500-09-025385-154

COURT OF APPEAL OF QUÉBEC

(Montréal)

On appeal from a judgment of the Superior Court, District of Montréal, rendered on May 27, 2015 and rectified on June 9, 2015 by the Honourable Justice Brian Riordan.

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Nos. 500-06-000076-980 – 500-06-000070-983 S.C.M.

IMPERIAL TOBACCO CANADA LTD.

APPELLANT /
INCIDENTAL RESPONDENT
(Defendant)

v.

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ

JEAN-YVES BLAIS

CÉCILIA LÉTOURNEAU

RESPONDENTS /
INCIDENTAL APPELLANTS
(Plaintiffs)

- and -

JTI-MACDONALD CORP.

ROTHMANS, BENSON & HEDGES INC.

MIS EN CAUSE
(Defendants)

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ARGUMENT OF THE APPELLANT, IMPERIAL TOBACCO CANADA LTD.

APPELLANT IMPERIAL TOBACCO CANADA LTD. ("*ITCAN*") RESPECTFULLY SUBMITS THE FOLLOWING:

OVERVIEW

1. On May 27, 2015,[1] the Honourable Justice Brian Riordan rendered judgment (the "**Judgment**") in respect of two companion class actions: the first sought relief on behalf of a disparate class of individuals who had smoked cigarettes at any point since 1950 and who subsequently suffered from certain diseases (the "**Blais Class**"), whereas the second sought relief on behalf of smokers and former smokers who were "addicted" and who similarly smoked cigarettes at any point since 1950 (the "**Létourneau Class**").

2. In summary, the Judgment resulted in an unparalleled award of $15 billion in compensatory and punitive damages – awarded on a collective basis – which was premised upon unprecedented legal theories, evidentiary shortcuts and fundamental legal errors, including the following (*inter alia*):

(i) An unjustified abrogation of the Appellants' procedural and substantive rights under the class actions regime, purportedly in the name of procedural expediency, which had the effect of entirely "reading out" the Class Members from the proceedings;

(ii) The uniform treatment of two classes of demonstrably disparate individuals, with highly differentiated purchasing and smoking behaviours, injuries and exposure to messaging over the 50-year class periods;

(iii) A fundamental misapplication of the governing principles of civil liability with respect to causation, to the point of excluding <u>any</u> analysis of the causal link between the Appellants' deemed faults and the Class Members' injuries;

(iv) A fundamental misapplication of the governing principles of civil liability with respect to a manufacturer's duty to inform, without any regard for consumer awareness and without any recognition of the central role played by the Federal regulator (*i.e.*, Health Canada);

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[1] Corrected on June 9, 2015.

(v) Material errors of law with respect to the interpretation and application of the *Consumer Protection Act,*[2] resulting in a retroactive application of the statute to the entirety of the Class without any consideration of causal impact or the requisite "nexus" between the consumer and the allegedly misleading representation;

(vi) Material errors of law with respect to the interpretation and application of the *Charter of Human Rights and Freedom,*[3] again resulting in retroactive application of the statute without regard for the fundamental elements of civil liability;

(vii) A fundamental misapplication of the law governing "spoliation" and the duty to preserve records, with the result that ITCAN was subjected to a free-standing award of punitive and compensatory damages in respect of historical document retention practices that solely impacted duplicate copies of a discrete subset of documents (which duplicates were destroyed well before this litigation was commenced);

(viii) A misapplication of the law governing "conspiracy" grounded in a subjective review of dated historical documents, in the absence of any supporting witness testimony and without any regard or acknowledgement of the relevant testimony that was offered;

(ix) A misapplication of the law relating to punitive damages, without due regard for the authorizing statutes or the applicable jurisprudence;

(x) A misapplication of the law relating to prescription, such that Class Members who were specifically warned by the Appellants about the health hazards at issue – in express terms – nonetheless had their rights of action preserved (in many cases, for decades);

(xi) An erroneous apportionment of liability based on improper and irrelevant considerations, and in a manner that disregarded even the Respondents' requests for relief;

(xii) An erroneous calculation of interest and additional indemnity, which included the payment of interest on certain Class Member claims before they were even crystallized; and

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2 CQLR, c P-40.1 ("*CPA*")
3 CQLR, c C-12 ("*Québec Charter*").

(xiii) A wholesale disregard for fundamental rules of evidence, including the repeated reliance on hearsay and a disregard for witness testimony.[4]

3. What is more, the Trial Judge made this unprecedented award in the context of an overly broad and inherently unmanageable proceeding, involving two overlapping classes comprised of virtually everyone in Québec who has smoked cigarettes in the last half-century.

4. Indeed, the expansive claims – which included numerous alleged civil faults and statutory breaches – implicated virtually every product on the market and virtually every activity of the Appellants in the second half of the Twentieth Century.

5. Notwithstanding the breadth of their allegations, the Respondents' claims were found to have been generally unsubstantiated, with the sole exception of the claims related to the Appellants' communication of product risks to consumers. In this latter regard, the Trial Judge concluded that the Appellants had failed to adequately inform consumers of smoking risks, a finding that was inexplicably deemed – without evidence – to apply to all Class Members, across the entirety of the Class Period.

6. Notably, during the 251 days of trial not a single member of either Class testified. Indeed, no direct evidence was tendered by the Respondents about a single member's smoking behaviour, medical history, injuries, damages, reliance on representations or decision-making.[5]

7. Rather, the Respondents chose to limit their evidence to a handful of experts and a collection of hand-picked former employees of the Appellants, who were unable to offer direct testimony about many of the material events in dispute. Indeed, a majority of the witnesses were not even employed by the Appellants at the time that many of these events took place.

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4 Over and above these fundamental legal errors are a number of material errors of mixed fact and law, discussed herein.

5 In fact, the only evidence about individual Class Members in the entirety of the record was the limited commentary contained in one of the Respondents' expert reports filed by a pulmonologist, wherein Dr. Desjardins provided his medical opinion as to Mr. Blais' condition (*i.e.*, paraseptal emphysema, which Desjardins conceded is typically congenital – see Trial Transcript (Desjardins), February 4, 2013 at p. 331, QQ. 748-749). Notably, neither Mr. Blais' medical records nor his testimony was entered into evidence, nor was any evidence tendered as to his smoking history. In this latter regard, there is no evidence whatsoever to suggest that Mr. Blais smoked ITL products. In fact, the record is to the contrary (see, *eg.*, *Conseil Québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2007 QCCS 645 (Julien, J.)).

8. In essence, the Respondents conducted a "plaintiff-less" trial, relying on dated historical documents – from varying sources and with varying degrees of reliability[6] – in an effort to "reconstruct" events from decades ago in a manner that might conform to their legal thesis.

9. However, even this liberal use of documentary hearsay did not assist the Respondents with the evidentiary gaps relating to their own clients. To the contrary, the Respondents opted to close their case without any evidence whatsoever in respect of the Class Members.

10. In fact, the Respondents freely conceded that they did not even attempt to prove a causal link between the Appellants' conduct and the Class Members' smoking behaviour or injuries, and even went so far as to admit in closing arguments that they essentially sought to impose liability on the Appellants for the mere act of manufacturing and selling cigarettes in Canada.[7] In so doing, the Respondents disregarded the guidance of this very Court:

> Il ressort de tout cela que le fardeau des intimés ne s'arrête pas à la démonstration de l'existence de la faute de l'appelante et de ses codéfenderesses à l'égard des membres des deux groupes, mais aussi à celles, indissociables, du préjudice et du lien de causalité, et ce, à l'égard de chacun des membres de ces groupes.
>
> … la double question de l'existence du préjudice (même seulement moral) et du lien de causalité entre celui-ci et l'une ou l'autre des fautes alléguées fait donc partie intégrante des questions à résoudre par le juge du fond.[8]

11. Instead of tendering the requisite evidence in respect of causation, the Respondents asked the Court to draw sweeping (and unsubstantiated) presumptions to fill in their evidentiary gaps. Although the Trial Judge ultimately obliged them in this regard – at least insofar as the "failure to inform" allegations were concerned – he did so without any evidentiary or legal foundation.

12. More to the point, the presumptions that he purported to invoke – upon which the entirety of the Respondents' claims are premised – are unsustainable on the face of the Judgment.

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6 Including unauthenticated documents sourced from the internet and foreign non-parties.

7 Respondents' Notes & Authorities, para. 49: "The Plaintiffs therefore submit that it is a civil fault to design, sell, and manufacture an addictive, useless product that causes death in half of its long term users."

8 *Imperial Tobacco Canada Ltd. c. Létourneau*, 2014 QCCA 944 at paras. 41 and 46.

13. For example, the Trial Judge essentially disregarded the Appellants' detailed expert evidence concerning the expansive public awareness of risks during the Class Period[9] – notwithstanding the Respondents' failure to tender any Class Member or expert testimony to the contrary – and instead "presumed" that the Appellants' "failure to inform" of the risks of smoking must have caused each and every Class Member to start or continue smoking.

14. In other words, he essentially "presumed" – allegedly on the basis of "common sense" – that the public was universally unaware of the risks of smoking, throughout the Class Period.

15. However, elsewhere in the Judgment the Trial Judge makes the express finding that "the public knew or should have known of the risks and dangers of contracting a Disease from smoking as of January 1, 1980".[10] He similarly found that different or earlier product warnings "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".[11]

16. Accordingly, the sweeping presumption of Class-wide fault, injury and causation arising from the Appellants' "failure to inform" is unsustainable on the Trial Judge's own findings.[12]

17. Similarly, in the context of the Létourneau Action, the Trial Judge inexplicably concluded that the Appellants' express warnings about addiction were not sufficient to discharge their duty to inform, on the basis of his own (unsupported) supposition that such warnings needed to be coupled with a sufficient period of "public digestion" (which he arbitrarily determined would require a period of 18 months). In so doing, he imposed a duty not recognized in civil law, which extended well beyond the obligation to inform.

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9 As discussed herein, the Appellants tendered extensive expert evidence confirming that there was widespread public awareness of the risks of smoking throughout the Class Period, which crystallized by no later than the early 1960s.

10 Judgment, para. 121. Notably, he arbitrarily "discounted" the Defendants' liability after this date by 20% to account for the shared responsibility attributable to Class Members for their "stupidity" in deciding to smoke.

11 Judgment, para. 803.

12 These "presumptive" errors are merely compounded by the uncontested evidence that the Appellants expressly warned about the very Diseases at issue in these proceedings – including cancer, lung disease and addiction – during the Class Period (Judgment, para. 110). The Trial Judge's use of Class-wide presumptions in the face of this reality, without any attempt to reconcile the obvious inconsistency between his presumptions and the uncontradicted evidence, further undermines the Judgment's conclusions.

18. Moreover, the corresponding presumption that the risks of addiction were not known by anyone in the Class until 18 months after an express warning was published flies in the face of both the record and the "common sense" upon which the Trial Judge purports to rely.

19. In short, the Respondents presented the Trial Judge with no "known facts" about the Class Members' smoking habits, risk awareness or decision-making from which to draw "presumptions", and therefore deprived him of the ability to draw upon Article 2849 CCQ to ameliorate their evidentiary shortcomings.

20. Similar errors manifest themselves in the Trial Judge's categorical reasoning with respect to section 219 of the CPA.

21. In particular, the Appellants were deemed to have violated the statutory provision by virtue of a limited subset of print ads which purportedly conveyed the "impression" that smoking was not harmful because of their use of "attractive, healthy-looking models and healthy-looking environments".[13] On the basis of this finding, the Trial Judge concluded that all Class Members were entitled to "claim moral and punitive damages pursuant to section 272 of the CPA".

22. However, in making this Class-wide determination, the Trial Judge wholly failed to reconcile the following facts (*inter alia*):

(i) The CPA did not come into force until 1980 (*i.e.*, 30 years after the commencement of the Class Period, and several months after the date on which the Trial Judge himself said the public should have been aware of the health risks);

(ii) Although the Trial Judge does not provide an exhaustive list of the offending publications, the ads in question ran – at most – for a period of less than 10 years (*i.e.*, from the enactment of the CPA in 1980, to the statutory prohibition of cigarette advertising in Canada in 1988);[14]

(iii) There is no evidence how many Class Members – if any – saw the ads in question, let alone what impact they had; and

(iv) Every single ad in question also contained an express health warning on its face.

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13 Judgment, para. 535.

14 Cigarette advertising in Canada resumed for a brief 2-year period in the mid-1990s, although it should be noted that no ITL advertising from this period was identified by the Trial Judge in his list of "offending" marketing materials (Judgment, para. 535).

23. These facts – which are not in dispute – necessarily preclude any Class-wide determinations with respect to the alleged breaches of the CPA. Accordingly, the Trial Judge's decision to award collective recovery to the entirety of the Class in this context represents an error of law.

24. Ultimately, the Trial Judge's errors flow from a flawed perception of the class actions regime. Throughout the Judgment, the Trial Judge made repeated reference to his efforts to streamline the adjudicative process and employ legal shortcuts. In so doing, he effectively read the Respondents out of these proceedings entirely, and materially compromised the Appellants' rights to a fair trial in the following respects (*inter alia*):

(i) He inexplicably concluded that Class Member evidence would not only be "useless", but would in fact become increasingly so as the number of the people in the class increased;[15]

(ii) He overlooked the complete lack of evidence concerning Class Members, and instead purported to rely on his own assessment of "typical" or "average" experiences, based on alleged "common sense";

(iii) He acknowledged that his reasoning gave rise to the prospect that "some people might be included in the classes, and thus compensated, incorrectly", but dismissed this as being a matter of little concern due to the size of the classes; and

(iv) He granted collective recovery, based on the "best estimate of the typical moral damages that a [Class] Member suffered", without <u>any</u> evidence as to what Class Members in fact suffered by way of moral or other damages (if any).

25. With respect, ITCAN submits that the class action provisions of the Code of Civil Procedure were never intended to compromise a defendant's fundamental legal rights in this manner. To the contrary, the Courts have consistently warned about the perils of allowing such prejudice to be visited upon a litigant in the name of procedural expediency.[16]

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15 Judgment, para. 262.

16 *Bou Malhab v. Diffusion Métromédia CMR inc.*, [2011] 1 SCR 214, 2011 SCC 9, at para. 52 ["*Bou Malhab*"]; *Apple Canada Inc. v. St Germain*, 2010 QCCA 1376 at paras. 99 and 113 ["*Apple Canada Inc.*"]; *Pharmascience inc. v. Option Consommateurs*, 2005 QCCA 437, at para. 31 ["*Pharmascience*"].

26. Notably, all of the foregoing legal errors – each of which is independently sufficient to dispose of this appeal – arise even if one were to accept all of the Trial Judge's findings of fact. They are purely legal errors. What is more, they are errors of law that give rise to legal absurdities.

27. Consider, for example, the following conclusions that necessarily flow from the Trial Judge's reasoning (*inter alia*):

(i) A defendant to a proceeding commenced by a class of consumers has fewer rights than a defendant to an individual proceeding commenced by any of those same consumers. The larger the class, the lower the burden of proof;

(ii) Not a single Class Member was aware of the health hazards of smoking as of December 31, 1979, but the entirety of the Class was aware of these same hazards on the following day;

(iii) Not a single Class Member was aware of the risk of tobacco addiction until 18 months after an express warning of the risk was affixed to every cigarette pack sold in Canada;

(iv) Class Members who made the decision to smoke with full knowledge of the health hazards of smoking – including those who started smoking after January 1, 1980 (*i.e.*, the deemed "knowledge date") – are nonetheless entitled to claim moral and punitive damages on the basis of the Appellants' non-disclosure of these very hazards;

(v) Notwithstanding the existence of express health hazard warnings on every cigarette pack sold in Canada since 1972 and on every advertisement since 1973, every single Class Member's purchasing decision was the direct result of the Appellants deemed "failure to inform", regardless of when such decisions took place and regardless of the Class Members' awareness of the health hazards;

(vi) Even after the Federal government has specifically legislated the express terms of the product warnings that should be adopted by manufacturers of a particular product, these same manufacturers can nonetheless be found liable to consumers for the inadequacy of such warnings; and

(vii) The entirety of the Class – including those who quit smoking in the 1950s, 1960s or 1970s – is entitled to advance statutory claims against the Appellants and recover moral and punitive damages under legislation that was introduced in the late 1970s / early 1980s.

It is self-evident that these propositions are unsustainable as a matter of law.

28. Over and above these legal errors are the numerous palpable and overriding errors of fact – or errors of mixed fact and law – which similarly emerge from the Judgment. While such evidentiary errors are indeed fundamental, and serve to highlight the unsustainability of the Trial Judge's reasoning, they are ultimately not essential to this appeal due to the dispositive errors of law that manifest themselves throughout the Judgment. Accordingly, ITCAN will limit these submissions to only the most significant of the Trial Judge's factual and evidentiary errors.

29. For all of the reasons set out herein, ITCAN submits that the Judgment contains errors of law – as well as palpable and overriding errors of fact – which necessarily invalidate the Judgment's conclusions.

PART I – FACTS

A. Procedural History

30. A summary of the relevant procedural history is set out in the Argument of JTI-Macdonald Corp.[17]

B. Factual Background

31. The summary of background facts that follows is largely uncontested: the parties do not materially dispute the historical context that gave rise to these proceedings. Likewise, the Trial Judge did not make material factual findings which challenged the significant historical events, although much of this factual background is noticeably absent from the Judgment.

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[17] A more detailed procedural history is also set out at paras. 9-21 of ITCAN's Inscription in Appeal.

32. While the historical context may not be materially in dispute, it is fundamentally important to the claims at issue. Tobacco is among the most regulated products in the world, and has been for decades. In Canada, entire sectors of the Federal government – including divisions of Health Canada, Agriculture Canada and even the Department of Finance – are devoted to virtually every facet of the manufacture and sale of cigarettes.[18]

33. Accordingly, any analysis of the Appellants' and Class Members' rights and obligations must be undertaken with these regulatory and societal underpinnings in mind.

(i) History of Smoking & Health in Canada

34. Cigarettes have been sold in Canada for well over a century. From the outset of its commercial sale, tobacco was known to be "hazardous".

35. The trial record is clear that throughout the Class Period, the sale of cigarettes has been specifically regulated by Health Canada. Indeed, this was expressly confirmed by the former government employees and ministers who testified in these very proceedings, which testimony is also noticeably absent from the Trial Judge's analysis.

36. At all material times, the Canadian government and public health community were specifically aware of the health risks posed by smoking, and were directly involved in extensive research related to the issue of smoking and health. Indeed, the Canadian government became a world leader in tobacco control.

37. Even the Respondents have conceded that the Canadian government and public health community knew of the material risks of smoking by at least the early 1960s – a concession that the Trial Judge did not address in his reasons.[19] However, as the expert evidence confirmed, the government and public health community's knowledge of the association between smoking and disease – including lung cancer – can be clearly demonstrated prior to 1950.[20]

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18 See, *eg.*, Judgment, paras. 188-189 (discussing the role of Agriculture Canada in development and promotion of tobacco strains); para. 105 (discussing Health Canada's education role in respect of tobacco, beginning in the early 1960s); paras. 200 and 352-355 (discussing Health Canada's role in promoting certain tobacco products).

19 Respondents' Notes and Authorities, para. 330: "No controversy existed at trial as to the period when the Canadian government and the public health community accepted that smoking caused several major diseases, including lung cancer, throat cancer, and emphysema. Documentary evidence, expert reports and testimony at trial consistently opined that such knowledge existed in the early 1960s".

