objection as to relevance and as "CONF", this being by consent of the Plaintiffs. In it, we find numerous financial statements dating back to 1998, along with documents related to them. There are also a number of documents explaining the tax planning that was done within the Japan Tobacco group at the time of the formation of the Interco

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[517] Annexe A, the summary of JTM's "Earnings from operations" for the years 2009 through 20013, would also become public, provided that the Court chooses that measure for evaluating punitive damages. That is, in fact, the measure that we prefer. JTM undertook to file two other summaries covering after-tax earnings and results after payments under the Interco Contracts. They came in the form of Annexes C and D to Exhibit 1747.1.

Contracts. They are for the most part quite technical and go into much greater detail than is necessary for the Plaintiffs to tell the story that they feel needs to be told.

[1190] They are the masters of their evidence, subject to any proper intervention the Court feels is required. Here, they confirm that all that they wish to say about the Interco Contracts is found in paragraphs 2138 through 2145 of their Notes, and that there is no need to refer to the underlying exhibits or to render them public[518]. That is confirmed by the fact that the only reference to them in the pleadings that the Court could find is in those eight paragraphs.

[1191] We see no justification for forcing the Plaintiffs to adduce any further proof than that which they choose to make. It is their decision and they will live or die by it. For our part, we see no need to state any other facts than those set out there, or to examine in detail any other documents. These exhibits are unnecessary for the adjudication of this matter.

[1192] We shall therefore ratify the Entente and render a confidentiality order with respect to the documents listed in Annexe B and the testimony of Mr. Poirier of May 23, 2014 and order that they remain under seal unless and until a further order changes their status. Exhibit 1747.1, on the other hand, becomes public, including Annexe A, JTM's earning from operations.

XII. INDIVIDUAL CLAIMS

[1193] The Plaintiffs displayed an impressive sense of clairvoyance in their Notes when they opted to renounce to making individual claims, declaring that "Outside of collective recovery, recourses of the members against the defendants are just impossible".[519] The Court agrees.

[1194] The Companies are of two minds about this. While no doubt rejoicing in the knowledge that there will be no need to adjudicate individual claims in the present files, they wish to avoid the possibility of any new actions being taken by current Class Members, a highly unlikely event, to be sure. That is why they insisted that the Plaintiffs not be allowed to remove the request for an order permitting individual claims and that the Court rule on it. The Plaintiffs do not object.

[1195] Consequently, we shall dismiss the request for an order permitting individual claims of the Members against the Companies in both files.

XIII. PROVISIONAL EXECUTION NOTWITHSTANDING APPEAL

[1196] The Plaintiffs seek a judgment declaring that the Companies were guilty of "improper use of procedure", one result of which would be the possibility of an order for provisional execution notwithstanding appeal under article 547(j) of the Code of Civil Procedure. The Court put over the question of procedural abuse until after judgment on the merits, but this did not stop the Plaintiffs in their quite understandable quest for some immediate payment of damages.

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

[1197] They changed strategy and requested provisional execution on the basis of the penultimate paragraph of article 547, which reads:

> In addition, the court may, upon application, order provisional execution in case of exceptional urgency or for any other reason deemed sufficient in particular where the fact of bringing the case to appeal is likely to cause serious or irreparable injury, for the whole or for part only of a judgment. (The Court's emphasis)

[1198] In light of the delays in these cases, it takes no great effort to sympathize with the plight of the Members, particularly in the Blais file. Initiated some 17 years ago, these cases are far from being over. The Plaintiffs estimate that the appeals process will likely take another six years. The Court finds that optimistic, but possible.

[1199] In the meantime, Class Members are dying, in many cases as a direct result of the faults of the Companies. In our opinion, this represents serious and irreparable injury in light of the time required for the appeals. And there are other reasons sufficient to require an order of provisional execution.

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

[1201] There is also the appeal phase, a process that will be far from economical both in terms of time and of money. It is critical in the interest of justice that the Plaintiffs have the financial wherewithal to see this case to the end. Finally, the Fonds d'aide aux recours collectifs, which has been carrying part of that financial burden over these many years, also deserves consideration at this point.

[1202] Thus, it is fair and proper to approve provisional execution for at least part of the damages awarded, and we shall so order, limiting the immediate-term execution to the initial deposits and punitive damages. We do this in full knowledge of the Court of Appeal's statement to the effect that provisional execution for moral and punitive damages is very exceptional[520]. There is very little in these files that is not very exceptional, and this is no exception.