20 Trial Exhibit 40346, pp. 25-29 pdf, paras. 3.19 to 3.30 (Perrins Report).

38. Dr. Perrins, a Professor of History and Dean of the Faculty of Arts at Acadia University, provided detailed and uncontroverted expert testimony on the history of tobacco regulation in Canada. He confirmed that the Canadian government was – at all material times – actively engaged in the management of the public health risk posed by smoking. In particular, he noted that "during the late 1940s and 1950s there was a growing concern amongst governments, as well as within the medical and public health communities, regarding the rising numbers of diagnosed lung cancer deaths, as well as the association between the rise of this chronic disease and cigarette smoking".[21]

39. As of 1943, part of the curriculum for students in Québec included information regarding the phenomenon of "the tobacco habit", as well as tobacco's "effects upon the organs of the human body", the "injurious effects of cigarette smoking".[22] Similarly, as early as 1946 the government specifically advised Canadians that tobacco smoke affected vital organs.[23] By 1962, the Federal Ministry of Health's stated position was that "...there is overwhelming evidence that smoking damages the lungs whether it be by the production of chronic bronchitis, emphysema, asthma or cancer. There is also a great deal of evidence linking smoking with cardiovascular troubles."[24] Nonetheless, the government's view remained that smoking was a matter of personal choice.[25]

40. By mid-1963, immediately prior to the National Conference on Smoking and Health, the Canadian government's position on smoking was that "there is scientific evidence that cigarette smoking is a contributory cause of lung cancer and that it may also be associated with chronic bronchitis and coronary heart disease".[26]

41. At the same time, the Canadian government publicly acknowledged that it had a duty to inform the public about the risk to health connected with cigarette smoking and that special efforts should be made to dissuade children and young people from acquiring the habit.[27] The Federal government undertook a multitude of initiatives specifically directed at educating the Canadian public about the risks of smoking.[28]

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21 Trial Exhibit 40346, p. 14.
22 Trial Exhibit 25104, p. 5. See also Trial Exhibit 21503, p. 20, evidencing a similar curriculum a decade later.
23 Trial Exhibit 40104, p. 4 pdf.
24 Trial Exhibit 20469, p. 2 pdf.
25 *Ibid.*
26 Trial Exhibit 40346.114, pp. 17-18 pdf.
27 Trial Exhibit 40346.114, pp. 17-18 pdf: "Health agencies, including the Department of National Health and Welfare, have a duty to inform the public about the risk to health connected with cigarette smoking."
28 The evidence confirming the nature and extent of these educational initiatives is more fully summarized in the Argument of JTI-Macdonald Corp.

42. By 1965, Health Minister LaMarsh commented that the government-commissioned surveys which showed that 90% of Canadians were aware of the risks of smoking proved that "success has been achieved" as a result of these educational initiatives (which continued throughout the Class Period).[29]

(ii) Public Awareness of Health Risks

43. As the expert evidence confirmed, public awareness of the risks of smoking generally tracked that of the government, such that there was extensive public awareness throughout the Class Period.

44. In particular, Professor Duch – a Professor of Quantitative Political Science at the University of Oxford – was asked to opine on the awareness of the Québec populace (from 1950 to 1998) of the health risks associated with smoking, as well as the public's view that smoking can be difficult to quit. He undertook a comprehensive review of Canadian and Québec-based surveys and published public opinion data – from various sources – and concluded as follows:

> "There is no doubt, based on all available public opinion data from the early 1950s to the present, that at least since 1954, and probably earlier, a very high proportion of the Québec public has been aware of reported links between smoking and lung cancer, which is a serious health condition. Public opinion in Québec was recorded as reaching exceptionally high levels of awareness by, at the latest, 1963. This very high level of awareness is present in all age and education sub-populations in Québec (and Canada)."[30]

45. Professor Duch's expert conclusions regarding historical public awareness of smoking risks – which findings were not challenged by any other expert in these proceedings – are entirely consistent with the conclusions of Professor Flaherty with respect to the public media discourse related to smoking risks.

46. In particular, Professor Flaherty – a Professor Emeritus of History and Law at the University of Western Ontario – was asked to opine on the public's awareness of the association between smoking and cancer and other disease risks, based on publicly available materials. On the basis of his extensive historical review, Professor Flaherty

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29 Trial Exhibit 40064.73, p. 1.
30 Trial Exhibit 40062.1, p. 10 pdf, paras. 10-11 (Duch Report).

concluded that smoking risks were "common knowledge" by no later than 1964, after which date "publicity about the health risks of smoking was constantly circulating and re-circulating throughout Québec".[31]

47. The record is clear that Québec public awareness of the health hazards of smoking remained ubiquitous to the end of the Class Period. Even the Respondents' own expert – though admittedly unqualified – conceded that the risks of disease associated with smoking were publicly known by the 1970s,[32] and the Trial Judge himself concluded that "the public knew or should have known of the risks and dangers of contracting a Disease from smoking as of January 1, 1980" (despite the voluminous evidence confirming such widespread awareness long before this date).[33]

(iii) The Evolution of the Concept of "Tobacco Addiction"

48. The trial evidence further confirmed this same expansive level of awareness – across all constituents – with respect to the issue of "addiction".

49. Although the term "addiction" was colloquially applied to smoking in newspapers and other public documents at various times during the Class Period, the Canadian government and even the U.S. Surgeon General (**"USSG"**) rejected the use of the term in the cigarette context until the close of the 1980s. Before the commencement of the Class Period, however, the Canadian government and public health authorities were well aware of the potential "habit-forming" nature of cigarette smoking.

50. Again, while there is certainly extensive evidence in the record of awareness dating back to the 1940s, even the Respondents conceded that knowledge of tobacco addiction crystallized among members of the Canadian government and public health community by at least the early 1960s (a concession that was ignored by the Trial Judge).[34]

51. References to the "tobacco habit" in government communications date back to the 1940s.[35] By 1964, the Department of Health confirmed that "the smoking habit is not an

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31 Trial Exhibit 20063, pp. 3-4, para. 4 (Flaherty Report).
32 Judgment, para. 77.
33 Judgment, para. 121.
34 Respondents' Notes and Authorities, para. 331: "The available evidence demonstrates that the Canadian government and the public health community acknowledged tobacco dependency as a medical condition since at least the early 1960s."
35 Trial Exhibit 20419, p. 3 pdf.

addiction, but rather 'habituation' since it is psychological rather than pharmacological in nature".[36]

52. Even the US Surgeon General's Report of 1964 – which was widely disseminated and expressly identified numerous health risks associated with smoking – concluded that smoking was a habit rather than an addiction.[37] In particular, the USSG noted that in "medical and scientific terminology, the practice should be labelled habituation to distinguish it clearly from addiction, since the biological effects of tobacco, like coffee and other caffeine-containing beverages, betel morsel chewing and the like, are not comparable to those produced by morphine, alcohol, barbiturates and many other potent addicting drugs."[38]

53. In its 1964 Smoking and Health Reference Book, the Department of Health specifically addressed the question of the proper "characterization of the tobacco habit", referencing various passages from the 1964 USSG Report in its analysis. The Department of Health concluded that smoking was properly characterized as "an habituation rather than an addiction".[39]

54. In the late 1980s, following significant lobbying efforts by health groups to adopt the "addiction" terminology in the smoking context (as was proposed by the USSG in 1988)[40] – in part due to the term's "provocative" and "controversial" nature[41] – Assistant Deputy Minister of Health Liston commissioned the Royal Society to specifically assess whether the smoking habit could be classified as an addiction under the then-contemporary diagnostic criteria.[42] Notably, Dr. Liston gave direct testimony on these very issues at trial, though his evidence was not even mentioned by the Trial Judge.

55. Ultimately, the Royal Society Report adopted the addiction terminology in 1989. However, in so doing, the Report "reject[ed] existing definitions of 'drug addiction' and substitute[d] a new one".[43] In particular, the Royal Society concluded that, just as "earlier definitions of drug addiction have evolved over the past forty years", a "refinement" of the

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36 Trial Exhibit 40126, p. 3 pdf.
37 Trial Exhibit 20059 (USSG 1964).
38 Trial Exhibit 20059, p. 350, pdf p. 3 (USSG 1964).
39 Trial Exhibit 40123, pp. 63-66 pdf.
40 Trial Transcript (Liston), December 11, 2013, pp. 79-81, QQ. 162-167; Trial Exhibit 20985, p. 1 pdf.
41 Trial Exhibit 40346.381, noting that "use of the term addiction in connection with cigarette smoking is probably somewhat provocative and could lead to controversy".
42 Trial Transcript (Liston), December 11, 2013, pp. 80-82, QQ. 166-172.
43 Trial Exhibit 20989; Trial Transcript (Liston), December 11, 2013, p. 85, Q. 183.

then-existing conception of addiction was appropriate in order to bring it within the tobacco arena.[44]

(iv) Public Awareness of "Tobacco Addiction"

56. The Appellants also tendered detailed evidence about the public awareness of the habit-forming properties of cigarettes throughout the Class Period. In particular, Professor Duch testified that from the very first public survey in Canada to address the issue of tobacco "habituation", high percentages of respondents (*i.e.*, 84%+) indicated awareness of the risk[45].

57. Similarly, Professor Flaherty reviewed the public media reports and related public documents, on the basis of which he identified a consensus among the Québec population as of the 1950s that it was difficult to quit smoking. This consensus gave rise to a number of articles designed to provide assistance to smokers who wished to quit:[46]

> 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 by the mid-1960s. By this time, it had long been part of the common knowledge of Québecers (from about the mid-1950s) that smoking was difficult to quit…[47]

(v) The History of Product Warnings in Canada

58. The evidence regarding product warnings during the Class Period is similarly uncontested, and is summarized by the Trial Judge at paragraph 110 of the Judgment.

59. In short, every cigarette pack sold in Canada as of 1972 included an express health warning. Although the size and content of these warnings varied over time, they remained in effect for the duration of the Class Period (and beyond).

60. Similarly, every cigarette advertisement as of 1973 included an express health warning on the face of it.[48] Again, while the size and content of these warnings varied over time, they remained in effect for the duration of the Class Period.

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44 Trial Exhibit 212, p. 7 pdf.

45 Trial Exhibit 40062.1 at p. 69 pdf (Duch Report); see also Trial Transcript (Duch), May 27, 2013 at p. 68, Q. 125.

46 Trial Exhibit 20063, paras. 31-32, pp. 13-14 (Flaherty Report); Trial Exhibit 30028.1, paras. 53-57, pp. 11-12 and paras. 68-75, pp. 13-14 (Lacoursière Report).

47 Trial Exhibit 20063, para. 4, pp. 3-4 [emphasis added] (Flaherty Report).

48 Trial Exhibit 20063.6, p. 33.

61. Certain of these product and advertising warnings included express language advising of many of the very risks at issue in these proceedings, including: “cancer” / “lung cancer”, “fatal lung disease”, and the “addictive” properties of cigarettes, as well as the risk of death / shortened life expectancy.[49] This fact was accepted by the Trial Judge, but inexplicably did not factor into his subsequent legal analysis.

62. The initial adoption of product warnings by the Appellants in 1972 – and their continued use up to 1988 – was done voluntarily, in the absence of any mandatory legislation or regulation. More importantly, it was done “with the participation and approval of the Canadian Government”.[50]

63. At no point did ITCAN ever challenge the content of the warnings themselves.[51] To the contrary, even after the enabling legislation was struck down by the Supreme Court in 1995, ITCAN and the other Appellants voluntarily maintained the use of detailed health warnings.[52]

64. At various points during the Class Period, the Canadian government considered and rejected the issue of mandated pack warnings on cigarettes. Notably, this decision was not premised on a lack of appreciation of the risks of smoking, but rather on policy grounds.[53]

65. For example, in 1965 the Department of National Health and Welfare specifically considered the issue of health warnings, but dismissed the concept as “silly” and “unrealistic” at the time.[54] In 1969, the Isabelle Report recommended the implementation of certain warnings, including two possible warnings that referred to dependency (not addiction),[55] but these recommendations were not adopted by the Canadian government.

66. Later, in 1971, proposed legislation was tabled which would have introduced a singular warning stating that “Danger to Health Increases With Amount Smoked, Avoid Inhaling”,[56] but again the legislation was never adopted. Notably, however, the first

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49 Judgment, para. 110.
50 Judgment, para. 394. The voluntary health warnings formed part of the Voluntary Codes.
51 Trial Transcript (Descôteaux), May 2, 2012, at p. 127, Q. 235.
52 Trial Exhibit 40005O-1995 (1995 Voluntary Code) at p. 1 pdf.
53 As discussed below, the Trial Judge disregarded this conscious policy decision by the Canadian government.
54 Trial Exhibit 20356.
55 Trial Exhibit 1554.4, p. 41 pdf.
56 Trial Exhibit 20073, p. 16 pdf.

warnings voluntarily adopted by the industry in 1972 closely mirrored the proposed legislated warnings.

67. In the early 1980s, the Canadian government also considered whether to modify the "specificity" of the pack warnings. For example, in 1981 the Director of the Bureau of Tobacco Control specifically wrote to the Assistant Deputy Minister of Health on this topic of particularized warnings and advised that "it would not be advisable to have disease-specific warning information printed on cigarette packages at this time".[57]

68. Similarly, there was also a stated desire within the government not to publish detailed information about tobacco constituents other than tar and nicotine so as to avoid consumer confusion.[58]

69. As mentioned, the Federal Government implemented specific legislated warnings in 1989, which have since evolved and continue to be in effect today. However, as the Trial Judge himself acknowledged, it is an incontrovertible fact that consumers start and continue smoking in the face of these legislated warnings, and nothing the manufacturers do from a risk communication perspective will change this reality.[59]

(vi) Tobacco Advertising and the "Voluntary Codes"

70. Over the course of the Class Period, there was a dramatic evolution in the public marketing and sale of cigarettes. The form and content of the message evolved, as did the medium by which such messages were communicated.

71. Notably, cigarette advertising did <u>not</u> take place at all times during the Class Period – an important fact, given the Respondents' request for collective recovery. Rather, cigarette advertising was effectively banned as of 1988. Moreover, the nature and content of the advertising materially changed over the 50-year period.

72. In part, this evolution of cigarette advertising over the Class Period was attributable to the "Voluntary Codes" that were adopted by the industry over the years, "with the participation and approval of the Canadian Government".[60] In essence, the Voluntary

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57 Trial Exhibit 21344, p. 2 pdf.
58 See, *eg.*, Trial Transcript (Zilkey), December 10, 2013, p. 30, Q. 64. See, also, Trial Exhibit 20799.
59 Judgment, para. 803.
60 Judgment, para. 394.

Codes were voluntary undertakings by the Appellants to refrain from marketing activity that they deemed to be inadvisable or inappropriate.

73. The first such Code was adopted in 1964, which included a number of undertakings and prohibitions designed to ensure that cigarette advertising was to be "directed to adults", including restrictions on certain broadcast advertising (which ceased entirely as of 1972). Subsequent iterations of these Voluntary Codes expanded upon these principles, and included additional undertakings such as voluntary warnings, tar and nicotine disclosures, and limits on advertising expenditures.

74. Of central importance to this Appeal are the voluntary restrictions on "health claims", both express and implied, that were embedded in the Voluntary Codes. In particular, the Codes prohibited any form of advertisement stating – or, after 1972, "implying" – that "smoking the brand advertised promotes physical health or that smoking a particular brand is better for health than smoking any other brand of cigarette".[61]

75. Notably, the Trial Judge generally rejected the Respondents' claims of improper advertising, except in respect of certain (unidentified) ads from the 1980s portraying "attractive, healthy-looking models and healthy-looking environments", which he claimed – without any evidence – could give a "credulous and inexperienced consumer" the "general impression" that smoking is not harmful to health.

76. Importantly, he made this finding without the benefit of any Class evidence to support this "general impression", let alone evidence of how many Class Members – if any – saw the impugned advertisements.

77. Although the specific advertisements that the Trial Judge deemed to fall into this offending category were not identified in the Judgment (aside from a few "examples"), the record is clear that all such advertisements would necessarily have included express warnings about the health risks of smoking. Moreover, their distribution would have been limited to the period prior to 1988 (*i.e.*, the date of the implementation of the legislated advertising ban), subject to certain limited exceptions.[62]

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61 Trial Exhibit 40005B (1964 Code), Rule 4; Trial Exhibit 40005C (1972 Code), Rule 11; Trial Exhibits 40005G (1975 Code) & following, Rule 8.

62 After the *Tobacco Products Control Act*, S.C. 1988, c. 20, was struck down by the Supreme Court in 1995 as being unconstitutional, the Appellants resumed advertising for a brief period. Notably, in so

(vii) Public Statements by ITCAN

78. As stated above, ITCAN did not make any form of positive health assertions in its product advertising during the Class Period. What is more, ITCAN made very few public statements about health-related issues during the Class Period, beyond what was communicated on their products and advertisements by way of the health warnings.[63]

79. Company witnesses repeatedly testified that ITCAN refused to engage in a "health debate" in the public domain,[64] and did not generally comment on health issues other than by means of the government-approved messaging contained in its pack and advertising warnings. The company viewed this public health issue as being the domain of Health Canada, and considered the government to be the best source of any such messaging.[65]

80. This evidence was corroborated by Professor Flaherty, who reviewed nearly 12,000 public communications issued over the course of the Class Period as part of his expert mandate. On the basis of this review, he concluded that – other than a limited set of public statements from foreign and domestic tobacco manufacturers in the 1950s and early 1960s regarding formal "causation" (as distinct from association) – the industry as a whole said very little about smoking and health beyond what was communicated by means of the warnings.[66]

81. In their Notes and Authorities, Respondents were only able to identify 17 discrete and isolated statements – made over a 50-year period, in a variety of contexts – which they asserted (without corroborating evidence) were somehow indicative of a public "denial" or "trivialization" of smoking risks by ITCAN. This list of 17 "public statements" included private letters, internal draft documents, and submissions by counsel in a small claims proceeding in Rimouski.[67] Importantly, the Respondents tendered no evidence whatsoever that <u>any</u> of these "statements" were in fact communicated to the public, let

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doing they entered into a Voluntary Code that maintained the detailed warnings that had previously been legislated, including in the context of advertising – see Trial Exhibit 40005O-1995 (1995 voluntary code) at pdf. 1.

63 ITCAN's summary of the record is excerpted at paragraph 243 of the Judgment.

64 See, *eg.*, Trial Transcript (Kalhok), April 18, 2012, pp. 112-113, QQ. 264-268, describing ITCAN's "policy of silence". See, also, Trial Exhibit 126, discussing the fact that "tobacco industry leaders have largely remained silent".

65 Trial Transcript (Kalhok), April 10, 2012, at p. 108, Q. 444.

66 Trial Exhibit 20063, at pp. 55-59, paras. 146-155 (Flaherty Report).

67 Respondents' Notes & Authorities, para. 600, citing the submissions of counsel in a 1997 proceeding "in the context of a lawsuit against ITL before the small claims court by Madame Létourneau."

alone whether a single Class Member – or indeed any consumer in Québec – ever heard or read such statements.

82. Ultimately, the Trial Judge relied exclusively on 6 alleged "public statements" by ITCAN over the 50-year Class Period as the basis for his imposition of Class-wide liability:

(i) a 1970 radio interview conducted by a Vancouver radio station, which the Trial Judge acknowledged "did not have any direct effect in Québec";[68]

(ii) a 1969 internal company newsletter to ITCAN employees, summarizing recent submissions to a Parliamentary committee;[69]

(iii) an apparent written response (possibly in draft) to a question from a Financial Post representative, in respect of which there is no evidence of eventual publication;[70]

(iv) a 1976 internal working document which was a draft company position statement that "never saw the light of day";[71]

(v) private correspondence to the editor of the Montreal Star, again without any evidence of subsequent publication of its content;[72] and

(vi) a 1994 internal statement communicated to ITCAN employees through a company newsletter.[73]

83. Notably, none of these statements related in any way to the phenomenon of tobacco addiction or habituation.

84. Rather, the statements were primarily grounded in the scientific distinction between "causation" – which ITCAN periodically challenged due to the inability to identify a causal mechanism – and statistical association, which was accepted. As the Trial Judge himself

68 Judgment, paras. 245-246.
69 Judgment, paras. 248-249.
70 Judgment, para. 251.
71 Judgment, para. 253; Trial Transcript (Kalhok), April 10, 2012, pp. 149-150, Q. 599; Trial Transcript (Kalhok), April 11, 2012, p. 26, QQ. 51-55; Trial Transcript (Kalhok), May 8, 2012, pp. 226-227, QQ. 634-638
72 Judgment, para. 257.
73 Judgment, para. 265.

noted, "many of the Companies' statements were technically accurate. Science has not, even today, been able to identify the actual physiological path that smoking follows…".[74]

85. Although the evidence shows that ITCAN periodically considered publicly "defending" cigarettes against anti-tobacco sentiment, it ultimately made a conscious decision not to do so.[75] In particular, at no point during the Class Period did ITCAN ever adopt a marketing campaign that had the intention or effect of denying or marginalizing health risks, or engage in any form of proactive media messaging with respect to health risks (or a denial thereof).

(viii) The Canadian Tobacco Manufacturers' Council

86. ITCAN accepts that, at various points in time during the Class Period, it coordinated with its market competitors when communicating with the Canadian government on discrete issues, including issues related to smoking and health. Notably, such co-operation began in 1963 when the government expressly requested a joint response from the industry on all major tobacco issues. The "Ad Hoc Committee" of the Canadian Tobacco Manufacturers was thus formed by the industry, at the direction of the government.[76]

87. Among other things, the Ad Hoc Committee had a standing policy of cooperation with the Department of National Health and Welfare on matters of smoking and health.[77] In 1971, the Committee evolved into the Canadian Tobacco Manufacturers' Council ("CTMC"),[78] although its fundamental mandate remained unchanged. Indeed, one of the stated goals of the CTMC from its very inception was to act as a "liaison with government and health authorities".[79]

88. The evidence further confirms that these industry associations (*i.e.*, the Ad Hoc Committee and the CTMC) shared research and technical information with the Canadian

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74 Judgment, para. 267.
75 Trial Transcript (Descôteaux), March 14, 2012, at pp. 45-46, Q. 165.
76 Trial Exhibits 20326, 20328 and 20330.
77 Trial Exhibit 299 at p. 30 (p. 36 pdf). See, also, Trial Exhibit 40347.11 (Isabelle Committee Report) at p. 21 (p. 20 pdf): "It is also interesting that a large amount of the increasing evidence about the harmful effects of cigarette smoking is being derived from studies sponsored by the tobacco industry. The industry is to be commended, of course, for its extensive support of this type of research."
78 Trial Exhibit 544E.
79 Trial Exhibit 20695 at p. 1 pdf.

government,[80] and co-operated with government departments in establishing a world-leading regime of voluntary regulation before legislation was enacted in 1988.[81]

C. Respondents' Evidence at Trial

(i) Respondents Did Not Challenge The Historical Record

89. As mentioned, the Respondents did not contest the fact of Health Canada's expansive and ongoing role in the area of tobacco regulation throughout the Class Period, nor did they challenge the factual background giving rise to these proceedings (as set out in the immediately preceding section).

90. Similarly, the Respondents did not file any expert or Class Member evidence to contest the extensive awareness evidence tendered by the Appellants' experts (summarized above). To the contrary, the Respondents conceded governmental and public health community awareness of smoking risks by the 1960s.[82]

91. The Trial Judge similarly did not dispute the historical record of events in his Judgment, although he did ultimately depart from the expert evidence. In particular, the Trial Judge ignored the Appellants' experts on public risk awareness and instead relied upon the *ad hoc* commentary of one of the Respondents' experts on the American tobacco industry (Dr. Proctor) for the purposes of affixing a "knowledge date".

92. However, it is important to note that the passing commentary offered by Dr. Proctor in this regard: (i) was not contained in his expert report, (ii) did not flow from his expert mandate, (iii) did not fall within his area of expertise, and (iv) was elicited by the Trial Judge by means of "judicial cross-examination" at the conclusion of the witness' testimony.[83]

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80 See, *eg.*, Trial Exhibit 20378 (May 24, 1968 Minutes of Ad Hoc CTMC Meeting) at p. 1, para. 2: "It was agreed that the Ad Hoc Committee should cooperate with the federal government, Department of National Health and Welfare [on] the possibility of establishing a system for the periodic testing of the tar and nicotine levels of cigarette smoke and to study, and in cooperation with the government, to consider the merits of a practical means of informative labeling...". See also Trial Exhibit 40346.244, describing the CTMC warnings about the phenomenon of compensation.

81 See, *eg.*: Trial Exhibit 20349.2, June 30, 1964 letter from Judy LaMarsh to J. M. Keith regarding the 1964 Voluntary Code: "This continued spirit of co-operation on the part of the Canadian industry is much appreciated by the Government."; Trial Exhibit 40346.300, April 18, 1977 correspondence from Health Canada to the CTMC summarizing their recent meeting, including the discussion of "how much effort had been directed, with considerable success, to reducing tar and nicotine levels in cigarettes. You referred also to the fact that a disproportionate share of promotional expenditures is now devoted to advertising low tar cigarettes. We appreciate very much your cooperation and the progress achieved to date".

82 Respondents' Notes & Authorities, paras. 330-331.

83 Trial Transcript (Proctor), November 29, 2012, at pp. 33-38, QQ. 80-99.

93. Indeed, the Trial Judge's conclusion relating to the "knowledge date" for the Blais Class was almost exclusively derived from the following *ad hoc* exchange:

> **LA COUR:** … So, although the decision I will have to make relates to Canada, it would be helpful for me to have your view, as an expert on American historiography ... of tobacco on the following question. At what date, if any, can it be said that the average American knew, or should reasonably have been expected to know, that the smoking of cigarettes causes lung cancer or larynx cancer, throat cancer, or emphysema? I recognize that this does not necessarily answer the question for Canada, but I find it of some relevance.
>
> …
>
> **A:** Another way I express it, sometimes, is there's scientific instances in the fifties (50s) that it's causing cancer; an administrative consensus in the sixties (60s) - Royal College of Physicians, Canadian medical authorities, Surgeon General certification - I call these administrative governmental certification, as opposed to the best science. So it's second stage. And the third stage is, I sometimes call it a journalistic or popular consensus. You know, when Johnny Carson gives up smoking on television in seventy-two (72) or three (73), something like that, that's a signal of a turn, of a shift, a [sea change]. So that's why I say seventies (70s), and definitely eighties (80s). There is... I cannot give you a more precise... because the reality is not more precise. But that, I think is a threefold: fifties (50s), sixties (60s), and then seventies/eighties (70s-80s).[84]

94. The Respondents tendered no other evidence of general public awareness, or a lack thereof, and none whatsoever in respect of the Canadian or Québec populace.[85]

(ii) Respondents Did Not Call Class Member Evidence

95. The Respondents tendered no evidence of commonality across the Class, nor evidence of a common fault leading to Class-wide injury.

96. In fact, the trial record is devoid of evidence from Class Members, or about Class Members. Aside from limited commentary contained in one of the Respondents' expert medical reports – limited to a pulmonologist's opinion as to Mr. Blais' condition (*i.e.*, paraseptal emphysema, which the expert conceded is typically congenital)[86] – the Trial Judge was provided with no evidence whatsoever in respect of any Class Member.

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84 Trial Transcript (Proctor), November 29, 2012, QQ. 80-98.

85 Although the Trial Judge found that the Plaintiffs' expert in surveys and marketing research (Mr. Christian Bourque) indirectly "touched on" the issue of public awareness in the context of his testimony regarding the internal marketing surveys conducted for the Companies, he correctly concluded that such evidence "was not conducive to determining" issues of public awareness (Judgment, para. 76).

86 Trial Transcript (Desjardins), February 4, 2013, p. 331, QQ. 748-749.

97. In particular, the trial record contains no evidence as to the following (*inter alia*):

(i) What Class Members smoked which cigarettes, and for what period;

(ii) When and why Class Members started and/or continued to smoke;

(iii) What Class Members knew about the risks of smoking when they made the decision to smoke;

(iv) Which of the Appellants' advertising was seen by which Class Members, and the "impression" that such advertising had on them;

(v) What warnings were seen by which Class Members;

(vi) The health of Class Members before they started to smoke, or the specifics of their medical profile (*i.e.*, congenital risks, etc.);

(vii) The cause or history of their acquired disease (if any);

(viii) Their willingness / desire to quit smoking, or their efforts to do so; or

(ix) The nature or extent of any injury or "loss" flowing from their medical condition or addiction.

98. Moreover, insofar as the six allegedly "trivializing" public statements by ITCAN were concerned (most of which were never made public during the Class Period, or otherwise), the Respondents tendered no evidence as to whether any of these were heard by members of the Class or what impact – if any – these statements had on any Class Members, let alone all Class Members.

(iii) Respondents' Limited Evidence Regarding "Causation"

99. In order to discharge their burden of proof, the Respondents were obligated to lead sufficient evidence to prove two key elements of the causal chain: the link between the Appellants' deemed faults and the Class Members' smoking and/or purchasing decisions ("Conduct Causation"), and the link between such "wrongfully caused" smoking and any Class Member injuries ("Medical Causation").

100. In both respects, the Respondents' evidence fell short. Indeed, the Trial Judge acknowledged that the Respondents "did not even try to prove the cause of smoking on an individual basis" and made no attempt to "show a possible causal connection between a fault by the Companies" and the Class Members' smoking behaviour or injuries.[87]

101. Although the Respondents similarly tendered no evidence relating to the specifics, history or cause of any particular Class Members' disease, they attempted to address the notion of Medical Causation in the aggregate by filing expert evidence from an epidemiologist.

102. In particular, Respondents directed Dr. Siemiatycki to use statistical methods to estimate "[a]t 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" and "[a]mong all smokers who got the disease in Québec since 1995, for how many did the balance of probabilities exceed 50%".[88]

103. Notably, the two questions that Respondents posed to Dr. Siemiatycki sought merely an estimation of the number of disease cases among Class Members that were caused by *smoking*. Dr. Siemiatycki was not asked to construct a model that could be used to estimate the number of disease cases caused by an Appellant's fault (*i.e.*, Conduct Causation), or even the number of disease cases caused by the Appellants' products.[89]

104. On cross-examination, Dr. Siemiatycki expressly conceded that his estimates were not sufficient on their own to establish a causal connection between any fault on the part of Appellants and the Class Members' injuries.[90]

105. Moreover, the methodology employed by Dr. Siemiatycki was criticized by multiple experts on the grounds that (*inter alia*) his method of analysis had not been "validated by any scientific community", did not conform to a "standard statistical or epidemiological method", and did not generate statistically reliable results for determining Medical Causation.[91]

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87 Judgment, paras. 703 and 798.

88 Trial Exhibit 1426.1, p. 7 (Siemiatycki Report).

89 Respondents' entire case therefore appears to be predicated on the unproven assumption that any smoking by any Class Member, whenever or wherever it occurred and for whatever reason, was caused by a Defendant's fault. Trial Transcript (Price) , March 18, 2014 at pp. 265-266, Q. 764; Trial Exhibit 21315 (Price Report), p. 1; Trial Transcript (Siemiatycki), February 21, 2013, pp. 14-16, QQ. 37-45.

90 Trial Transcript (Siemiatycki), February 21, 2013, pp. 14-16, QQ. 37-45.

91 Trial Exhibit 40549, pp. 12 and 18 (Marais Report). This point appears to have been accepted by the Trial Judge at para. 728 of the Judgment.

106. Beyond this limited and "unique" epidemiological evidence – which was not fit for the purpose for which it was tendered – the Respondents provided the Trial Judge with no additional evidentiary basis on which to assess the various issues related to causation.

D. The Trial Judge's Findings

(i) The Blais Action – ITCAN's Faults

107. Notwithstanding Respondents' wide-ranging allegations, implicating a multitude of alleged acts and omissions spanning more than 50 years, ITCAN was found to have committed no faults whatsoever in the manufacture or design of its products. Similarly, the Trial Judge found no basis to impugn ITCAN's historical marketing practices, save and except for a limited statutory breach in respect of a small (undefined) subset of its marketing publications from the 1980s.

108. However, irrespective of Respondents' failure to substantiate most of their allegations, ITCAN was found to have inadequately discharged its "duty to inform" consumers of the health risks associated with smoking, for the entirety of the Class Period (*i.e.*, 1950-1998).

109. By virtue of this "failure to inform" – and on no other basis – ITCAN was found to have committed faults under Articles 1457 and 1468 CCQ, Article 49 of the *Québec Charter*, and section 228 of the CPA.[92]

110. ITCAN was also found to have violated section 219 of the CPA by virtue of the "general impression" allegedly conveyed by certain of its advertisements, according to the Trial Judge's subjective assessment (made without the benefit of any supporting evidence). Notably, these limited publications – not specifically identified in the Judgment – were necessarily confined to a period of no more than 10 years during the 50-year Class Period, and were all communicated with express health warnings.

111. In order to impose liability for ITCAN's purported failure to inform – again, for the entirety of the Class Period – the Trial Judge was forced to either reject (in the case of Professors Flaherty and Lacoursière), ignore (in the case of Dr. Perrins), or "re-interpret"

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92 Judgment, para. 643.

(in the case of Professor Duch) the voluminous and uncontradicted[93] expert evidence relating to the widespread awareness of smoking risks in Québec by the early 1960s. In each case, the independent experts had opined on matters for which they were specifically qualified by the Court in the context of these very proceedings.

112. With respect to Professor Flaherty, who was retained to review and analyze the multitude of public media from the second half of the Twentieth Century and opine on the level of public discourse about smoking risks, the Trial Judge claimed to have rejected his conclusions on the basis that the expert purportedly failed to take into account the Appellants' advertising. However, the Trial Judge's reasoning in this regard failed to acknowledge:

(i) The fact that Professor Flaherty's expert opinion did incorporate any tobacco advertising during the Class Period that could be construed as touching on issues related to smoking and health;[94] and

(ii) This criticism is contradicted by the Trial Judge's own findings, made in the context of his rejection of the Respondents' allegations related to ITCAN's marketing practices, that "the companies' ads were not informative about smoking and health questions".[95] Notably, Professor Flaherty came to the very same conclusion in his expert report, namely that cigarette advertising in Canada was not done on the basis of health claims (and therefore was largely irrelevant to the issue of public awareness of risks).[96]

113. The Trial Judge further rejected the evidence of Professor Flaherty – as well as that of Professor Lacoursière – on the basis that they both lacked expertise in "psychology or human behaviour".[97] Notably, this sudden imposition of expert qualification criteria stands in stark contrast to his earlier qualification of them as experts entitled to opine on the matters set out in their reports (*i.e.*, the broad public discourse on smoking-related risks that prevailed throughout most of the Class Period).

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93 As mentioned, the Respondents did not tender any expert evidence to contest the findings and conclusions of Professors Flaherty, Perrins, Duch or Lacoursière.
94 Trial Transcript (Flaherty), May 21, 2013, pp. 86-87, QQ. 142-143.
95 Judgment, para. 438.
96 Trial Transcript (Flaherty), May 23, 2013, p. 61, Q. 174, noting that the "information content" of Canadian advertising was essentially non-existent insofar as the smoking and health issue was concerned.
97 Judgment, para. 94.

114. With respect to Professor Duch, the Trial Judge opted to "re-interpret" (rather than reject) his evidence on public awareness, which clearly indicated that "by at least 1963 there was an exceptionally high level of awareness, 88 percent, among the Québec population of reports or information that smoking may cause lung cancer or have other harmful effects".[98]

115. Notwithstanding this unequivocal conclusion, the Trial Judge decided to "add ten or fifteen years" to Professor Duch's conclusions (or more specifically, 17 years) in order to arrive at his 1980 "knowledge date":

> 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".[99]

116. As the Respondents did not tender any expert evidence of their own with respect to the issue of the Québec public's awareness of smoking-related risks during the Class Period, the Trial Judge was forced to ground his conclusions in the spontaneous oral evidence of the Respondents' expert in the history of the American cigarette industry, Dr. Proctor.

117. Notably, Proctor did <u>not</u> "opine as to the date of knowledge by the public in his report",[100] and similarly lacked expertise in "psychology or human behaviour". Nevertheless, his limited testimony, elicited from the Trial Judge's independent examination of the unqualified witness, served as the primary basis for the finding that public awareness of the risks of smoking crystallized by no later than January 1, 1980.

118. In reliance on this finding (*i.e.*, that there was broad public awareness of the material risks of smoking by no later than January 1, 1980), the Trial Judge concluded that ITCAN had a complete defence to the "failure to inform" claims advanced under Article 1468 CCQ as of this date, by virtue of Article 1473 CCQ.

119. However, the "other faults" – again, based entirely on the selfsame "failure to inform" of material product risks – were deemed to "continue throughout the Class Period", subject only to an 80/20 shared responsibility as between ITCAN and Class Members who started smoking after 1976,[101] on the basis that "any Blais Class Member who started to smoke

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98 Trial Exhibit 40062.1, p. 5 (Duch Report).
99 Judgment, para. 108.
100 Judgment, para. 97.
101 The Trial Judge selected a cut-off date that was 4 years prior to the "knowledge date", on the basis of his theory that everyone becomes "tobacco dependent" after a period of 4 years of continuous smoking.

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".[102]

120. In making the above findings of fault, the Trial Judge also chose to disregard the extensive (and direct) evidence concerning expansive government involvement in the Canadian tobacco industry and its management of the public health risk of smoking.

121. In particular, he concluded that the government's policy decision not to implement more detailed warnings until 1988 was itself evidence of the fact 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".[103]

122. Notably, this "inference" about an apparent lack of government awareness was again adopted in stark contrast to other findings by the Trial Judge to the effect that the Canadian government was "occupying the field" in certain areas of tobacco control and product development.[104]

123. Moreover, the inference of government "ignorance" is directly contradictory to the extensive evidence of Dr. Perrins and Dr. Young as to the central role played by the government in the management of all aspects of smoking in Canada.[105] In disregarding the evidence of Dr. Perrins in particular, the Trial Judge noted as follows:

> "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."[106]

124. However, having found that the evidence was "not … relevant", the Trial Judge nonetheless drew inferences about the state of knowledge of the Federal government that were directly contradictory to this very same expert evidence (as well as the voluminous corroborating fact evidence from the government officials who testified about the knowledge and involvement of Health Canada in smoking and health issues throughout the Class Period, which evidence is not even referenced in the Judgment).

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102 Judgment, para. 828. Notably, this allocation of responsibility similarly ignored the subsequent changes in warnings (which included express warnings about many of the risks at issue in these proceedings as of the late 1980s), and the increased risk messaging after 1980.
103 Judgment, para. 235.
104 Judgment, para. 354.
105 See, *eg.*, Trial Exhibit 21316 (Young Report), p. 21; Trial Exhibit 40348 (Perrins Report, 2nd Supp), p. 9.
106 Judgment, footnote 44.

(ii) The Blais Action – Causation

(a) Conduct Causation

125. With respect to the causal link between ITCAN's deemed faults and the Class Members' smoking behaviour and/or injuries, the Trial Judge acknowledged that the Respondents "did not even try to prove the cause of smoking on an individual basis" and made no attempt to "show a possible causal connection between a fault by the Companies" and the Class Members' smoking behaviour or injuries.[107]

126. Accordingly, he simply "presumed" a Class-wide causal link between the faults and the smoking behaviour of each and every Class Member. More specifically, the Trial Judge applied his own view of "common sense" to conclude that ITCAN's failures to warn "about the toxicity of tobacco" were deemed to have had "some effect on any rational person" and therefore were similarly deemed to have "caused" all of the Class Members' injuries.[108]

127. Notably, this counterintuitive "presumption" was made in the face of overwhelming expert evidence of risk awareness, as well as his own findings with respect to the dates on which there was widespread public awareness of the risks (*i.e.*, the "knowledge dates").

128. Further, the Trial Judge expressly acknowledged that adequate warnings "would not have stopped all smoking" and recognized the likelihood that there are "other causes at play" in determining smoking behaviour.[109]

(b) Medical Causation

129. On the basis of section 15 of the *Tobacco-Related Damages and Health Care Costs Recovery Act,*[110] the Trial Judge concluded that the Respondents were entitled to prove Class-wide medical causation solely on the basis of statistical and epidemiological evidence, which was deemed to give rise to an "inference of causation" that had not been sufficiently "rebutted" by ITCAN.[111]

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107 Judgment, paras. 703 and 798.
108 Judgment, para. 803.
109 Judgment, paras. 803 and 806.
110 CQLR c R-2.2.0.0.1 ("*TRDA*")
111 Judgment, paras. 514 and 760.

130. Moreover, the Trial Judge concluded that the Respondents, in relying on the statistical evidence contemplated by section 15 of the TRDA, need not rely on a "method of analysis which has been validated by any scientific community" or which "conforms to a 'standard statistical or epidemiological method'," but rather could rely exclusively on the sworn testimony of an expert (Dr. Siemiatycki) as to the reliability of the data generated by his "novel" and "unique" methodology.[112]

131. The Trial Judge made this finding in the face of the clear and convincing evidence from multiple experts – including Dr. Barsky (a pathologist), Dr. Mundt (an epidemiologist), Dr. Marais (an applied mathematical and statistical analyst) and Dr. Price (a bio-statistician) – to the effect that causation of disease in any particular individual is not capable of being determined solely on the basis of an undifferentiated, universally applicable metric: *i.e.,* the lifetime number of pack-years smoked.