[1203] In this regard, there is precedent for a type of *sui generis* provisional execution in a class action. In the case of *Comartin v. Bodet*[521], the defendants were required to deposit a portion of damages on a provisional basis. The money was held by the prothonotary pending appeal and not distributed to the members until the judgment was final. We are inclined to follow similar lines here, although not identical. We are open to the possibility of distributing certain amounts immediately.

[1204] We shall, therefore, order each Company to deposit into its respective attorney's trust account, within sixty (60) days of the date of the present judgment, an amount equal to its initial deposit of moral damages plus both condemnations for punitive damages. In their proposal concerning the distribution process, the Plaintiffs should

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520 *Hollinger v. Hollinger* [2007] CA 1051, at paragraph 3.

521 [1984] Q.J. No. 644 (Superior Court), at paragraphs 154 and following.

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 Motion for Authorization to Institute the Class Action;

[1210] **CONDEMNS** the Defendants solidarily to pay the amount of $100,000 as moral damages to each class member diagnosed with cancer of the lung, the larynx, the oropharynx or the hypopharynx who started to smoke before January 1, 1976, plus interest and the additional indemnity from the date of service of the Motion for Authorization to Institute the Class Action;

[1211] **CONDEMNS** the Defendants solidarily to pay the amount of $80,000 as moral damages to each class member diagnosed with cancer of the lung, the larynx, the oropharynx or the hypopharynx who started to smoke as of January 1, 1976, plus interest and the additional indemnity from the date of service of the Motion for Authorization to Institute the Class Action;

[1212] **CONDEMNS** the Defendants solidarily to pay the amount of $30,000 as moral damages to each member diagnosed with emphysema who started to smoke before January 1, 1976, plus interest and the additional indemnity from the date of service of the Motion for Authorization to Institute the Class Action;

[1213] **CONDEMNS** the Defendants solidarily to pay the amount of $24,000 as moral damages to each member diagnosed with emphysema who started to smoke as of January 1, 1976, plus interest and the additional indemnity from the date of service of the Motion for Authorization to Institute the Class Action;

[1214] **DECLARES** that, as among the Defendants, ITL shall be responsible for 67% of the solidary condemnations for moral damages pronounced in the present judgment, including all costs; RBH shall be responsible for 20% thereof and JTM shall be responsible for 13% thereof;

[1215] **ORDERS** Defendant Imperial Tobacco Canada Ltd. to make an initial deposit for compensatory damages of $670,000,000 into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1216] **ORDERS** Defendant Rothmans, Benson & Hedges Inc. to make an initial deposit for compensatory damages of $200,000,000 into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1217] **ORDERS** Defendant JTI Macdonald Corp. to make an initial deposit for compensatory damages of $130,000,000 into its attorney's trust account within sixty (60) days of the date of the present judgment;

[1218] **RESERVES** the Plaintiffs' right to request orders for additional deposits should the above initial deposits prove insufficient to cover all claims made by eligible Members of the Class;

[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;

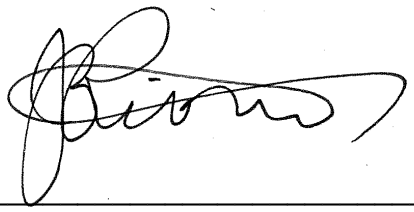
[1251] **DISMISSES** JTM's objection based on relevance for the evidence relating to the Interco Contracts;

[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.

1468. The manufacturer of a movable property is liable to reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.

[...] (The Court's emphasis)

1469. A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in the design or manufacture of the thing, poor preservation or presentation of the thing, or the lack of sufficient indications as to the risks and dangers it involves or as to means to avoid them.

(The Court's emphasis)

1473. The manufacturer, distributor or supplier of a movable property is not liable to reparation for injury caused by a safety defect in the property if he proves that the

1457. Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.

Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.

Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.

1468. Le fabricant d'un bien meuble, même si ce bien est incorporé à un immeuble ou y est placé pour le service ou l'exploitation de celui-ci, est tenu de réparer le préjudice causé à un tiers par le défaut de sécurité du bien.