132. The Trial Judge rejected the Appellants experts' detailed criticisms of the Respondents' untested methodology on the grounds that such experts failed to offer the Trial Judge "a way around" the fact that the Respondents' experts had not tendered evidence that was sufficient to determine causation on a Class-wide basis.[113] Importantly, the Appellants' experts did not offer the Trial Judge a "way around" the Respondents' methodological shortcomings precisely because they each independently concluded that the output of Dr. Siemiatycki's methodology did not produce a statistically meaningful result.

133. The Trial Judge ultimately accepted and applied the results of Dr. Siemiatycki's "novel" methodology, after making his own substantial "adjustments", notwithstanding the Trial Judge's own acknowledgment that the result would be to include "cases that would not qualify were individual analyses to be done", and that "some people might be included in the classes, and thus compensated, incorrectly".[114]

(iii) The Blais Action – Damages

134. On the basis of the foregoing reasoning – and in the absence of an authorized common issue relating to damages – the Trial Judge awarded collective moral and punitive damages to the Class Members. Notably, he did so without hearing from a single

112 Judgment, paras. 728-729.
113 Judgment, para. 969.
114 Judgment, paras. 745, 975, 997.

Class member as to the impact of ITCAN's conduct or any injuries sustained as a result, concluding that "the usefulness of individual testimony is inversely proportional to the number of people in the class".[115]

135. Instead, the Trial Judge created his own "best estimate of the typical moral damages" and applied these amounts to the entirety of the Class, in the absence of any evidence of injury or loss being tendered in respect of any Class Member, and in the face of a highly differentiated Class of people suffering from different injuries, over different periods of time, in distinct regulatory and social contexts.[116]

136. Using this "best estimate" of "typical damages", the Appellants were condemned to pay approximately $6.8 billion plus interest in moral damages, and an additional $30,000 in punitive damages. ITCAN was, in turn, ordered to pay a 67% share of these amounts, based on the Trial Judge's exercise of "discretion".

137. Moreover, on the basis of the "simple, common-sense notion that it is high time that the Companies started to pay for their sins", ITCAN was ordered to pay $670 million by way of provisional execution within 60 days of the Judgment, pursuant to Article 547(2) CCP.[117]

138. Although unrelated to the issues in dispute, the Trial Judge also made additional findings related to ITCAN's historical destruction of documents, undertaken well before the commencement of these proceedings. In particular, he concluded that such a protocol was indicative of "bad faith" because it was possibly designed to preserve arguments in respect of "professional secrecy", even though the Trial Judge expressly acknowledged that no such claim of professional secrecy was ever advanced by ITCAN.[118]

139. Accordingly, notwithstanding an express renunciation by the Respondents of a request for (compensatory) damages specifically in respect of the allegations of "spoliation", ITCAN was ordered to pay an increased share of the total compensatory award based on the allegations of improper destruction of historical documents.

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115 Judgment, para. 262.
116 Judgment, para. 960.
117 Judgment, para. 1200. This order was later set aside by this Court in *Imperial Tobacco Canada ltée v. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224.
118 Judgment, para. 370.

140. Notably, this award was made in the face of clear evidence that copies of all of the "destroyed" documents at issue were in fact provided to the Respondents in these proceedings, and were filed as exhibits.[119]

141. Lastly, the Trial Judge embarked on an analysis of the Respondents' "conspiracy" allegations. He did so, however, not for the purposes of finding a fault, but rather to simply establish "the criteria to justify solidary (joint and several) condemnation among the Companies under Article 1480".[120]

142. The Trial Judge's conclusions regarding "conspiracy" rested on two main findings, namely: (i) the role played by the CTMC, and (ii) a singular "Policy Statement" from 1962.[121]

143. With respect to the former, the Trial Judge made findings about the CTMC based on a limited documentary review, without regard for the extensive witness testimony by former government ministers and former representatives of the CTMC. Indeed, his findings were often times in direct contradiction to this testimony.

144. With respect to the "1962 Policy Statement", the Trial Judge again made sweeping conclusions about the dated document in the absence of a single witness who was able to provide direct testimony about its origins, rationale, evolution or implementation.

145. Notably, the express terms of the document – stated to be "in the public interest" – stand in sharp contrast to the Trial Judge's subjective reading of the document.[122]

(iv) The Létourneau Action

146. The central findings and reasoning applied by the Trial Judge in the Blais Action, above, were similarly applied in respect of the Létourneau Action. In particular, the only fault for which liability was imposed pertained to ITCAN's deemed failure to adequately inform consumers of the risk of addiction.[123]

147. On the issue of public awareness, the Trial Judge concluded that the applicable "knowledge date" was 18 months after an express warning of "addiction" was affixed to

119 Trial Exhibits 58 to 58.60, and 59 to 59.41.
120 Judgment, para. 439.
121 Judgment, paras. 441-450.
122 Judgment, paras. 441-470.
123 See, *eg.*, Judgment, para. 133.

all Canadian cigarette packs (*i.e.*, March 1, 1996), on the Trial Judge's own theory – not grounded in any expert or other evidence – that a "pack warning does not have its full effect overnight".[124]

148. Conversely, on the issue of ITCAN's knowledge of the risk of addiction, the Trial Judge determined that knowledge of "dependence" was sufficient to trigger the duty to warn, concluding that such knowledge was acquired by ITCAN in the 1950s.[125]

149. In order to arrive at a date on which ITCAN's awareness of the phenomenon of "addiction" crystallized, the Trial Judge reasoned by analogy to the expert evidence of Professor Flaherty and concluded that "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".[126] However, having accepted the expert's evidence for this limited purpose, he then proceeded to inexplicably reject the selfsame evidence as it applied to the public. Instead, he unilaterally concluded that the public was not in fact aware of the risk for another 40 years.[127]

150. Insofar as the "injury" at issue in the Létourneau Action is concerned, the Trial Judge conceded that "the Authorization Judgment does not provide a definition of dependence", such that he had to "fill the void".[128] He ultimately adopted his own purely quantitative definition of the term, premised entirely on the volume of cigarettes smoked over a certain period of time (without regard for the individual or underlying "injury").[129]

151. In this regard, the Trial Judge adopted his definition of "tobacco dependence" (specifically, 4 years of daily smoking) from a singular article authored by a third party who did not testify in these proceedings and who lacked the requisite expertise to validate the proposed definition.[130]

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124 Judgment, para. 128.
125 Judgment, paras. 137-138.
126 Judgment, para. 138.
127 As discussed below, the Trial Judge's inexplicable elevation of the use of the term "addiction" to a *sine qua non* is inconsistent with the evidence and his own findings (see Judgment, paras. 149-150).
128 Judgment, para. 770.
129 Judgment, paras. 771-776 and 786.
130 Trial Exhibit 40501 at page 8 pdf (Russell article), which is referred to in Trial Exhibit 1471 (DiFranza article).

152. Applying this strictly numerical definition to the proceedings before him, the Trial Judge recognized – but did not address – the problem that "there might be some individuals in the Class who are not tobacco dependent".[131] Nevertheless, he deemed this consideration to be unproblematic.

153. Ultimately, the Trial Judge acknowledged that any attempt to "put a number to the moral damages actually suffered by the Létourneau Class would be pure conjecture on our part" – a concern that inexplicably did not manifest itself in the Trial Judge's parallel reasoning in respect of the Blais Action.[132]

154. Nonetheless, he proceeded to award punitive damages in an order of magnitude that was 50 times greater than the largest prior award of punitive damages in this Province. In so doing, he attempted to rationalize the $72.5 million punitive award imposed on ITCAN on the basis of the "per member" dollar value, notwithstanding his express acknowledgement that "punitive damages are not based on a per-member or per-class metric".[133]

PART II – ISSUES IN DISPUTE

155. The following issues are raised on this appeal:

(i) The Trial Judge erred in his application of the class action rules in a manner that materially compromised the Appellants' procedural and substantive rights.

(ii) The Trial Judge erred in his approach to the fundamental requirements of causation. In particular, he improperly disregarded the Respondents' burden of proof with respect to the causal elements of civil liability, and/or misapplied the rules of evidence by drawing presumptions that were wholly unsupported by the evidence – and often times in contradiction to the evidence and/or findings of fact – contrary to the principles of Art. 2849 CCQ.

(iii) The Trial Judge erred in his articulation of the "duty to inform", without regard for consumer awareness and/or the role of the Federal regulator.

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131 Judgment, para. 815.
132 Judgment, para. 956.
133 Judgment, para. 1085.

(iv) The Trial Judge erred in his interpretation and application of the *Consumer Protection Act* in a manner that disregarded the Respondents' evidentiary burdens and/or the temporal limits of the legislation.

(v) The Trial Judge erred in his interpretation and application of the Québec *Charter* in a manner that disregarded the Respondents' evidentiary burdens and/or the temporal limits of the legislation.

(vi) The Trial Judge made fundamental errors in his articulation of the Létourneau Class. In particular, he erred by adopting a definition of "addiction" that was without legal significance and/or contrary to the evidentiary record.

(vii) The Trial Judge erred in his analysis of ITCAN's historical document retention practices by imposing upon ITCAN obligations not recognized at law.

(viii) The Trial Judge erred in his analysis of "conspiracy" by adopting factual and legal findings not recognized under Québec law and/or not supported by the evidence.

(ix) The Trial Judge erred in his analysis of punitive damages, without due regard for the authorizing statutes and/or the applicable jurisprudence.

(x) The Trial Judge erred in his prescription analysis by drawing unsupported conclusions about the Class Members' knowledge of their rights of action.

(xi) The Trial Judge erred by apportioning liability as between the Appellants on the basis of improper and/or irrelevant considerations.

(xii) The Trial Judge erred in condemning the Appellants to pay interest and the additional indemnity prior to the crystallization of certain Class Member claims.

(xiii) The Trial Judge erred in his evidentiary rulings, and expressly relied upon documents not properly in evidence.

PART III – ARGUMENT

A. GOVERNING STANDARD OF APPELLATE REVIEW

156. The principles governing the intervention of an appellate court were articulated by the Supreme Court of Canada in *Housen v. Nikolaisen*,[134] and are well known to this Court.

157. Errors of law – which attract a "correctness" standard – have previously been found to include errors with respect to the following judicial determinations (*inter alia*):

(i) the applicable legal standard, such as the scope of the obligation to inform;[135]

(ii) the rules of evidence,[136] including the application of presumptions,[137] the allocation of the burden of proof,[138] and the determination of the governing standard of proof;[139]

(iii) the applicability of – and governing standard under – statutory rights of action, such as the CPA or the *Charter*;[140]

(iv) the interpretation and application of the rules governing prescription;[141]

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134 *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33; These principles were reiterated by the Supreme Court in *Potter v. Commission des services d'aide juridique du Nouveau-Brunswick*, [2015] 1 SCR 500, 2015 SCC 10, at para. 137; see also *H.L. v. Canada (Attorney General)*, [2005] 1 SCR 401, 2005 SCC 25, at paras. 52-58.

135 *Audet v. Transameric Life Canada*, 2012 QCCA 1746 (paras. 56 & 63); see also *Watters v. White*, 2012 QCCA 257, where the CA ruled that the trial judge erred in law when he imposed a duty to inform on a doctor, based on the reasonable person standard, without averting to the practices and norms of the profession (paras. 76, 80 and 93).

136 See, *eg.*, *Ford du Canada Ltée v. Automobiles Duclos inc.*, 2007 QCCA 1541, wherein the Court confirmed that appellate intervention was also appropriate where the judge viewed the entirety of the evidence (and the applicable evidentiary rules) through a "prisme déformant".

137 *Christiaenssens v. Rigault*, 2006 QCCA 853; *Barrette v. Union canadienne (L'), compagnie d'assurances*, 2013 QCCA 1687 ["*Barrette*"]. Notably, the Court in the latter decision also confirmed that where the facts relied upon to draw the presumption are inadmissible or have not been proven, the presumption itself constitutes an error of law.

138 *Québec (Procureur général) v. Projets Lauphi inc.*, 2004 CanLII 17600 (QC CA), at paras. 63 to 73; *Richard v. Quessy*, 2003 CanLII 19444 (QC CA), at paras. 17-18: "[17] Le juge a également mis la preuve à la charge de l'appelant. À mon avis, il s'agit là d'une erreur de droit."

139 *N.G. v. J.L.*, 2005 QCCA 481, at para. 2: "[*translation*] Whereas the first judge also committed a legal error by allowing evidence of medical reports without requiring the testimony of their authors, contrary to the provisions of Article 294.1 CCP."; *Emeric Bergeron et Fils ltée v. Sauriol*, 2001 CanLII 38711 (QC CA): [*translation*] "By concluding that the respondent discharged himself of this burden, the first judge therefore made an error of law requiring the Court's intervention. Contrary to what the respondent pleaded, this is not a simple question of interpretation of evidence.".

140 *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333.

141 *Simeone v. Cappello*, 2012 QCCA 1060 at paras. 59-60.

(v) the articulation of the legal standard for an award of damages;[142]

(vi) the speculative award of damages;[143]

(vii) the interpretation of legislation;[144] and

(vii) the identification of the requisite criteria for the exercise of judicial discretion.[145]

158. Although the "palpable and overriding error" standard applicable to factual or mixed findings engages a high degree of appellate deference, it does not impose an insurmountable hurdle to appellate review. Rather, it simply means that the error must be obvious from the face of the record, such that "an unequivocal evidentiary element is quite simply an obstacle to the impugned finding of fact".[146] Where such an obvious error exists, appellate intervention is warranted.

159. Where a trial judge has failed to consider an element of the evidence which compromises the subsequent evaluation of the record, such as a failure to account for key facts or decisive testimony, appellate intervention is required.[147]

160. Similarly, where a trial judge improperly or unfairly disregards expert evidence without a valid basis for doing so, an appellate court may adopt a different conclusion as to the credibility and/or impact of the underlying expert evidence.[148]

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142 *Cinar Corporation v. Robinson*, 2013 SCC 73 at paras. 133-134 ["*Cinar Corp.*"].

143 *Garage Technology Ventures Canada, s.e.c. (Capital St-Laurent, s.e.c.) v. Léger et al.*, 2012 QCCA 1901, at paras. 71-75, leave to appeal to SCC refused, 2013 CanLII 21760 (SCC).

144 *Syndicat du personnel technique et professionnel de la Société des alcools du Québec (SPTP) v. Société des alcools du Québec*, 2011 QCCA 1642, at para. 56. *Montréal (Ville de) v. Crystal de la montagne, s.e.c.*, 2011 QCCA 365, at para. 4.

145 *Girard v. Gariépy*, [1975] CA 706, at p. 707; see also *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371, 2003 SCC 71, at para. 43.

146 *P.L. v. Benchetrit*, 2010 QCCA 1505 at para. 24. See, also, *Lévesque v. Hudon*, 2013 QCCA 920, at para. 68; also *Droit de la famille – 123636*, 2012 QCCA 2280, at para. 8. In *Hydro-Québec v. Construction Kiewit cie*, 2014 QCCA 947, this Court stated: "[368] En ce qui concerne les ajustements apportés au facteur de productivité, les opinions des experts divergent. Hydro-Québec devait pointer une erreur manifeste et dominante du juge sur cette question pour justifier une intervention de la Cour. Il s'agit essentiellement d'une question d'appréciation de la preuve et il n'y a pas lieu d'intervenir sur cette question."

147 Jean-Claude Royer and Sophie Lavallée, *La preuve civile*, 4th ed., (Cowansville (Qc): Yvon Blais, 2008), at pp. 381-385, at para. 503, citing *Assurances générales des Caisses Desjardins inc. c. ING Groupe Commerce*, JER'J' 2007-1059 (CA).

148 *Vidéotron, s.e.n.c. v. Bell ExpressVu, l.p.*, 2015 QCCA 422, paras. 91-95.

161. Factual presumptions are similarly subject to appellate review, as the courts have recognized that a trial judge is not uniquely positioned to draw such presumptions.[149]

162. Lastly, although assessment of damages has been found to be both a question of law and a question of fact – depending upon the circumstances of the particular case[150] – the arguments in favour of deference have been grounded in the notion that the trial judge has heard the parties and their witnesses, and is in a privileged position to assess their evidence.[151]

163. Where – as here – there has been no trial evidence as to damages and/or the trial judge committed errors of principle in his quantification of damages, there is no basis whatsoever for deference to the trial judge. In this regard, it should also be noted that appellate courts have similarly intervened where punitive damages awards have been deemed to be "patently excessive".[152]

B. THE TRIAL JUDGE FAILED TO APPLY THE PRINCIPLES GOVERNING CLASS ACTIONS

164. Throughout the Judgment, the Trial Judge makes sweeping generalizations, draws unsubstantiated inferences and creates presumptions with a view to imposing class-wide liability on the Appellants. On each such occasion, he grounds his reasoning in the supposed dictates of the class actions regime.

165. In so doing, the Trial Judge commits an error of law by fundamentally misconstruing the purpose and scope of the procedural class action mechanisms.

166. Notably, the common questions – as articulated – do not allow the Trial Judge to reach conclusions as to liability and damages. In particular, the authorized questions are exclusively focused on the Appellants' acts or omissions, without regard for what Class Members knew or are presumed to have known. Accordingly, even if the common questions were answered in the affirmative – and most were not – the relief granted by the Trial Judge still could not be sustained.

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149 *Ferme Denijoy inc. v. Société coopérative agricole de St-Tite*, 1994 CanLII 5719 (QC CA), at p. 14.

150 Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 8th ed., vol. 1 (Cowansville (Qc): Yvon Blais, 2014), pp. 1218-1219, para. 1-1380.

151 *Silver v. Baker*, [1998] RRA 321, 1998 CanLII 12697 (QC CA), at p. 327.

152 *France Animation, s.a. v. Robinson*, 2011 QCCA 1361, at paras. 240-260; see also paras. 133-141 of the Supreme Court decision, *Cinar Corp., supra* note 142.

167. Rather, before any form of liability could be imposed – and collective recovery awarded – the Trial Judge must first have been satisfied as to the essential elements of liability, namely fault, injury and causation, with respect to each and every Class Member.[153]

> …[T]he class action mechanism cannot be used to make up for the absence of one of the constituent elements of the cause of action. A class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings.
>
> …[F]or a class action to be allowed, the plaintiff must establish the elements of fault, injury and causal connection in respect of each member of the group.[154]

168. Having chosen the class action procedural vehicle, the Respondents were obliged to establish that each member of both groups has suffered a similar injury (although the extent of the injury may vary). At the very least, the Court must be able to conclude, on a balance of probabilities, that all the members of the group have sustained the alleged injury and did so as a result of the Appellants' conduct.[155] On the evidence before him, the Trial Judge could reach no such conclusions.

169. What is more, the Judgment could only be sustained if the record established that the Appellants committed faults throughout the entirety of the Class Period, against every member of the Class, and that such faults resulted in a similar injury to all members. Again, the record clearly supports no such conclusion.

170. The Trial Judge appeared to be mindful of these various shortcomings in the evidence, but nonetheless sought to overcome them by creating new rules of evidence and applying the class actions procedures in a manner that prejudiced the Appellants' substantive and procedural rights. In so doing, he committed an error of law.

171. In particular, this fundamental legal error manifested itself in the Trial Judge's wholesale disregard for the role of Class Members in these proceedings, and his presumptive approach to collective recovery:

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153 *Imperial Tobacco Canada Ltd. v. Létourneau*, 2014 QCCA 944; *Bou Malhab* at paras. 23 and 52; *Apple Canada Inc., supra* note 16, at para. 66; *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 SCR 666, para. 17; *Nadon v. Montréal (Ville de)*, 2008 QCCA 2221, paras. 33 to 38, leave to Appeal to SCC refused, 2009 SCC 11 ["*Nadon*"]; *Québec (Public Curator) v. Syndicat national des employés de l'Hôpital St-Ferdinand*, [1996] 3 SCR 211, paras. 31 to 33 ["*St-Ferdinand*"].

154 *Bou Malhab, supra* note 16, at paras. 52-53.

155 See *Bou Malhab*, *supra* note 16, para. 55 and *Nadon*, *supra* note 153, at para. 35; see also *Regroupement des citoyens contre la pollution v. Alex Couture inc.*, 2011 QCCS 4262, paras. 64-65; *Brochu v. Société des loteries du Québec (Loto-Québec),* 2006 QCCS 5379, para. 86 ["*Loto-Québec*"].

(i) The Trial Judge's Disregard for Class Members

172. As mentioned, the Respondents tendered no evidence whatsoever on behalf of a single Class Member over the course of the 2½ year trial. In particular, no Class Member testified about his/her smoking behaviour, decision-making, awareness of smoking risks, ability to quit, exposure to or reliance on advertising or risk warnings, health status or the nature and extent of any injury.

173. Accordingly, these proceedings became a "Plaintiff-less" product liability proceeding whereby class-wide liability and damages were imposed on the Appellants without any reference to the Class Members themselves. In effect, the Trial Judge abrogated the basic elements of civil liability.

174. In response to the Appellants' repeated expressions of concern in this regard, the Trial Judge ruled as follows:

> 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…[156]

175. ITCAN submits that this is a fundamental error of law. The law is clear that the class action provisions of the *Code of Civil Procedure* cannot be used to alter the substantive rights of the parties.[157] As discussed herein, nothing in the TRDA – whether applicable to these proceedings or not – purports to alter these fundamental principles.

176. If ITCAN had been subject to a claim by a single individual, it would have been afforded the right to inquire (*inter alia*) as to the individual's smoking history, risk profile, awareness of smoking risks and decision-making, as well as the nature and extent of their injuries – in other words, the opportunity to rebut the various presumptions that the Trial Judge invokes throughout the Judgment – before any form of liability could be imposed.

177. However, where ITCAN is now subject to an identical claim on behalf of 100,000 or 1,000,000 such individuals – seeking the imposition of class-wide liability – all of these

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156 Judgment, para. 262

157 *Apple Canada Inc., supra* note 16, at para. 99: a class proceeding is merely "a procedural vehicle whose use neither modifies nor creates substantive rights. It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so." See also para. 66.

fundamental substantive and procedural rights are suddenly compromised by virtue of the Trial Judge's pronouncement as to the "uselessness" of such evidence.[158]

178. If anything, the addition of differently situated claimants should make comprehensive legal determinations as to causation, liability and damages more difficult to reach, not less so.

179. The prejudice imposed on ITCAN by this finding is exacerbated in this particular case by virtue of the extensive use of "presumptions" that the Trial Judge employed throughout the Judgment. Indeed, the Trial Judge not only presumed – without evidence – that all members of both Classes were similarly situated (notwithstanding their widely varied histories, experiences and profiles), he also presumed that they all suffered comparable moral damages, and that such damages were universally caused by the faults of the Appellants. For the reasons discussed below, the presumptions are entirely without foundation, and are contrary to both the evidence and "common sense". Accordingly, they cannot be justified on the basis of "procedural expediency".

180. While ITCAN concedes that some of the common questions may ultimately be answered without the need for Class Member evidence, the Trial Judge's presumption of causation, imposition of liability and award of damages (particularly compensatory damages) without regard for such evidence constitutes a fundamental error of law.

(ii) Collective Recovery

181. Issues related to compensatory and punitive damages did not form part of the common questions that were authorized pursuant to the 2005 Authorization Judgment. Nonetheless, the Respondents sought – and the Trial Judge ultimately granted – moral and punitive damages on a collective basis.

182. The Judgment offers limited analysis of Article 1031 CCP or the principles governing collective recovery more generally. In particular, the Trial Judge makes no

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158 The Trial Judge's ruling dismissing the Defendants' Motions to Dismiss reflected a similar distortion of the class action regime in a manner that compromised ITCAN's fundamental rights: "Even if fault were found at the collective level, the Companies could, and it is clear that they would, set up aggressive defences to each and every individual claim, requiring the members to undertake lengthy and costly trials. This is exactly what class actions are supposed to avoid, at least to the extent possible"; see *Conseil québécois sur le tabac et la santé c. JTI-Macdonald Corp.*, 2013 QCCS 1924 at para. 19.

attempt to address the obvious disparity within the Class in the Blais Action, whose members are differently situated individuals, with disparate injuries and varied risk profiles and smoking histories, which evolved over multiple decades.

183. Rather, the Trial Judge concludes that since "fault, damages and causation" had been established in a general sense – with which conclusions ITCAN respectfully disagrees – the Court can then infer causation with respect to each Class Member and simply apply a "uniform amount" to each of the three Blais subclasses, based on the Court's "best estimate of the typical moral damages that a Blais subclass Member suffered as a result of contracting the Disease in question".

184. The requirements of Article 1031 CCP are clear:

> **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.

185. As expressly required by the Court of Appeal in *St-Ferdinand*,[159] a court confronted with a request for collective recovery must not deprive a defendant of the right to a fair trial, which includes the fundamental right to prove all means of defence that can be raised against the alleged faults. Indeed, a party cannot have fewer rights in the context of a request for collective recovery than they would be entitled to in an individual recourse.

> En effet, l'intimé qui demande le recouvrement collectif devra établir de façon suffisamment exacte, conformément à l'article 1031 C.p.c., le montant total des réclamations de ses membres pour que le tribunal puisse l'ordonner. Par ailleurs, si l'intimé ne fait pas une preuve suffisante à cet égard, la procédure de réclamation individuelle peut jouer. C'est véritablement à ces deux étapes de procédures que pourront être vérifiées l'existence de préjudices communs ou individualisés. Dans l'un et l'autre cas, les appelants conservent leurs droits à une défense pleine et entière.[160]

186. Similarly, the Supreme Court's analysis in *Bou Malhab* is instructive in this context. Having confirmed that "fault is determined by looking at the defendant's conduct, while injury is assessed by looking at the impact of that conduct on the victim", the Court

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159 *Syndicat National des Employés de l'Hôpital St-Ferdinand (C.S.N.) v. Québec (Public Curator)*, 1987 CanLII 4024 (QC CA).

160 Emphasis added. See also *Montréal (Ville de) v. Biondi*, 2013 QCCA 404 at paras. 70-72 and 137 (Justice Fournier, dissent), leave to appeal to SCC refused, 2013 CanLII 59889 (SCC) ["*Biondi*"]; *Loto-Québec, supra* note 155, at para. 111.

reiterated the fundamental principle that proof of a (legally significant) injury is necessary in respect of every member of a class:

> It is not until the *existence* of personal injury sustained by each member of the group has been proved that the judge will focus on assessing the *extent* of the injury and choosing the appropriate recovery method, whether individual or collective. If personal injury is not proved, the class action must be dismissed. Thus, contrary to what is argued by the appellant, the possibility of ordering individual recovery of damages does not relieve the plaintiff of the burden of first proving that each member of the group sustained personal injury. In other words, the recovery method cannot make up for the absence of personal injury.[161]

187. At trial, the Respondents failed to tender accurate and reliable evidence as to any of the following:

(i) Class size (particularly with respect to the *Létourneau* proceedings);

(ii) The nature and degree of the Class Members' "individual injuries" from which a total amount of recovery can be accurately determined;

(iii) The presence of Class-wide injuries which are causally linked to Appellants' faults and which are shared by each and every member of the Class (even if they vary as to degree); and

(iv) 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.

188. The Québec courts have consistently held that it is inappropriate to award collective recovery in the face of a multitude of individual issues (such as the assessment of damages, individual causation and/or the availability of defences (including contributory negligence, acceptance of the risks, failure to mitigate)).[162]

189. Indeed, given that these proceedings are grounded in facts which span 50 years, dozens of products, over a million (putative) members and three Appellants, there is no

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161 *Bou Malhab, supra* note 16, at para. 55.

162 *F.L. v. Astrazeneca Pharmaceuticals, p.l.c.*, 2010 QCCS 470, at paras. 91-92 and 140-159 ["*Astrazeneca*"]; *Goyette v. GlaxoSmithKline inc.*, 2009 QCCS 3745, paras. 55-57, 64-84, appeal dismissed in 2010 QCCA 2054, paras. 7-9; *Brito v. Pfizer Canada Inc.*, 2008 QCCS 2231, paras. 19-22 and see also paras. 101-102; *Lebrasseur v. Hoffmann-La Roche Ltée*, 2013 QCCS 3024, paras. 42-44.

evidence to establish that all or even any Class Members have valid claims entitling them to any amount of damages. In these circumstances, the very notion of awarding recovery on an aggregate basis offends the very principles of fundamental justice.

190. The courts have similarly reiterated that class proceedings are not commissions of inquiry,[163] nor are they a means to punish someone who contravenes the law.[164] In addition, the courts have expressly affirmed the principle that class proceedings are not a vehicle by which to award damages merely for use of a product.[165]

191. In summary, the evidence tendered in these cases does not enable the determination of the total amount of claims with "sufficient accuracy". To the contrary, the Respondents did not tender any evidence as to individual Class Member injuries, or the specifics of loss. At best, they relied on expert evidence as to the general types of injury that might theoretically be suffered as a result of certain of the Diseases – which included an enormous variance, both across and within the various Disease subclasses[166] – without attempting to tie this abstract evidence to the Class in any way.[167]

192. The shortcomings inherent in this approach are most clearly illustrated by the "Emphysema Subclass" identified by the Trial Judge (although they are equally present in all Disease Subclasses). More specifically, the Trial Judge recognized at the outset of his analysis that the Respondents' own expert opined that approximately "60% of individuals with COPD report significant limitations in their daily activities".[168]

193. Nevertheless, the Trial Judge proceeded to award moral damages to 100% of the Class Members, on a collective basis. Notably, this finding was also made in the face of the acknowledgement by the Respondents' own expert (Dr. Desjardins) of the highly

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163 *General Motors of Canada v. Billette*, 2009 QCCA 2476, para. 40, leave to appeal to SCC refused, 2010 CanLII 20816 (SCC); *Sibiga v. Fido Solutions Inc.*, 2014 QCCS 3235, para. 121 (appeal pending)

164 *Harmegnies v. Toyota Canada Inc.*, 2008 QCCA 380, paras. 47-48, leave to appeal to SCC refused, 2008 CanLII 48824 (SCC).

165 *Astrazeneca*, *supra* note 162, at para. 92.

166 See, *eg.*, Trial Exhibit 1382.2 (Desjardins Report), at p. 75: "Chaque personne s'adapte différemment à la maladie, ses conséquences et les nombreux bouleversements personnels et sociaux qui en découlent … Il est clair que lorsque les traitements ne provoquent aucun effet secondaire ou seulement des effets très tolérables, les patients subiront un stress moins intense qu'en présence de nombreux effets secondaires.". See, also, Trial Transcript (Guertin), February 11, 2013, at pp. 184-185: "[i]l y a pas deux (2) patients qui sont identiques tout à fait. Il y a pas deux (2) patients … c'est vrai que tous les patients sont tout à fait différents."

167 See *Bou Malhab, supra* note 16, at para. 54 and *Imperial Tobacco Canada Ltd. v. Létourneau*, 2014 QCCA 944 at para. 38.

168 Judgment, para. 999 referring to Trial Exhibit 1382 (Desjardins Report) at p. 46 pdf, Graph J.

varied impact of COPD, and the need for individual assessment to determine the particular effects of the condition on the quality of life of the individual.[169]

194. The Trial Judge's application of judicial "shortcuts" in an effort to impose collective recovery ultimately creates a tension that even the Trial Judge is forced to acknowledge, though he attempts to rationalize the resulting prejudice by reference to procedural expediency:

> "…some people might be included in the classes, and thus compensated, incorrectly. But should that be a concern with classes of the size here? The courts should not allow the spirit and the mission of the class action to be thwarted by an impossible pursuit of perfection."[170]

195. ITCAN submits that its request that the Court adhere to the principles of civil liability is not akin to demanding an "impossible pursuit of perfection". Rather, the imposition of collective recovery in this context, where it is clearly not appropriate and has not been justified by the Respondents, merely has the effect of "thwarting" ITCAN's substantive and procedural rights.

196. With respect, how can the Trial Judge reasonably make an award of collective moral damages – based on a "per Class Member" dollar figure randomly selected by the Respondents, without a rational connection to any evidence of Class Member loss – while at the same time acknowledging that the Classes include people who should not be compensated? Such a finding is necessarily contrary to the governing class actions jurisprudence.

197. As the Québec Superior Court recently noted in *Nova v. Apple*, "the possibility of uninjured class members being included in a class description should be avoided … [A] class action can succeed only if each claim it covers, taken individually, could serve as a basis for court proceedings".[171]

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169 See, *eg.*, Trial Exhibit 1382 (Desjardins Report), pp. 49-50. See also his Trial Transcript, February 4, 2013, pp. 184-196 and pp. 361-383. Notably, at page 381, Dr. Desjardins admitted that an individual assessment is required to determine the effects of the condition on the quality of life of the individual. Similarly, Dr. Desjardins accepts that even within a particular "stage" of severity of COPD, there is acknowledged variability - see Trial Transcript (Desjardins), February 4, 2013, p. 188.

170 Judgment, paras. 975-976. Note that COPD consists of a number of different diseases – of differing severity – including emphysema, chronic bronchitis, and sometimes asthma.

171 *Nova v. Apple Inc.*, 2014 QCCS 6169, at para. 68 (appeal pending), relying on *Bou Malhab*. See also *Association pour la protection automobile v. Ultramar ltée*, 2012 QCCS 4199, at para. 219.

198. It must be remembered that the Respondents were the ones to articulate the parameters of the Class. Accordingly, the Appellants should not be substantively or procedurally "penalized" because of an overly broad Class definition. Indeed, this would create a perverse incentive for future plaintiffs to define a class as broadly as possible with a view to benefitting from the Trial Judge's logic of "the bigger the class, the less demanding the proof".[172]

199. Ultimately, the Trial Judge offered no supportable factual or legal rationale for the collective treatment of a Class of individuals who started smoking at different times over a period of 50 years, in varied regulatory and social environments and with differing levels of risk awareness, and who experienced differing injuries (to the extent that they suffered compensable injuries at all, which the Trial Judge himself acknowledged would not be the case for every Class Member).

C. THE TRIAL JUDGE ERRED IN HIS TREATMENT OF CAUSATION

200. The Trial Judge correctly acknowledged that "causation is a particularly critical element in these cases".[173] However, in purporting to address the various elements of causation necessary for the imposition of liability and the award of collective damages, he commits a number of fundamental legal and factual errors.

(i) The Flawed Causal Model

201. Generally speaking, the Trial Judge's causal analysis contains errors of law that can be grouped into two categories: errors as to "conduct causation" (*i.e.*, the causal link between the faults and the smoking behaviour), and errors as to "medical causation" (*i.e.*, the causal link between the smoking behaviour and the injuries). Each is addressed below.

202. However, the very framework of the Trial Judge's overall causal analysis is fundamentally flawed from the outset. In particular, in relying exclusively on the evidence of the Respondents' expert (Dr. Siemiatycki) to answer his three (flawed) "causal questions",[174] the Trial Judge failed to acknowledge that such evidence was premised on population-based

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172 In *Bou Malhab*, *supra* note 16, the Supreme Court's comments were to the contrary: "Generally speaking, it is recognized that the larger the group, the more difficult it is to prove that personal injury has been sustained by the member or members bringing the action" (para. 59).

173 Judgment, para. 646.

174 Judgment, para. 647.

estimates generated without any regard for consumption patterns (*i.e.*, which particular products were smoked, by whom, at what volume, and at what period of time).[175]

203. Indeed, the second question posed by the Trial Judge – namely, how many cases of the Diseases were caused by "the Companies' products" – simply cannot be answered on the evidence before him. Similarly, the defined Class, which requires Class Members to have smoked the Appellants' products, cannot be quantified. There is no evidence anywhere in the record to indicate which Class Members smoked which products.

204. In reality, the Trial Judge's causal model rests on the flawed – and demonstrably incorrect – premise that once it has been determined that the Disease has been caused by an act of smoking (any act of smoking, at any time, involving any product), and it has been determined that the Appellants' faults could theoretically have impacted any of the Class Members' smoking behaviour (in the abstract, as no actual Class Member evidence was tendered), then all acts of smoking by Class Members (and any related Diseases) are necessarily attributable to those faults.

205. Notably, even if this flawed causal model were to be applied to the facts of this case, the Respondents have not even satisfied the second criteria. In particular, they have not demonstrated that any single Class Member was impacted by the Appellants' deemed faults (let alone all of them). There is simply no causal evidence, at the individual level or in the aggregate.

206. The question that should be asked by the Court – and, indeed, the question that needs to be answered before any liability can be imposed – is the following:

> *On a balance of probabilities, which faults of ITCAN caused which acts of smoking by which Class Members – over what period – and which of these acts of smoking caused which Class Members' Diseases?*

207. The Trial Judge suggests that the Appellants, in demanding that this central question be answered in the affirmative before any imposition of liability, are unreasonably demanding that causation be determined on the basis of a "sole fault of the

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[175] Notably, the record clearly confirmed that over the course of the Class Period, the volume of "non-Defendants' products" (i.e., non-party cigarette manufacturers, imports, non-cigarette products, etc.) reached material levels (*i.e.*, 10% of total Québec market), particularly in the 1980s. See: Trial Transcript (Ricard), October 9, 2013 at p. 187, QQ. 372-373.

Companies" standard.[176] This is not so. ITCAN is merely asking that the Court adhere to the fundamental tenets of civil liability.

208. Indeed, the Supreme Court has expressly recognized that it is incumbent upon plaintiffs in a class action to satisfy this very burden:

> …[F]or a class action to be allowed, the plaintiff must establish the elements of fault, injury and causal connection in respect of each member of the group.[177]

209. ITCAN readily acknowledges that a Class Member's smoking behaviour can be motivated by multiple factors. The mere fact that there may be multiple causal factors at play would not in and of itself break the causal link between any fault of ITCAN and the Class Member's injuries, and ITCAN has never suggested otherwise.

210. However, in order for there to be a causal link, it must be shown that the relevant period of smoking by the Class Member would have not occurred "but for" ITCAN's fault.

211. Under Québec law, "*la seule constante véritable de toutes les décisions est la règle selon laquelle le dommage doit avoir été la conséquence logique, directe et immédiate de la faute".*[178] Accordingly, causation is only established once the prejudice is shown to be a direct, logical and immediate consequence of the fault, proven on the balance of probabilities.

212. In this regard, Québec courts have consistently applied the "*but for*" test ("*n'eût été*" or "*facteur déterminant*"), as most recently articulated by the Supreme Court in *Clements v. Clements.*[179] Since *Clements,* Québec courts have held that it is incumbent upon the plaintiff to prove that the fault is the probable cause of the prejudice and that, on the balance of probabilities, "but for the Defendants' acts or omissions" the injury would not have occurred.[180]

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176 Judgment, para. 791.

177 *Bou Malhab, supra* note 16, at paras. 52-53.

178 Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile*, 7th ed. (Cowansville (Qc): Yvon Blais, 2007) at p. 624. Cited with approval in *Roberge v. Bolduc*, [1991] 1 SCR 374 at p. 442.

179 2012 SCC 32 at paras. 8 and 13.

180 *Roy c. Mout*, 2015 QCCA 692 at para. 31, citing *Ediger v. Johnston*, 2013 SCC 18, [2013] 2 SCR 98 at para. 444. See, also, *Promutuel Lanaudière, société mutuelle d'assurances générales v. Groupe Harnois inc.*, 2009 QCCS 2106; *Agalakov c. De Simone*, 2015 QCCS 4873: "Non seulement Agalakov doit-elle prouver une faute, elle doit également convaincre le Tribunal qu'il existe un lien de causalité entre la faute et les dommages subis. En d'autres termes, elle doit établir que n'eut été de la faute invoquée, elle n'aurait pas perdu la propriété de l'appartement."

213. Accordingly, when – for example – the Trial Judge draws a presumption that ITCAN's failure to warn "would have had some effect on any rational person",[181] this is not sufficient to establish causation on a Class-wide basis. In particular, if that rational person would have smoked regardless of being warned, the failure to warn is not only not the cause of his smoking, it is not a cause of his smoking.