[...] (Le Tribunal souligne)

1469. Il y a défaut de sécurité du bien lorsque, compte tenu de toutes les circonstances, le bien n'offre pas la sécurité à laquelle on est normalement en droit de s'attendre, notamment en raison d'un vice de conception ou de fabrication du bien, d'une mauvaise conservation ou présentation du bien ou, encore, de l'absence d'indications suffisantes quant aux risques et dangers qu'il comporte ou quant aux moyens de s'en prémunir.

(Le Tribunal souligne)

1473. Le fabricant, distributeur ou fournisseur d'un bien meuble n'est pas tenu de réparer le préjudice causé par le défaut de sécurité de ce bien s'il prouve que la victime

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

Nor is he liable to reparation if he proves that, according to the state of knowledge at the time that he manufactured, distributed or supplied the property, the existence of the defect could not have been known, and that he was not neglectful of his duty to provide information when he became aware of the defect.

(The Court's emphasis)

1477. The assumption of risk by the victim, although it may be considered imprudent having regard to the circumstances, does not entail renunciation of his remedy against the person who caused the injury.

1478. Where an injury has been caused by several persons, liability is shared by them in proportion to the seriousness of the fault of each.

The victim is included in the apportionment when the injury is partly the effect of his own fault.

1480. Where several persons have jointly participated in a wrongful act which has resulted in injury or have committed separate faults, each of which may have caused the injury, and where it is impossible to determine, in either case, which of them actually caused the injury, they are solidarily bound to make reparation thereof.

1526. The obligation to make reparation for injury caused to another through the fault of two or more persons is solidary where the obligation is extra-contractual.

1537. Contribution to the payment of a solidary obligation is made by equal shares among the solidary debtors, unless their interests in the debt, including their shares of the obligation to make reparation for injury

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

Il n'est pas tenu, non plus, de réparer le préjudice s'il prouve que le défaut ne pouvait être connu, compte tenu de l'état des connaissances, au moment où il a fabriqué, distribué ou fourni le bien et qu'il n'a pas été négligent dans son devoir d'information lorsqu'il a eu connaissance de l'existence de ce défaut.

(Le Tribunal souligne)

1477. L'acceptation de risques par la victime, même si elle peut, eu égard aux circonstances, être considérée comme une imprudence, n'emporte pas renonciation à son recours contre l'auteur du préjudice.

1478. Lorsque le préjudice est causé par plusieurs personnes, la responsabilité se partage entre elles en proportion de la gravité de leur faute respective.

La faute de la victime, commune dans ses effets avec celle de l'auteur, entraîne également un tel partage.

1480. Lorsque plusieurs personnes ont participé à un fait collectif fautif qui entraîne un préjudice ou qu'elles ont commis des fautes distinctes dont chacune est susceptible d'avoir causé le préjudice, sans qu'il soit possible, dans l'un ou l'autre cas, de déterminer laquelle l'a effectivement causé, elles sont tenues solidairement à la réparation du préjudice.

1526. L’obligation de réparer le préjudice causé à autrui par la faute de deux personnes ou plus est solidaire, lorsque cette obligation est extracontractuelle

1537. La contribution dans le paiement d'une obligation solidaire se fait en parts égales entre les débiteurs solidaires, à moins que leur intérêt dans la dette, y compris leur part dans l'obligation de réparer le préjudice

caused to another, are unequal, in which case their contributions are proportional to the interest of each in the debt.

However, if the obligation was contracted in the exclusive interest of one of the debtors or if it is due to the fault of one co-debtor alone, he is liable for the whole debt to the other co-debtors, who are then considered, in his regard, as his sureties.

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.

2811. A fact or juridical act may be proved by a writing, by testimony, by presumption, by admission or by the production of real evidence, according to the rules set forth in this Book and in the manner provided in the Code of Civil Procedure (chapter C-25) or in any other Act.

2846. A presumption is an inference established by law or the court from a known fact to an unknown fact.

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

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

Cependant, si l'obligation a été contractée dans l'intérêt exclusif de l'un des débiteurs ou résulte de la faute d'un seul des codébiteurs, celui-ci est tenu seul de toute la dette envers ses codébiteurs, lesquels sont alors considérés, par rapport à lui, comme ses cautions.

1621. Lorsque la loi prévoit l'attribution de dommages-intérêts punitifs, ceux-ci ne peuvent excéder, en valeur, ce qui est suffisant pour assurer leur fonction préventive.