214. In what could be construed as an implicit acknowledgement of the shortcomings in his causal analysis, the Trial Judge suggests that section 15 of the TDRA somehow "overrides" the jurisprudence demanding proof that each member suffered a similar prejudice that was causally linked to the Appellants' faults.[182] This conclusion is clearly in error, for a number of reasons:

(i) As discussed below, section 15 has no bearing whatsoever on the issue of "conduct causation" (and has not been relied upon by either the Respondents or the Trial Judge in respect of this issue);

(ii) Section 15 requires that class-wide medical causation be proven in a manner that conforms to the applicable professional standards, which is not the case in these proceedings (again, for the reasons discussed below);

(iii) The statutory provision, which speaks solely to the type of evidence that can be tendered as proof of causation, cannot be used to displace the extensive body of jurisprudence requiring the existence of proof – by whatever acceptable means – of a causal link between the deemed faults and the injury of each class member.

215. With respect to the applicability of the governing jurisprudence, Justice Riordan attempted to simply dismiss the earlier Supreme Court decisions (specifically, *St-Ferdinand*, *Bou Malhab* and *Bisaillon*) on the supposed basis that the TRDA did not apply in those prior proceedings. While this is factually true, the Trial Judge's conclusions as to the materiality of this distinction are in error.

216. Indeed, this Court – in the context of these very proceedings – has already confirmed that the principles enunciated by the Supreme Court in these prior decisions do apply to the cases at hand. In particular, the Court of Appeal concluded in *Imperial Tobacco Canada Ltd. v. Létourneau*, 2014 QCCA 944 (at paragraphs 36 to 46) as follows:

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181 Judgment, para. 803.
182 Judgment, para. 693.

(i) Class actions are purely procedural vehicles which do not modify the applicable rules of substantive law, including the rules of evidence and civil liability;[183] and

(ii) The burden of proof rests on the Respondents to establish, on a balance of probabilities, that the Appellants' deemed faults caused a shared injury in all members of the Class, failing which the action must be dismissed.[184]

217. Of particular note is the fact that the Court of Appeal, in full knowledge of the existence and application of section 15 of the TRDA, endorsed the following passage from *Bou Malhab*:

> [53] Le droit de la diffamation s'applique donc intégralement dans le contexte d'un recours collectif. Comme je l'ai mentionné précédemment, pour que son action soit accueillie, le demandeur doit établir les éléments faute, préjudice et lien de causalité à l'endroit de chacun des membres du groupe (*Hôpital St-Ferdinand*, par. 33). Bien sûr, la procédure collective permet au juge de tirer des inférences de la preuve, mais il demeure qu'il doit être convaincu selon la prépondérance des probabilités de l'existence de chacun des éléments à l'égard de chacun des membres (voir, pour le préjudice, *Hôpital St-Ferdinand*, par. 34-35).[185]

218. Accordingly, the Trial Judge's blanket dismissal of the prior jurisprudence requiring individual proof of causation on the basis of section 15 of the TRDA constitutes an error of law.

(ii) Conduct Causation

219. As this Court reiterated in *Nadon*,[186] the jurisprudence is clear that the burden rests on the plaintiff to prove an adequate causal link between the fault of each of defendants and the injury suffered by the representative plaintiff and by each member of the class.

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183 Para. 37, citing (*inter alia*) *Bisaillon*, at para. 17: "The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights (*Bou Malhab v. Métromédia C.M.R. Montréal inc.*, 2003 CanLII 47948 (QC CA), [2003] RJQ 1011 (CA), at paras. 57-58; *Tremaine v. A.H. Robins Canada Inc.*, 1990 CanLII 2808 (QC CA), [1990] RDJ 500 (CA), at p. 507; Yves Lauzon, *Le recours collectif* (Cowansville (Qc): Yvon Blais, 2001), at pp. 5 and 9). It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so: Denis Ferland and Benoît Emery, *Précis de procédure civile du Québec*, 4th ed. (Cowansville (Qc): Yvon Blais, 2003), at pp. 876-77." [Emphasis added].

184 Paras. 36-38, citing paras. 52-55 of *Bou Malhab, supra* note 16.

185 *Imperial Tobacco Canada Ltd. v. Létourneau*, 2014 QCCA 944 at para. 38 [emphasis in the original]

186 *Nadon*, *supra* note 153, paras. 33-38, confirming 2007 QCCS 150, leave to appeal to SCC refused, 2009 CanLII 19885 (SCC).

220. Similarly, the Supreme Court's comments in *Bou Malhab* emphasized the importance of the plaintiff's burden to prove a causal link between the injury and the fault:

> Fault is determined by looking at the defendant's conduct, while injury is assessed by looking at the impact of that conduct on the victim, and a causal link is established where the decision maker finds that a connection exists between the fault and the injury. This is an area of law where it is important to make a clear distinction between fault and injury. Proof of injury is not a basis for presuming that a fault was committed. Proof that a fault was committed does not, without more, establish the existence of a compensable injury.[187]

221. The Trial Judge correctly acknowledged that the Respondents expressly disclaimed any effort to discharge their burden with respect to proving "conduct causation" through expert or other evidence, as they made no attempt to "show a possible causal connection between a fault by the Companies" and the Class Members' smoking behaviour or injuries.[188]

222. Moreover, whereas the Respondents sought to invoke section 15 of the TRDA in the context of medical causation (discussed herein), they can invoke no such reliance on section 15 to assist them in addressing conduct causation.

223. While section 15 contemplates that "proof of causation … between the defendant's wrong or failure and the [damages for tobacco-related injuries] … 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",[189] the Respondents decided to tender no statistical, sociological or other studies which purported to causally link the Appellants' faults to the Class Members' conduct or injuries. Accordingly, they can have no recourse to this statutory provision.

224. In the absence of any evidence purporting to substantiate a causal link between ITCAN's faults and the Class Members' smoking behaviour or injuries, the Trial Judge had to resort to Articles 2811 and 2846 CCQ in an effort to simply "presume" – on the basis of mere "common sense" – that ITCAN's failure to warn caused each and every

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187 *Bou Malhab*, *supra* note 16, at para. 22.

188 Judgment, para. 723.

189 The section is phrased in terms of "the health care costs whose recovery is being sought". If the Trial Judge's conclusion that section 15 applies is correct, the wording of section 15 would be modified by virtue of sections 24 and 25 of the TRDA (subject to arguments regarding constitutional validity).

member of the Class to start or continue smoking.[190] Simply put, these "common sense" presumptions are unsustainable, for a number of reasons:

(a) The Presumption of "Conduct Causation" Is not Supported by the Evidence or the Factual Findings

225. In order to substantiate his order for collective recovery, the Trial Judge sought to extend the presumption of "conduct causation" to the entirety of the two Classes. However, it is equally evident from the Trial Judge's own reasoning that the presumption cannot be extended this far in view of the following statements to the contrary contained in the Judgment (*inter alia*):

(i) "… 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";[191]

(ii) "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";[192]

(iii) The Trial Judge recognized that "…there could be other causes at play";[193] and

(iv) "In these files there is nothing in the proof to indicate that the Companies' 'disinformation' had any effect whatsoever on the Respondents' decision not to sue earlier".[194]

226. In summary, the Trial Judge concluded that there was widespread public awareness of the material risks of smoking by no later than January 1, 1980, and he acknowledged that a certain (unknown) percentage of consumers will continue to smoke regardless of what they are told about the risks of doing so.

227. Accordingly, the alleged "common sense" presumption that ITCAN's "failure to inform" affected the entirety of the Class, for the entirety of the Class Period, cannot be sustained on the Judgment's own findings, let alone on the evidentiary record as a whole. As courts have

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190 Notably, the Trial Judge devotes a mere 4 pages in the 236-page Judgment to this "critical" question of whether the deemed failure to inform caused Class Members to smoke.
191 Judgment, para. 121.
192 Judgment, para. 803.
193 Judgment, para. 806.
194 Judgment, para. 877.

previously stated, findings grounded in "common sense" are only permissible in the "clearest of cases".[195] Such a threshold clearly has not been met in this case.

228. Moreover, such a presumption runs directly contrary to the detailed and uncontroverted expert evidence tendered by the Appellants confirming that warnings cannot be presumed to impact consumer behaviour.

229. For example, Dr. Young – an expert in product warning design – offered uncontroverted expert evidence to the effect that "non-warning factors" influence a person's safety and health-related behaviour to a greater degree and with greater predictability than product warnings. These non-warning factors include a myriad of personal and situational/environmental factors.[196]

230. Similarly, Professor Viscusi – an expert in risk perception and the communication of risk information – confirmed that people make the decision to smoke independently, and the way they react with warnings is highly varied.[197]

231. As the Respondents tendered no expert evidence to contradict any of the foregoing, it is unclear on what basis the Trial Judge could possibly have drawn the sweeping "common sense" presumption that the Appellants' deemed failure to adequately warn "caused" the smoking behaviour of the entirety of both Classes, over the entirety of the Class Period.

232. Indeed, the application of "common sense" would seem to suggest that this categorical conclusion is unsustainable. Consider, for example, those who started smoking with full knowledge of the risks, particularly those who started smoking in the latter portion of the Class Period (*i.e.*, after the Trial Judge's "knowledge date"). How could it be said that ITCAN's failure to publish a particular warning on its packs could be a "cause" of such individuals' smoking behaviour? Such a position is simply untenable.

(b) The Presumption of "Conduct Causation" Is Contrary to the Civil Code of Québec

233. Further – and perhaps most fundamentally – the Trial Judge's purported reliance on Articles 2846 and 2849 CCQ was not in conformity with the clear requirements of the

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195 *Hébert c. Centre Hospitalier affilié universitaire de Québec*, 2011 QCCA 1521, at para. 62, citing *P. E. Neil c. Pamela Lodge*, [2010] NBJ No. 417 (NB CA).

196 Trial Exhibit 40494 (Viscusi Report), para. 23; Trial Exhibit 21316 (Young Report), p. 32.

197 Trial Exhibit 40494 (Viscusi Report), paras. 20-21, pp. 10-11.

Civil Code of Québec. As mentioned, the presumption as to conduct causation is premised on the notion that ITCAN's failure to inform Class Members of the risks of smoking "had some effect".[198] With respect, this conclusion is fundamentally flawed for two independent reasons:

(i) There is no evidence to support the presumption that ITCAN's faults had "some effect" on everyone in the Class. To the contrary, for the reasons set out above, the evidence confirms that ITCAN's faults did not have any effect on a significant portion of the Class Members (*i.e*., those who knew and disregarded the risks, among others);

(ii) A finding that a particular act had "some effect" on the entirety of the Class – even if it could be presumed on the evidence – does not fulfil the legal requirements to establish causation for each Class Member. Moreover, it does not satisfy the requirements of Article 2849 CCQ which specifically require presumptions to be "serious, precise and concordant" – as the finding that ITCAN's faults had "some effect" does not provide a basis for the Trial Judge to arrive at a causal conclusion to the exclusion of "a different or contrary result".

234. In *St-Ferdinand,*[199] the Supreme Court articulated the governing rules of evidence with respect to proof by means of presumptions in the context of class actions. In particular, the Court confirmed that the limitations imposed on "presumptions of fact" – namely that they be sufficiently serious, precise and concordant – apply with equal, and arguably greater, force in the class context.[200]

235. The fact that the Court may – in certain circumstances – draw factual inferences does not in any way modify the burden of proof. A Court may only draw presumptions from specific known facts that support the inference, as opposed to approximations, hypotheses, suspicions or conjectures.[201]

198 Judgment, para. 803.
199 *Supra* note 153.
200 *Ibid* at paras. 37-39.
201 *Barrette*, *supra* note 137, paras. 58 to 60; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, at para. 35.

236. As to the requirement that the Court shall only take into consideration presumptions that are serious, precise and concordant, the Court's comments in *J. G. v. Nadeau* are instructive.[202] In particular, the Court confirmed that factual presumptions are:

> (i) "serious" only when the existence of the known fact leads to the existence of the unknown fact by a strong induction;
>
> (ii) "precise" only when the known fact leads directly and specifically to the unknown fact. If it is equally possible to draw inferences that are different or even contrary, the desired inferences will not be precise and will only give rise to doubt and uncertainty; and
>
> (iii) "concordant" only when they all lead consistently to establishing the unknown fact. If they contradict or neutralize one another, they are not concordant, and they can only give rise to doubt.

237. Simply put, there were no such "serious, precise or concordant" inferences that could have been drawn from the evidence by the Trial Judge.

238. As a starting point, a Court must have a basis in evidence (*i.e.*, "known facts") from which to draw presumptions. Here, the Respondents did not provide the Trial Judge with an evidentiary record to even engage any form of presumption.

239. In particular, the Trial Judge was presented with no "known facts" about a particular Class Member from which to draw presumptions or inferences about unknown facts (*i.e.*, the totality of the Class).[203] As there was no evidence of causation (*i.e.*, the effect of ITCAN's failure to inform on smoking behaviour) in respect any particular Class Member, there similarly could be no basis to draw presumptions about all Class Members under Article 2849 CCQ

240. Secondarily, even if the causal presumption had been substantiated by some form of evidence – which it was not – the Trial Judge's reliance on Article 2849 CCQ is nonetheless flawed. Although he correctly observed that "precise" presumptions are those

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202 2013 QCCS 410 (appeal pending), paras. 156-157 (emphasis added), citing *Charbonneau c. Centre Hospitalier Laurentien*, 2009 QCCS 4974.

203 The only "known fact" which the Trial Judge acknowledges does emerge from the evidence – insofar as Class Member interaction with warnings is concerned – is that people will continue to smoke even in the face of adequate warnings (Judgment, para. 803).

where "the conclusion flowing from the known fact leads directly and specifically to the unknown one, so that it is not reasonably possible to arrive at a different or contrary result or fact",[204] he erred in his subsequent application of this principle to cases before him.

241. In concluding that "precise … does not necessarily mean that the faults have to be the only cause of smoking, or even the dominant one",[205] the Trial Judge failed to recognize that in order for the faults to even be characterized as a "cause" they necessarily must rise above a mere "factor" that potentially influenced the Class Members' smoking behaviour. In essence, the Trial Judge's purported reliance on Articles 2846 and 2849 CCQ has the effect of reducing the "but for" causal requirement – summarized above[206] – to a "some possible effect" threshold, and amounts to an error of law.

242. Lastly, the Trial Judge implicitly – and arguably explicitly – endorsed the current environment insofar as the state of ITCAN's warnings are concerned. In particular, he acknowledged that the lack of adequate warnings in historical periods cannot be attributable to all smoking, since "even in the presence of such warnings today, people start and continue to smoke".[207]

243. However, the risk information contained in the "adequate warnings" of "today" also existed during the Class Period.[208] Accordingly, the "presumption" of Class-wide causation is belied by his own findings.

(iii) Medical Causation

244. ITCAN adopts and relies upon the arguments of RBH and JTIM with respect to the issue of medical causation.

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204 Judgment, para. 802.
205 Judgment, para. 804.
206 See, *supra*, discussion of *Clements v. Clements*, 2012 SCC 32 at paras. 8 and 13; *Roy c. Mout*, 2015 QCCA 692 at para. 31, citing *Ediger v. Johnston*, 2013 SCC 18, [2013] 2 SCR 98 at para. 444.
207 Judgment, para. 803.
208 At footnote 61 of the Judgment, the Trial Judge references the *Tobacco Act* warnings, but claims not to address them in his reasoning because they came into force after the close of the Class Period. However, his commentary regarding "such warnings today" erroneously implies that there has been some manner of material change in the risk information communicated by cigarette warnings since the close of the Class Period. In fact, the risk information contained in the legislated warnings after the Class Period with respect to the Diseases in question is equivalent to the information communicated as of 1994 (and substantially similar to those communicated as of 1988). More to the point, the Trial Judge does not identify any purported "shortcomings" in the warnings that were implemented as of 1994 (or, indeed, those implemented as of 1988, or before).

245. In short, ITCAN does not dispute the causal relationship between the act of smoking and the Diseases at issue in the Blais Action. Contrary to the erroneous suggestion of the Trial Judge,[209] ITCAN acknowledges that smoking is a major cause of disease, including lung cancer.

246. However, this acknowledgement does not deprive ITCAN of the fundamental right to insist that the Respondents discharge their burden to prove that the Class Members' illnesses were – on a balance of probabilities – caused by the act of smoking ITCAN's cigarettes, as opposed to some other manufacturers' products or some other cause entirely. This fundamental burden is a necessary, though not sufficient, element of the Respondents' proof.

(a) The Trial Judge's Misapplication of Section 15 of the TRDA

247. In this case, the Respondents chose to rely exclusively on the expert evidence of an epidemiologist (Dr. Siemiatycki) to discharge this initial burden. The Trial Judge concluded that such an approach was permissible by virtue of section 15 of the TRDA. However, in so doing, the Trial Judge fundamentally misapplied the statutory provision to these cases.

248. Section 15 of the TRDA provides 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. [emphasis added]

249. Notably, section 15 of the TRDA is permissive, and is concerned solely with the type of evidence that may be adduced. It simply contemplates that parties may discharge their evidentiary burden with respect to certain aspects of causation by means of statistical or epidemiological evidence. Contrary to the findings of the Trial Judge, the provision does not shift the burden to the defendant, nor does it dispense with the need to prove all aspects of causation.

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209 Judgment, para. 47.

250. Accordingly, the Trial Judge erred when he suggested that the burden articulated by the Supreme Court in *Bou Malhab* with respect to proof of individual medical causation in respect of each Class Member was "overridden" in tobacco cases by virtue of section 15 of the TRDA. There is simply no basis for this conclusion.

251. Similarly, the Trial Judge's criticism of the Appellants experts' alleged disregard for "the effect of section 15 of the TRDA" is unfounded.[210] In particular, the Trial Judge suggests that the permissive use of statistical and epidemiological evidence contemplated by section 15 somehow renders the various criticisms of Dr. Siemiatycki inapplicable, to the point of finding that "to be effective, rebuttal evidence must consist of proof of a different reality".[211]

252. This is a manifest error. If the Appellants experts' criticisms were sufficient to establish that Dr. Siemiatycki's evidence did not adequately support his conclusions with respect to medical causation, on no fair reading of section 15 can the Appellants be said to be under an obligation to tender statistical information to affirmatively disprove causation.

(b) The Trial Judge's Disregard for the Requirements of Scientific Evidence and Statistical Methods

253. The above errors are exacerbated by the Trial Judge's treatment of the Respondents' expert evidence, specifically with regard to the lack of scientific rigour demanded by the Court. In particular, the Trial Judge dismissed the myriad of criticisms of Dr. Siemiatycki's approach voiced by numerous defence experts on the following grounds:

> [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".
>
> [729] Given its unique application, Dr. Siemiatycki's system has never really been tested by others and thus cannot have been either validate[d] 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.

254. In other words, the Trial Judge accepted a novel and untested methodology invented by Dr. Siemiatycki solely for the purpose of this litigation – which the Trial Judge

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210 Judgment, paras. 719-767.
211 Judgment, paras. 737 and 742.

acknowledges has not been validated by the scientific community and does not conform to recognized statistical or epidemiological methods – purely on the basis of Dr. Siemiatycki's testimony to the effect that the results are "probable" (notwithstanding the overwhelming expert evidence to the contrary, which identified the many reasons why Dr. Siemiatycki's results were wholly unreliable).

255. Again, this reasoning imports a reading of section 15 which is inconsistent with the statutory provision on its face. There is nothing in section 15 – or the TRDA more generally – to suggest that the permitted use of statistical or epidemiological evidence can disregard the fundamental tenets of statistics or epidemiology. To the contrary, it is implicit in the wording of section 15 that any such use of statistics or epidemiology will be in conformity with the standards imposed by those disciplines.

256. Moreover, contrary to the suggestion of the Trial Judge, the Supreme Court's decision in *Snell v. Farrell*[212] offers the Court no assistance in this context. While it is true that the civil degree of causal proof is not equivalent to that demanded by scientific proof, the Supreme Court's reasoning does not suggest that the underlying methodology which is used to establish causation similarly need not conform to accepted scientific methodological requirements.

257. To the contrary, where the Court relies on scientific evidence – for any purpose – it must assess that evidence using the same methods and principles generally accepted and applied in the relevant scientific communities. In the case of statistical evidence, for example, this would include requiring a 95% confidence interval to establish statistical significance.[213]

258. The Supreme Court's comments in the companion medical malpractice cases relied upon by the Trial Judge at paragraphs 726-728 of the Judgment simply stand for the self-evident proposition that "medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law. It is the function of the trier of fact, not the medical witnesses, to make a legal determination of the question of causation".[214]

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212 1990 CanLII 70 (SCC), [1990] 2 SCR 311 ["*Snell*"]

213 See *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at paras. 389-392.

214 *Snell, supra* note 212, at p. 330. See, also, *Laferrière v. Lawson*, [1991] 1 SCR 541, 1991 CanLII 87 (SCC), at para. 156 – also cited by the Trial Judge – where the Court commented as follows: "Recently, in *Snell, supra* note 212 … this Court made clear (at p. 328) that "[c]ausation need not be

259. In so ruling, however, the Court was equally clear in its admonition that a "plaintiff should not be compensated by reversing the burden of proof for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone".[215] With respect, the Trial Judge's approach to causation in these proceedings disregarded this fundamental principle.

260. In fact, the medical malpractice cases cited by the Trial Judge say nothing about the evidentiary requirements of the underlying scientific or medical evidence that is to be applied on a civil "balance of probabilities" standard. Rather, the governing authority in this regard is the Supreme Court's decision in *R. v. J.-L.J.* (and related cases),[216] where the Court noted that the admissibility of "novel" science – such as Dr. Siemiatycki's model – should be evaluated on the basis of whether (*inter alia*) it has been previously tested, subject to peer review and is "generally accepted".

261. Notably, at the time of his testimony, Dr. Siemiatycki's analytic model – adopted exclusively for this litigation – had not been tested, had not been subject to peer review or publication, and was not generally accepted (as described more fully in the Argument of RBH).

262. As the Supreme Court noted in *R. v. D.D.*, "[w]here the record clearly does not support a finding of admissibility on the basis of the *Mohan* criteria, the Court of Appeal may rule that the evidence should not have been admitted".[217] For the reasons set out above, it is clear that the evidence of Dr. Siemiatycki did not satisfy any of the *Mohan* criteria.

263. What is more, the model itself was subject to detailed criticism during the trial by multiple experts, across a variety of disciplines (including statistics and epidemiology). In each case, however, the Trial Judge simply dismissed these methodological criticisms out of hand on the untenable premise that such criticisms were not valid without an accompanying "way around" the critiques so presented.[218]

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determined by scientific precision" and that "[i]t is not . . . essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation" (p. 330). Both this Court and the Québec Court of Appeal have frequently stated that proof as to the causal link must be established on the balance of probabilities…"

215 *Snell*, *supra* note 212, at p. 327.

216 *R. v. J.-L.J.*, [2000] 2 SCR 600, 2000 SCC 51 at para. 33. See, also, *R. v. Trochym*, 2007 SCC 6, [2007] 1 SCR 239.

217 *R. v. D.D.*, [2000] 2 SCR 275, 2000 SCC 43, at paras. 12-13.

218 Judgment, para. 969.

264. Even where the Trial Judge notionally accepted the identified shortcomings in Dr. Siemiatycki's model – for example, his wholesale failure to account and control for confounding factors and other variables – he nonetheless glossed over these flaws by accepting methodological adjustments that were not only "untested" but were patently "unscientific":

> [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…

265. To be clear, the Appellants experts' evidence demonstrated not simply that Dr. Siemiatycki's model was "not perfect", but rather that it was not scientifically reliable for the purposes of assessing whether individual Class Members acquired the Diseases due to smoking. More specifically:

(i) He applied an undifferentiated epidemiological analysis of "average smokers" to each individual smoker, without regard for relevant differences between those individuals (most notably whether and when the Class Member had quit smoking);

(ii) He did not account for the impact of exposure to other risk factors; and

(iii) He did not even measure heterogeneity, with the result that Dr. Siemiatycki's model did not produce a statistically meaningful result.

266. By way of example, the Trial Judge acknowledged that Dr. Siemiatycki ignored the fundamental and uncontested fact that quitting smoking for a sufficient period of time can reduce an individual's risk exposure to that of a non-smoker.[219] Indeed, he specifically identified this as an "important omission" from Dr. Siemiatycki's analysis. Nevertheless, the Trial Judge proceeded to simply "wash away" this fundamental flaw by suggesting that it is not a concern because the Class definition requires Class Members to have been diagnosed with a Disease. With respect, this circular logic is untenable. In particular, it entirely ignores the very causation concerns that were identified by each of the Appellants' experts, namely that Dr. Siemiatycki's model has the effect of including people in the Class whose illness is wholly unrelated to smoking (such as someone who smoked the requisite pack-years, quit for long enough to reduce their risk exposure to baseline, and then acquired the Disease for reasons entirely unrelated to their historical smoking).

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219 Judgment, para. 706.

267. Not only did the Trial Judge ignore these methodological shortcomings in the Respondents' expert evidence, but he castigated the Appellants experts for simply challenging such evidence "while obstinately refusing to make any of their own on the key issue facing the Court". Indeed, he goes so far as to suggest that their blanket criticisms amounted to a "strategy", which called into question the experts' compliance with their obligations of independence and impartiality.[220]

268. Simply put, the Trial Judge's criticism in this regard is unfair and misguided. Moreover, it evidences a judicial mindset that is premised upon an implicit shifting of the burden, without any legal justification for this reversal of onus.

269. Each of the Appellants' experts, whom the Trial Judge recognized as being "highly competent individuals" testifying on matters "squarely within their expertise",[221] provided their opinion to the Trial Judge that the premise of his question was fundamentally wrong: there is no single metric measuring "how much smoking" that can be applied in isolation to establish causation of disease in an individual.

270. As each explained, the notion that volume of smoking can be the sole determinant of causation is an entirely flawed premise. Take, for example, the obvious case of someone who acquired one of the Diseases before he/she started to smoke, or who suffered from a congenital form of the Disease. It is patently obvious that no volume of smoking can be set as a "causal threshold".

271. In the circumstances, the refusal of each of the Appellants' experts to provide the Trial Judge with their own "pack year" number in a context where they had each independently concluded that such a number could not be calculated in a manner consistent with the requirements of their respective professions cannot be attributed to either obstinacy or to a lack of objectivity.

D. THE TRIAL JUDGE ERRED IN HIS ANALYSIS OF THE "DUTY TO INFORM"

272. The central "fault" identified by the Trial Judge with respect to ITCAN's historical conduct since 1950 was phrased in terms of ITCAN's purported "failure to inform" of the material risks of smoking. In the Blais Action, the failures pertained to the Diseases at

220 Judgment, paras. 719-722.
221 Judgment, para. 722.

issue, whereas in the Létourneau Action the deemed failures arose in respect of the phenomenon of "tobacco dependence".

273. Ultimately, the Trial Judge concluded that ITCAN's "failure to inform" consumers about the material risks of smoking triggered faults under Articles 1457 and 1468 CCQ, as well as Article 49 of the Québec *Charter* and section 228 of the CPA.[222] In the case of each fault, the Trial Judge's reasoning was effectively the same: ITCAN failed to provide "clear warnings about the toxicity of tobacco".[223]

274. In so ruling, the Trial Judge committed both legal errors in his articulation of the relevant legal standard, as well as palpable and overriding factual errors in respect of the assessment of the underlying factual and expert evidence.

275. As a preliminary matter, however, it is telling that the Judgment is completely silent as to what specific messages the Appellants should have conveyed to the public (or, indeed, when such messaging should have occurred). The Trial Judge alleges that there was a lack of "clear warnings about the toxicity of tobacco", but doesn't address the fact that such warnings were expressly communicated throughout much of the Class Period (some of which were nearly identical to the warnings that are communicated today, with which the Trial Judge seems to be satisfied).[224]

276. He similarly does not account for the fact that the Class Period covers a half-century, during which time the industry standards – as well as the social norms and standards relating to product warnings[225] – evolved dramatically. As this Court has previously recognized, warnings standards must be assessed against the applicable "standards of the day".[226] The Trial Judge, however, simply reaches the bald conclusion that there was a "failure to inform" – apparently at all times and in all respects – without any indication of what the Appellants should reasonably have communicated (or when).

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222 Judgment, paras. 643-644.
223 Judgment, para. 803.
224 See, *eg.*, the warnings listed at para. 110 of the Judgment.
225 See Trial Exhibit 21316 (Young Report), p. 25: "Norms for safety and health, as well as norms for warnings, were different in the 1950s, 1960s and 1970s than they are today – fewer warnings were provided generally. As a result, any attempt to apply current thresholds for warning to this earlier time period would be inappropriate"
226 *Inmont Canada Ltd. c. Cie d'assurance canadienne nationale (La)*, JE 84-884 (CA), pp. 9-10.

(i) The Trial Judge Misconstrued the Scope of the "Duty to Inform"

277. Generally speaking, a product manufacturer has an obligation under Article 1469 CCQ to warn consumers of material risks that are not otherwise known. The "knowledge" qualification is fundamental. Indeed, the courts have repeatedly confirmed that no plaintiff can succeed with a claim based either on the contractual or extra-contractual liability regimes for an alleged failure to warn of inherent product risks if such risks are already known by the consumer or if the consumer could have acquired knowledge with reasonable prudence and diligence.[227]

278. This notion of consumer awareness of product risks – actual or presumed – is a clear and unequivocal limitation on any duty to warn that may be imposed on the manufacturer.

279. What is more, it is an express limitation that also formed part of the jurisprudence interpreting and applying Article 1053 CCLC, which was in force for the majority of the Class Period.[228]

280. With this framework in mind, it is necessary to consider the Trial Judge's approach to the "duty to inform" and its application in these proceedings.

281. At the outset, ITCAN agrees with the principles enumerated by the Trial Judge at paragraph 227 of the Judgment, subject to the following comments:

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227 *Loto-Québec, supra* note 155, at para. 173: « De plus, on a vu qu'en matière contractuelle, l'utilisateur d'un ALV est soumis à l'obligation de se renseigner lorsqu'il a la possibilité de connaître l'information ou d'y avoir accès ». L'article 1473 C.c.Q. consacre la même limite à l'obligation extracontractuelle d'information de la défenderesse en exonérant le fabricant, le distributeur ou le fournisseur du bien meuble « s'il prouve que la victime (l'utilisateur de l'ALV) connaissait ou était en mesure de connaître le défaut du bien ou qu'elle pouvait prévoir le préjudice ».; *Baron v. Supermarché Lavaltrie*, [2004] RJQ 3147 (C.Q.), 2004 CanLII 39173 (QC CQ), a case where a plaintiff had brought a claim under Section 53 seeking compensatory damages from the Defendant supermarket for food poisoning she suffered after consuming ground beef that contained E. coli bacteria. Sylvestre J.C.Q. rejected the claim on the basis the Defendant had posted adequate warning labels on and around the product and the plaintiff, even though she was illiterate, had heard of the risks in the media and was therefore aware of the risk and knew how to avoid it.; *Létourneau v. Imperial Tobacco Ltée*, [1998] RJQ 1660, 1998 CanLII 10744 (QC CQ), where de Pokomandy J. noted that manufacturers must warn of risks that are not apparent to a user of ordinary prudence and diligence. There is no obligation to give a superfluous warning of risks that are general knowledge, or of which a specific consumer has knowledge.

228 See, *eg.*, Pierre Gabriel Jobin, "L'obligation d'avertissement et un cas typique de cumul" (1979) 39:5 Revue du Barreau 939, pp. 941-942: "…pour qu'existe une obligation d'avertissement, le danger doit être à la fois caché et inconnu de l'acheteur.".

(a) At paragraph 227(e) of the Judgment, the Trial Judge states that "it is not enough for a manufacturer to respect regulations governing information in the case of a dangerous product", citing an excerpt from Baudouin. In so doing, he fails to acknowledge that Baudouin limits this statement of principle to products whose "dangerousness goes beyond the knowledge of ordinary consumers". Here, the evidence is clear that the dangers of cigarettes were not "beyond the knowledge of ordinary consumers", and certainly not for the duration of the Class Period (as confirmed by the Trial Judge's own findings regarding the "knowledge dates").

(b) At paragraph 227(j) of the Judgment, the Trial Judge states that the duty to inform includes the "duty not to give false information; in this area both acts and omissions may amount to a fault", citing the case of *Bank of Montreal v. Bail*.[229] In so doing, he fails to acknowledge the Supreme Court's qualifying admonition that while both acts and omissions may give rise to faults under civil law, the obligation to inform "must not be defined so broadly as to obviate the fundamental obligation which rests on everyone to obtain information and to take care in conducting his or her affairs".

282. When one moves beyond these general statements of principle, however, there exists an irreconcilable disjuncture between the Trial Judge's articulation of the "duty to inform" (whether or not subject to the above qualifications) and his actual analysis of the product warnings in these cases.

283. For example, the Trial Judge acknowledged that every cigarette pack sold in Canada by ITCAN since 1972 has had an express health warning on its face, as did every ITCAN advertisement or other promotional publication since 1973.[230]

284. He further acknowledged that many of these warnings throughout the Class Period expressly warned of the very Diseases at issue in these proceedings, including "lung cancer", "addiction" and "lung disease" (in addition to more general warnings about dangers to health and shortened life expectancy).[231]

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229 *Bank of Montreal v. Bail Ltée*, [1992] 2 SCR 554, 1992 CanLII 71 (SCC)
230 Judgment, para. 110.
231 Judgment, para. 110.

285. Inexplicably, none of these findings impacted his ultimate conclusion that ITCAN failed to discharge its duty to inform – at all times during the Class Period, in respect of each and every Class Member.

286. Moreover, the manner in which the Trial Judge approached the issue of "warning" suggests that he applied a heightened threshold that was inconsistent with his abstract articulation of the duty to inform (and inconsistent with governing legal principles). In particular, the Trial Judge:

(i) criticized early warnings for failing to "strike fear into the heart of the average smoker" and for lacking "bite";[232]

(ii) suggested that the addiction warning needed a period of public digestion in order to have "sufficient force", importing the notion of behaviour modification;[233]

(iii) criticized ITCAN's public warnings – communicated over and above the pack warnings – for "failing to drive the message home";[234] and

(iv) suggested that only recently have the Appellants "moved in the direction of raising the alarm".[235]

None of these articulations is representative of a "duty to inform", but rather they impose a duty to "convince" – or a duty to modify behaviour – which is not recognized at law.

287. Similarly, in his discussion of ITCAN's internal market research – which he acknowledged was not a "source of reliable information as to the actual knowledge of the general public", nor was it intended to be[236] – the Trial Judge concluded that the historical data indicating that certain percentages of the (unrepresentative) survey sample did not personally "feel" that smoking was "dangerous for anyone" should have caused ITCAN to strengthen its warnings because of the public's apparent lack of awareness of the risks.

288. This conclusion is untenable, for two reasons:

(i) Although it is premised upon data which was found by the Trial Judge to be unreliable and unrepresentative, and collected for purposes other than measuring

232 Judgment, paras. 117-118.
233 Judgment, paras. 129-130.
234 Judgment, para. 285.
235 Judgment, para. 312.
236 Judgment, para. 323.

public awareness of risks, the Trial Judge's reasoning necessarily implies that the data should nonetheless have been used by ITCAN as though it was indicative of public awareness.[237]

(ii) More fundamentally, the Trial Judge improperly equated a question about "personal feelings" with awareness, thereby imposing on ITCAN a "duty to convince" rather than a "duty to inform".

289. As the expert evidence clearly indicated, a product manufacturer does not have the ability to make consumers "believe" a particular message – they can simply make them aware of it.[238] It is for this very reason that the legal standard is that of a duty to "inform". It is an objective standard which asks the court to assess whether consumers could reasonably have known of the risks, not a subjective standard of whether particular consumers embraced the risk information and/or changed their behaviour based on their unique value judgments. The law is such for good reason. If there was a "duty to convince" or a "duty to change behaviour", manufacturers would effectively be exposed to limitless liability.

290. Accordingly, the Trial Judge's implicit – and at times, explicit – imposition of a "duty to convince" or "duty to alter consumer behaviour" on ITCAN represents an error of law.[239]

291. This very same "heightened" duty manifests itself in the Trial Judge's reasoning with respect to ITCAN's deemed failure to adequately warn about the risk of "tobacco dependence" or addiction.

292. In particular, it is uncontested that an addiction warning was implemented by all Appellants in 1994. However, in the complete absence of any evidence, the Trial Judge unilaterally concluded that "even something as visible as a pack warning does not have its full effect overnight" and that the Court needed to allow time for the warning to "have

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237 The Trial Judge's findings based on the selective excerpt of Mr. Ricard's evidence at paragraph 328 of the Judgment misrepresents the record, as it does not acknowledge the repeated evidence from Mr. Ricard and other ITCAN witnesses that the CMA was not treated by ITCAN as a measurement of public awareness (see, *eg*., Trial Transcript, October 9, 2013 (Ricard), pp. 85-86, 90-93). Indeed, the Trial Judge's singular excerpt disregards the testimony of Mr. Ricard from a few pages earlier in the very same transcript where he expressly disclaims any measurement of public awareness by ITCAN (see Trial Transcript (Ricard), May 14, 2012, pp. 44-47. See, also, Trial Transcript (Ricard), May 9, 2012, pp. 177-180).

238 Trial Exhibit 40494 (Viscusi Report), p. 7, para. 16; Trial Exhibit 21316 (Young Report), p. 32.

239 As set out in the Argument of JTI, the Trial Judge's introduction of a "higher assurance of awareness" (Judgment, para. 103) is unknown in law and represents a clear legal error.

sufficient force".[240] On this basis, the Trial Judge concluded that the "knowledge date" for the Létourneau Action was 18 months after the pack warning was implemented.[241]

293. Accordingly, the Trial Judge's conception of the "duty to inform" goes well beyond the legally recognized standard, to the point of requiring a period of "digestion" by the public even after the manufacturer has specifically warned about a particular risk.

294. In essence, the Trial Judge created an entirely new legal standard and, in so doing, committed a fundamental error of law.

(ii) The "Knowledge Dates" Are in Error

295. The reasoning applied by the Trial Judge with respect to ITCAN's failure to "inform" was premised, in large measure, on his findings as to when the public knew about the risks of smoking (which he defines as the "knowledge dates" applicable to each Class).

296. The Trial Judge's conclusions in this regard misapprehended or disregarded material evidence. Moreover, as detailed in the section that follows, the Trial Judge's legal conclusions derivative from these "knowledge dates" are similarly flawed, and constitute errors of law in and of themselves.

(a) Knowledge Date Regarding "Addiction" Risks

297. In the Létourneau Action, the Trial Judge affixed a "knowledge date" of March 1, 1996 (*i.e.*, 18 months after an express "addiction" pack warning was implemented by ITCAN and the other Appellants). In so doing, he committed a number of fundamental errors:

(i) He randomly selected a date 18 months after the date on which express pack warnings were implemented, without any evidentiary or legal basis for doing so;

(ii) He purported to treat the terms "habit", "dependence" and "addiction" as interchangeable descriptions for the phenomenon of "difficulty of quitting",[242] but then proceeded to apply them differentially in a manner that clearly prejudiced ITCAN and departed from the evidentiary record. Consider, for example the

240 Judgment, paras. 128-129.

241 Extending this reasoning to its logical conclusion, this means that a manufacturer of any product with risk warnings – including a "new" product to the market – would be exposed to liability for an undefined period, pending sufficient public digestion of the warning.

242 Judgment, paras. 137, 149-150.

following irreconcilable approaches to risk awareness on the part of ITCAN and the public, respectively:

> ***ITCAN Awareness***: The Trial Judge concluded that ITCAN knew of the risk of "dependence" by the 1950s, relying on the expert evidence of Professor Flaherty who concluded that it was "common knowledge among the public since the mid-1950s that smoking was difficult to quit".[243]
>
> ***Public Awareness***: Conversely, when assessing the public awareness of the selfsame risks, the Trial Judge not only disregarded the very same evidence of Professor Flaherty about public awareness, but also misrepresented Professor Duch's evidence by focusing on when the public considered smoking to be a formal "addiction".[244] In so doing, he disregarded Professor Duch's uncontested evidence showing widespread awareness of the "habit-forming" properties of cigarettes dating back to the 1970s, and presumably earlier.[245]

(iii) The Trial Judge's emphasis on the public awareness of "addiction" (as distinct from dependence or habituation) in fixing the "knowledge date" utterly disregarded the uncontested evidence that while the term "addiction" was not applied by medical authorities to tobacco until 1988 (and in Canada, not until 1989),[246] the public knew of the phenomenon of "difficulty of quitting" for decades.[247] Notably, it was this latter phenomenon that the Trial Judge previously described as "what is important" to the analysis in the Létourneau Action.[248]

(b) Knowledge Date Regarding "Disease" Risks

298. The Trial Judge similarly erred when he applied the deemed "knowledge date" in the Blais Action. In particular:

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243 Judgment, paras. 137-138. Notably, Professor Flaherty did not speak about company awareness, but rather opined on public awareness. Inexplicably, the Trial Judge simply dismissed this evidence out of hand, except to the extent that it assisted in pushing ITCAN's own "knowledge date" back in time.