Ils s'apprécient en tenant compte de toutes les circonstances appropriées, notamment de la gravité de la faute du débiteur, de sa situation patrimoniale ou de l'étendue de la réparation à laquelle il est déjà tenu envers le créancier, ainsi que, le cas échéant, du fait que la prise en charge du paiement réparateur est, en tout ou en partie, assumée par un tiers.

2804. La preuve qui rend l'existence d'un fait plus probable que son inexistence est suffisante, à moins que la loi n'exige une preuve plus convaincante.

2811. La preuve d'un acte juridique ou d'un fait peut être établie par écrit, par témoignage, par présomption, par aveu ou par la présentation d'un élément matériel, conformément aux règles énoncées dans le présent livre et de la manière indiquée par le Code de procédure civile (chapitre C-25) ou par quelque autre loi.

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

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

the court which shall take only serious, precise and concordant presumptions into consideration.

du tribunal qui ne doit prendre en considération que celles qui sont graves, précises et concordantes.

2900. Interruption with regard to one of the creditors or debtors of a solidary or indivisible obligation has effect with regard to the others.

2900. L'interruption à l'égard de l'un des créanciers ou des débiteurs d'une obligation solidaire ou indivisible produit ses effets à l'égard des autres.

2908. A motion for leave to bring a class action suspends prescription in favour of all the members of the group for whose benefit it is made or, as the case may be, in favour of the group described in the judgment granting the motion.

2908. La requête pour obtenir l'autorisation d'exercer un recours collectif suspend la prescription en faveur de tous les membres du groupe auquel elle profite ou, le cas échéant, en faveur du groupe que décrit le jugement qui fait droit à la requête.

The suspension lasts until the motion is dismissed or annulled or until the judgment granting the motion is set aside; however, a member requesting to be excluded from the action or who is excluded therefrom by the description of the group made by the judgment on the motion, an interlocutory judgment or the judgment on the action ceases to benefit from the suspension of prescription.

Cette suspension dure tant que la requête n'est pas rejetée, annulée ou que le jugement qui y fait droit n'est pas annulé; par contre, le membre qui demande à être exclu du recours, ou qui en est exclu par la description que fait du groupe le jugement qui autorise le recours, un jugement interlocutoire ou le jugement qui dispose du recours, cesse de profiter de la suspension de la prescription.

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

Toutefois, s'il s'agit d'un jugement, la prescription ne recommence à courir qu'au moment où le jugement n'est plus susceptible d'appel.

2925. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise established.

2925. L'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est pas autrement fixé se prescrit par trois ans.

II. CODE OF CIVIL PROCEDURE OF QUEBEC

54.1. A court may, at any time, on request or even on its own initiative after having heard the parties on the point, declare an action or other pleading improper and impose a sanction on the party concerned.

54.1. Les tribunaux peuvent à tout moment, sur demande et même d'office après avoir entendu les parties sur le point, déclarer qu'une demande en justice ou un autre acte de procédure est abusif et prononcer une sanction contre la partie qui agit de manière abusive.

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

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

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;

administrateurs du bien d'autrui, ou encore de révocation du mandataire chargé d'exécuter un mandat donné en prévision de l'inaptitude du mandant;

(f) accounting;

(f) de reddition de comptes;

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

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

(h) judgments of sequestration;

(h) de sentences de séquestre;

(i) (subparagraph repealed);

(i) *(paragraphe abrogé);*

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

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

In addition, the court may, upon application, order provisional execution in case of exceptional urgency or for any other reason deemed sufficient in particular where the fact of bringing the case to appeal is likely to cause serious or irreparable injury, for the whole or for part only of a judgment.

De plus, le tribunal peut, sur demande, ordonner l'exécution provisoire dans les cas d'urgence exceptionnelle ou pour quelqu'autre raison jugée suffisante notamment lorsque le fait de porter l'affaire en appel risque de causer un préjudice sérieux ou irréparable, pour la totalité ou pour une partie seulement du jugement.

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

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

The judgment cannot be invoked in an action based on the same cause and instituted before another court; the court, on its own initiative or at the request of a party, must dismiss any action or proof based on the judgment.

Le jugement ne peut être invoqué dans une action fondée sur la même cause et introduite devant un autre tribunal; le tribunal doit alors, à la demande d'une partie ou d'office, rejeter toute demande ou toute preuve basée sur ce jugement.

1031. The court orders collective recovery if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; it then determines the amount owed by the debtor even if the identity of each of the members or the exact amount of their claims is not established.

1031. Le tribunal ordonne le recouvrement collectif si la preuve permet d'établir d'une façon suffisamment exacte le montant total des réclamations des membres; il détermine alors le montant dû par le débiteur même si l'identité de chacun des membres ou le montant exact de leur réclamation n'est pas établi.

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

1032. Le jugement qui ordonne le recouvrement collectif des réclamations enjoint au débiteur soit de déposer au greffe

the office of the court or with a financial institution operating in Québec, or to carry out a reparatory measure that it determines or to deposit a part of the established amount and to carry out a reparatory measure that it deems appropriate.

ou auprès d'un établissement financier exerçant son activité au Québec le montant établi ou d'exécuter une mesure réparatrice qu'il détermine, soit de déposer une partie du montant établi et d'exécuter une mesure réparatrice qu'il juge appropriée.

Where the court orders that an amount be deposited with a financial institution, the interest on the amount accrues to the members.

Lorsque le tribunal ordonne le dépôt auprès d'un établissement financier, les membres bénéficient alors des intérêts sur les montants déposés.

The judgment may also, for the reasons indicated therein, fix terms and conditions of payment.

Le jugement peut aussi fixer, pour les motifs qu'il indique, des modalités de paiement.

The clerk acts as seizing officer on behalf of the members.

Le greffier agit en qualité de saisissant pour le bénéfice des membres.

1034. The court may, if of opinion that the liquidation of individual claims or the distribution of an amount to each of the members is impossible or too expensive, refuse to proceed with it and provide for the distribution of the balance of the amounts recovered collectively after collocating the law costs and the fees of the representative's attorney.

1034. Le tribunal peut, s'il est d'avis que la liquidation des réclamations individuelles ou la distribution d'un montant à chacun des membres est impraticable ou trop onéreuse, refuser d'y procéder et pourvoir à la distribution du reliquat des montants recouvrés collectivement après collocation des frais de justice et des honoraires du procureur du représentant.

III. CONSUMER PROTECTION ACT

216. For the purposes of this title, representation includes an affirmation, a behaviour or an omission.

216. Aux fins du présent titre, une représentation comprend une affirmation, un comportement ou une omission.

218. To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.

218. Pour déterminer si une représentation constitue une pratique interdite, il faut tenir compte de l'impression générale qu'elle donne et, s'il y a lieu, du sens littéral des termes qui y sont employés.

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

219. Aucun commerçant, fabricant ou publicitaire ne peut, par quelque moyen que ce soit, faire une représentation fausse ou trompeuse à un consommateur.

220. No merchant, manufacturer or

220. Aucun commerçant, fabricant ou

advertiser may, falsely, by any means whatever,

(a) ascribe certain special advantages to goods or services;

(b) hold out that the acquisition or use of goods or services will result in pecuniary benefit;

(c) hold out that the acquisition or use of goods or services confers or insures rights, recourses or obligations.

publicitaire ne peut faussement, par quelque moyen que ce soit:

(a) attribuer à un bien ou à un service un avantage particulier;

(b) prétendre qu'un avantage pécuniaire résultera de l'acquisition ou de l'utilisation d'un bien ou d'un service;

(c) prétendre que l'acquisition ou l'utilisation d'un bien ou d'un service confère ou assure un droit, un recours ou une obligation.

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

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

253. Where a merchant, manufacturer or advertiser makes use of a prohibited practice in case of the sale, lease or construction of an immovable or, in any other case, of a prohibited practice referred to in paragraph a or b of section 220, a, b, c, d, e or g of section 221, d, e or f of section 222, c of section 224 or a or b of section 225, or in section 227, 228, 229, 237 or 239, it is presumed that had the consumer been aware of such practice, he would not have agreed to the contract or would not have paid such a high price.

253. Lorsqu'un commerçant, un fabricant ou un publicitaire se livre en cas de vente, de location ou de construction d'un immeuble à une pratique interdite ou, dans les autres cas, à une pratique interdite visée aux paragraphes *a* et *b* de l'article 220, *a*, *b*, *c*, *d*, *e* et *g* de l'article 221, *d*, *e* et *f* de l'article 222, *c* de l'article 224, *a* et *b* de l'article 225 et aux articles 227, 228, 229, 237 et 239, il y a présomption que, si le consommateur avait eu connaissance de cette pratique, il n'aurait pas contracté ou n'aurait pas donné un prix si élevé.

272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

(a) the specific performance of the obligation;

(b) the authorization to execute it at the merchant's or manufacturer's expense;

272. Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, un règlement ou un engagement volontaire souscrit en vertu de l'article 314 ou dont l'application a été étendue par un décret pris en vertu de l'article 315.1, le consommateur, sous réserve des autres recours prévus par la présente loi, peut demander, selon le cas:

(a) l'exécution de l'obligation;

(b) l'autorisation de la faire exécuter aux frais du commerçant ou du fabricant;

(c) that his obligations be reduced;

(d) that the contract be rescinded;

(e) that the contract be set aside; or

(f) that the contract be annulled.

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

(c) la réduction de son obligation;

(d) la résiliation du contrat;

(e) la résolution du contrat; ou

(f) la nullité du contrat,

sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.

IV. QUEBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS

1. Every human being has a right to life, and to personal security, inviolability and freedom.

He also possesses juridical personality.

1. Tout être humain a droit à la vie, ainsi qu'à la sûreté, à l'intégrité et à la liberté de sa personne.

Il possède également la personnalité juridique.

4. Every person has a right to the safeguard of his dignity, honour and reputation.

4. Toute personne a droit à la sauvegarde de sa dignité, de son honneur et de sa réputation.

9. Every person has a right to non-disclosure of confidential information.

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

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

9. Chacun a droit au respect du secret professionnel.

Toute personne tenue par la loi au secret professionnel et tout prêtre ou autre ministre du culte ne peuvent, même en justice, divulguer les renseignements confidentiels qui leur ont été révélés en raison de leur état ou profession, à moins qu'ils n'y soient autorisés par celui qui leur a fait ces confidences ou par une disposition expresse de la loi.

Le tribunal doit, d'office, assurer le respect du secret professionnel.

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition,

49. Une atteinte illicite à un droit ou à une liberté reconnu par la présente Charte confère à la victime le droit d'obtenir la cessation de cette atteinte et la réparation du préjudice moral ou matériel qui en résulte.

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

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:

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

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

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

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

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

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

(c) sur des affiches placées dans des endroits dont l'accès est interdit aux jeunes par la loi.

22(3). Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons.

22(3). Le paragraphe (2) ne s'applique pas à la publicité de style de vie ou à la publicité dont il existe des motifs raisonnables de croire qu'elle pourrait être attrayante pour les jeunes.

VII. TOBACCO-RELATED DAMAGES AND HEALTH-CARE COSTS RECOVERY ACT

1. The purpose of this Act is to establish specific rules for the recovery of tobacco-related health care costs attributable to a wrong committed by one or more tobacco product manufacturers, in particular to allow the recovery of those costs regardless of when the wrong was committed.

1. La présente loi vise à établir des règles particulières adaptées au recouvrement du coût des soins de santé liés au tabac attribuable à la faute d'un ou de plusieurs fabricants de produits du tabac, notamment pour permettre le recouvrement de ce coût quel que soit le moment où cette faute a été commise.

It also seeks to make certain of those rules applicable to the recovery of damages for an injury attributable to a wrong committed by one or more of those manufacturers.

Elle vise également à rendre certaines de ces règles applicables au recouvrement de dommages-intérêts pour la réparation d'un préjudice attribuable à la faute d'un ou de plusieurs de ces fabricants.

15. In an action brought on a collective basis, proof of causation between alleged

15. Dans une action prise sur une base collective, la preuve du lien de causalité

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

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522 Article 1621 C.C.Q.
523 *Ibidem*, pp. 53-54, Qs. 23-25; pp. 64-64, Qs. 55-56.
524 *Ibidem*, p 82, Q. 109; Exhibit 1749-r-CONF.
525 Exhibit 1437A.
526 Testimony of Michel Poirier, May 23, 2014, p. 71, Q. 62; pp. 166, Q. 388.
527 *Ibidem*, p. 81, Qs. 103-105.
528 *Ibidem*, pp. 85-87, Qs. 121-127; p. 95, Q. 145; pp. 166-167, Qs. 389-394; Exhibit 1750-r-CONF.
529 *Ibidem*, p. 82, Qs. 108-109; Exhibit 1749-r-conf; Exhibit 1749.1-r-conf.
530 *Ibidem*, p. 165, Qs. 382-384.

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?

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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.