244 Judgment, para. 124.

245 Trial Exhibit 40062.1 (Duch Report), pp. 69-70, referencing the 1979 survey data confirming that 84% of respondents agreed that it was "very hard to stop smoking" once you start. Duch noted that this was the "earliest public opinion survey measuring public views regarding the cigarette habit".

246 See, *eg*., Trial Transcript (Liston), December 11, 2013, p. 84, Q. 180; Trial Exhibit 212, at pp. 4-5; Trial Transcript (Neville), June 6, 2012, p. 191, Q. 649; Trial Transcript (Perrins), August 21, 2013, pp. 137-138, Q. 433.

247 Trial Transcript (Duch), May 27, 2103, p. 68; Trial Exhibit 20063 (Flaherty Report), paras. 4-5.

248 Judgment, para. 149.

(i) In fixing the date at January 1, 1980, the Trial Judge relied heavily on the spontaneous oral testimony of a self-proclaimed anti-tobacco advocate – Dr. Proctor[249] – who had no experience with the Canadian environment, did not comment on the issue of public awareness in his expert report, and provided his oral evidence about public awareness "on the fly" in response to a question from the Trial Judge.[250] Moreover, notwithstanding the fact that Proctor had no expertise in "psychology or human behaviour" – the very criticism on which the Trial Judge grounded his rejection of the Appellants' experts in awareness – the Trial Judge inexplicably had no reservations about relying on his pronouncements about public awareness levels (in the United States);

(ii) The Trial Judge unilaterally "re-interpreted" the evidence of Professor Duch on public awareness – which clearly indicated that "by at least 1963 there was an exceptionally high level of awareness, 88 percent, among the Québec population of reports or information that smoking may cause lung cancer or have other harmful effects"[251] – and decided to simply "add ten or fifteen years" to his conclusions, and then add a few more years for good measure to arrive at a 1980 "knowledge date":

> [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".

(iii) The Trial Judge simply rejected the detailed evidence of Professor Flaherty – a Professor Emeritus of History and Law at the University of Western Ontario – on the grounds that he did not review the Appellants' advertising, and he lacked expertise "in psychology or human behaviour" (a failing shared by Proctor, whose evidence the Trial Judge did accept). At the same time, the Trial Judge expressly concluded that "the companies' ads were not informative about smoking and health questions",[252] raising the question of why an expert's opinion about public awareness of smoking and health was rejected for its failure to account for material that was not informative about smoking and health questions.

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249 Trial Transcript (Proctor), November 26, 2012, pp. 58-82, QQ. 156-157, 159, 236, 240. Given Dr. Proctor's disclosed interests, the Trial Judge should have – but did not – apply the principles articulated by the Supreme Court in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 54.

250 Judgment, para. 97.

251 Trial Exhibit 40062.1 (Duch Report), p. 5.

252 Judgment, para. 438, emphasis added.

> In this regard, the Trial Judge is also incorrect in his assertion that Professor Flaherty "completely ignored the Companies' numerous advertisements" over the Class Period. As Professor Flaherty testified, to the extent that advertising did in some way touch on issues related to smoking and health, Professor Flaherty did in fact include these communications in his analysis.[253] That said, Professor Flaherty came to the very same conclusion as the Trial Judge, namely that cigarette advertising in Canada was not done on the basis of health claims (and therefore was largely irrelevant to the issue of public awareness of risks).[254]

299. In summary, the Trial Judge's findings in respect of the "knowledge dates" are quite simply in contradiction to the clear evidentiary record showing (*inter alia*): (i) surveys conducted in the 1950s and 1960s confirmed that between 80% and 90% of the Québec populace was aware of the harmful effects of smoking, including lung cancer;[255] (ii) the government's own survey results from 1964 showed that 90% of Canadians were aware of the risks of smoking;[256] and (iii) the media coverage of the risks of smoking – including "dependence" – was ubiquitous by the late 1950s and early 1960s.[257]

(iii) The Trial Judge Erred in his Legal Analysis of Consumer Awareness

300. Even if this Court were to accept the Trial Judge's findings regarding the applicable "knowledge dates" – both of which represent palpable and overriding errors – his subsequent application of these erroneous dates in his legal reasoning is similarly flawed, and represents an error of law.

301. At the outset of his analysis of the Blais Action, the Trial Judge acknowledged that ITCAN has a "complete defence" to the dangerous product claims after January 1, 1980 by virtue of Article 1473 CCQ.[258] However, he inexplicably adopted a categorical treatment of the Class prior to this knowledge date by assuming that every single Member was wholly unaware of the risks up to December 31, 1979.

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253 Trial Transcript (Flaherty), May 21, 2013, pp. 86-87, QQ. 142-143.
254 Trial Transcript (Flaherty), May 23, 2013, p. 61, Q. 174, noting that the "information content" of Canadian advertising was essentially non-existent insofar as the smoking and health issue was concerned.
255 Trial Exhibit 40062.1, at page 5 pdf, para. 1 (Duch Report).
256 Trial Exhibit 40064.73 (NH&W Press Release, August 31, 1965).
257 Trial Exhibit 20063 at pages 8-14 pdf, paras. 20-32 (Flaherty Report).
258 Judgment, para. 907.

302. Not only is this approach contrary to reason, it is also at odds with the extensive expert evidence from Professor Flaherty, Professor Lacoursière, Professor Duch and Dr. Perrins, each of whom confirmed the widespread public awareness of risks throughout the Class Period. In other words, the Appellants tendered detailed and specific proof – not contested by the Respondents by means of any qualified expert or Class Member evidence – confirming "that the victim knew … of the defect" prior to this deemed "knowledge date".

303. More fundamentally, the Trial Judge proceeded to negate the legal defence of awareness (*i.e.*, the fact that Class Members knew or "could have known" of the risks) – which is prescribed by law – by inexplicably shifting his analysis from the legal framework governing duties to inform (*i.e.*, Article 1473 CCQ) to more generalized duties under Article 1457 CCQ, the Québec *Charter* and the *Consumer Protection Act*.[259] In so doing, he asserted (without supporting authority) that the "complete defence" somehow fell away because a party's knowledge is "less relevant" in these latter contexts.[260]

304. On the basis of this unprincipled reasoning, the Trial Judge replaced the "complete defence" with an apportionment of liability as between ITCAN and the Class Members, whereby he imposed liability on ITCAN after the "knowledge date" – for the remainder of the Class Period – and merely attributed 20% of liability to Class Members who started to smoke after the deemed "smoking date" (*i.e.*, 4 years prior to the "knowledge date").

305. This apportionment of liability was purportedly adopted pursuant to Article 1478 CCQ, on the premise 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".[261] He similarly concluded that any smoking after January 1, 1976 was attributable to "stupidity",[262] a comment that arguably provides insight into the Trial Judge's judicial mindset.

306. The above legal analysis is fundamentally flawed, for a number of reasons:

(i) As a preliminary matter, the attribution of shared liability itself is again done on the basis of monolithic treatment of the Class, without regard for the material

259 Judgment, para. 240: "…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."
260 Judgment, para. 140.
261 Judgment, para. 828.
262 Judgment, para. 833.

differences between Class Members. In so doing, the Trial Judge's reasoning violates the principles of Article 1478 CCQ, which require that the relative liability of each party be assessed in the context of the totality of the evidence.[263]

(ii) More fundamentally, the Trial Judge erred by disregarding the defence of "awareness" that is available pursuant to Article 1473 CCQ, and purporting instead to rely on the general obligations arising under Article 1457 CCQ for which no equivalent defence – according to the Trial Judge – is available. This approach fundamentally disregards the regime specifically introduced for dealing with product risks, where the legislature determined that risk awareness was a complete defence. Moreover, even a plain reading of Article 1457 CCQ requires the Court to consider the scope of the duty "according to the circumstances", confirming that consumer awareness cannot simply be ignored under this provision. [264]

307. The jurisprudence is clear that defence of "risk awareness" (*i.e.*, whether an objective consumer could reasonably have known of the risk) is a fundamental and complete defence to claims for failure to inform brought pursuant to Article 1053 CCLC and/or Article 1473 CCQ. Indeed, when previously confronted with Mme. Létourneau's nearly identical individual claim, the Québec courts invoked this very principle and dismissed the action on the grounds that the risks of smoking were well-known by the time that she began smoking in 1964.[265]

308. In *La responsabilité civile du fabricant en droit québécois*", Baudouin noted that "Le fabricant se doit de signaler les risques courants provenant de l'utilisation ordinaire et usuelle de son produit et qui ne sont pas évidents pour l'usager normalement prudent et diligent".[266] Similarly, Jobin noted as follows:

> 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

263 Judgment, para. 833.

264 As noted above, the jurisprudence surrounding the interpretation and application of the predecessor to Article 1457 CCQ – Article 1053 CCLC, which was in force for the majority of the Class Period – specifically required courts to assess consumer awareness of the risks.

265 *Létourneau v. Imperial Tobacco Ltée*, REJB 1998-07025 (CQ).

266 Jean-Louis Baudouin, "La responsabilité civile du fabricant en droit québécois" (1977) 8 R.D.U.S. 1, at p. 19 (emphasis added).

> contributive conduisant, non à l'exonération de l'auteur, mais à un partage de responsabilité.[267]

309. In *Les contrats de distribution de biens techniques* (1975), Jobin also noted the following with respect to liability under Article 1053 CCLC: "Il n'a donc pas l'obligation de donner des avertissements ou instructions que tout le monde connaît ou devrait connaître".[268] Thirty years later, the same author commented as follows with respect to Art. 1473 CCQ:

> […] Le fabricant ne répond pas des dangers connus de tous ni de ceux, en particulier, que la personne prudente et diligente ne pouvait pas ne pas découvrir dans les circonstances. Le fabricant n'est responsable que des défauts de sécurité qui, selon une appréciation objective, sont cachés. [269]

310. There is no reason that liability for "failure to inform" – to the extent that it can be imposed under Article 1457 CCQ – should not be governed by the same principles that were applied in the jurisprudence under Article 1053 CCLC. Accordingly, the Trial Judge is incorrect when he says that consumer awareness is somehow "less relevant" under Article 1457 CCQ.[270]

311. More fundamentally, with the introduction of Articles 1468, 1469 and 1473 CCQ, the legislature adopted a "complete code" with respect to manufacturer liability for failures

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267 Pierre-Gabriel Jobin, *La vente*, 3d ed. (Cowansville (Qc): Yvon Blais, 2007), at para. 212 ["*Jobin, La vente*"]. See, also, Jeffrey Edwards, *La garantie de qualité du vendeur en droit québécois* (Montréal: Wilson & Lafleur, 2008), p. 102, para. 226: "L'article 1473 C.c.Q. précise que la responsabilité ne peut être retenue si la « victime connaissait ou était en mesure de connaître le défaut du bien ou qu'elle pouvait prévoir le préjudice ». Il s'agit à l'évidence de notions apparentées aux conditions de la connaissance et du caractère apparent du vice caché."

268 Pierre-Gabriel Jobin, *Les contrats de distribution de biens techniques* (Québec: Presses de l'Université Laval, 1975), p. 70.

269 *Jobin, La vente, supra* note 267, p. 295. See also: Nicole and Marc Lacoursière L'Heureux, *Droit de la consommation*, 6th ed. (Cowansville (Qc): Yvon Blais, 2011), p. 142, who confirm the same principle: "L'obligation de renseignement ne libère pas le consommateur de sa propre obligation de se renseigner. Il doit être diligent et s'abstenir de tout aveuglement volontaire; « le droit entend protéger le contractant contre une inégalité situationnelle, mais non contre sa propre sottise ou négligence. »; see also p. 109: « La garantie légale comprend l'obligation du fabricant d'informer le consommateur sur les risques et les dangers inhérents au bien ou à son utilisation dont le consommateur ne peut se rendre compte par lui-même. »; Under the CCQ, see Jean-Louis Baudouin, Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th ed. (Cowansville (Qc): Yvon Blais, 2013), p. 414, at para. 314: « Dans une certaine mesure, non négligeable, ce devoir de se renseigner est apprécié de façon subjective: on tient compte de la formation et l'expérience de la personne concernée. Le droit ne vient pas au secours de ceux qui dorment, disait la maxime romaine. Cette idée a déjà été développée dans le contexte du contrat d'assurance terrestre pour la déclaration de risque de l'assuré. On la retrouve notamment dans la garantie d'éviction contre les violations de limitations de droit public, et encore dans la responsabilité extra contractuelle du fabricant pour un défaut de sécurité que la victime ignorait et n'était pas en mesure de connaître ou lorsqu'elle ne pouvait prévoir le préjudice qui en résulterait: art. 1473 C.c.Q. »

270 Judgment, para. 140.

to inform. As this Court has previously recognized, the three provisions constitute a "complete and imperative regime".[271] Similarly, the Minister has noted that "les règles posées par l'article, complétées par celles des articles 1469 et 1473, ont pour effet d'instituer un véritable régime autonome et impératif de responsabilité extracontractuelle en matière de produits non-sécuritaires".[272]

312. Indeed, ITCAN is not aware of any prior decision by a Québec court – since the introduction of Article 1468 CCQ – where liability for a manufacturer's failure to inform has been differentially imposed (in manner or degree) under Articles 1457 and 1468 CCQ.

313. This absence of differential treatment under the two provisions stands to reason. If the Trial Judge's legal reasoning were to be applied, it would necessarily give rise to two untenable results:

(i) The "complete defence" afforded by Article 1473 CCQ would be negated, as plaintiffs would simply cloak their "failure to inform" allegations as more nebulous claims under Article 1457 CCQ or a statutory cause of action. In essence, the comprehensive code introduced by the Québec legislature to address consumer product warnings would be undermined entirely; and

(ii) The current regime of product warnings in Québec would be equally undermined by virtue of the fact that the sale of any consumer product with inherent risks – whether tobacco, knives, automobiles, food products or any other consumer good – would have to be accompanied by a host of express manufacturer warnings about all such risks, regardless of whether or not the public is broadly aware of them.

314. Both of these outcomes are unsustainable as a matter of principle, and are not reflective of the state of the law in Québec. The duty to inform is simply that – a duty to "inform the uninformed". It is not a duty to reiterate what is publicly known.[273]

315. While one might try to argue that the Trial Judge's analysis of the post-1980 conduct under Article 1457 CCQ in the Judgment was grounded in a fault that somehow differed

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271 *Imbeault v. Bombardier Inc.*, 2006 QCCS 769 confirmed on liability 2009 QCCA 260, at para. 186.

272 Ministère de la Justice, *Commentaires du ministre de la Justice: Le Code civil du Québec*, t. 1, (Québec: Publications du Québec, 1993) à la p. 896.

273 *Loto-Québec, supra* note 155, at para. 173; *Baron v. Supermarché Lavaltrie*, [2004] RJQ 3147 (CQ), 2004 CanLII 39173 (QC CQ); *Létourneau v. Imperial Tobacco Ltée*, [1998] RJQ 1660.

from a strict "failure to inform" – given his allusions to "impeding" and "delaying" the public acquisition of knowledge[274] – this argument rests on a distinction without a difference:

(i) The Trial Judge himself expressly grounds the deemed fault under Article 1457 CCQ in the "duty to warn" that is alleged to arise under that provision.[275]

(ii) All of the conduct identified by the Trial Judge as being "wrongful", without exception, implicates ITCAN's obligations to inform of product risks and the consumers' awareness of such risks. In other words, they pertain to matters governed by Article 1468 CCQ, and cannot be otherwise "disguised" with a view to circumventing the governing regime for liability.

316. Lastly, the Trial Judge's ultimate legal analysis – particularly in the Létourneau Action – does not bear out his own articulation of the relevant legal framework.

317. In particular, it was agreed by all parties that an express product warning about addiction was implemented in 1994. Applying the Trial Judge's theory, liability under each of Article 1457 CCQ, the Québec *Charter* and the *Consumer Protection Act* should cease as of this date, regardless of the state of public knowledge (which the Trial Judge inexplicably delays to March 1, 1996).

318. Similarly, any faults under Article 1469 CCQ should similarly cease, because the known risks have now been communicated. Nevertheless, the Trial Judge baldly concludes that the "faults continued throughout the Class Period", without pointing to any specific conduct after 1994 which could reasonably sustain such a finding.

319. In summary, the Trial Judge's conclusions regarding the applicable "knowledge dates" and his selective application thereof are premised upon manifest factual and legal errors.

(iv) The Trial Judge Erred in Disregarding the Fundamental Role of the Government in the Management of the Public Health Risk of Smoking

320. During the course of the trial, the Court heard detailed evidence from numerous experts and former government officials regarding the central role played by Health Canada and other government departments in regulating the manufacture and sale of

274 Judgment, para. 141.
275 Judgment, paras. 240-242.

tobacco in Canada. In the context of his Judgment, the Trial Judge makes passing reference to this extensive governmental involvement:

> "Health Canada certainly appears to have been occupying the field with respect to information about reduced-delivery products." (*Judgment, para. 354*)
>
> "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." (*Judgment, para. 355*)
>
> "Starting in 1972, 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." (*Judgment, para. 394*)
>
> "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 Québec." (*Judgment, para. 652*)

321. However, when it comes to his analysis of the history of the warnings about smoking risks and the state of public awareness, the Trial Judge effectively reads out the role of the government:

(a) He seemingly forgets the fact that all product warnings were adopted "with the participation and approval of the Canadian Government".[276]

(b) He fails to make even a single reference to the extensive testimony of Dr. Bert Liston, formerly of Health Canada and former Assistant Deputy Minister of the Health Protection Branch, concerning the extensive and ongoing role of the government in regulating tobacco products in Canada, including through public management of the health risks (by means of warnings and otherwise).[277]

(c) He ignores the extensive expert evidence of Dr. Perrins and Dr. Young as to the central role played by the government in the management of all aspects of

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276 Judgment, para. 394.

277 See, *eg.*, Trial Transcript (Liston), December 11, 2013, at pp. 103-104, Q. 242. Notably, the Trial Judge also only makes passing reference to the similar testimony from Marc Lalonde, the former Minister of Health.

smoking in Canada,[278] as well as the fact evidence of the government witnesses who specifically testified on this very issue.

322. Notably, in disregarding the extensive expert evidence of Dr. Perrins regarding the "knowledge of the public health community and the government", the Trial Judge simply concluded that he did not find this evidence "relevant."[279] However, having declared such evidence of government knowledge to be "irrelevant" to these proceedings, the Trial Judge unilaterally drew his own unsubstantiated conclusions about the apparent lack of knowledge of the government, seemingly based on his review of a single document filed without the benefit of witness testimony.[280]

323. In fact, in dismissing the applicability of the "learned intermediary" doctrine, the Trial Judge goes further and actually finds that ITCAN did not communicate the risks of smoking to Health Canada – an issue that he had previously deemed to be "not relevant":

> "…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."[281]

324. The Trial Judge also takes the unprecedented step of drawing "presumptions of fact" from government policy decisions. In particular, he notes as follows:

> "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."[282]

325. In essence, the Trial Judge draws an erroneous factual presumption about "government ignorance" from a conscious policy decision not to warn about smoking risks (an issue that was specifically considered by the Federal government at various times

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278 See, *eg.*, Trial Exhibit 21316 (Young Report), p. 21; Trial Exhibit 40348 (Perrins Report, 2nd Supp), p. 9.

279 Judgment, footnote 44.

280 Notably, the Crawford memo (Trial Exhibit 1564) upon which the Trial Judge relies for the proposition that "the Companies knew that Health Canada was in a state of confusion" was authored by a former representative of JTI's predecessor company who did not testify (about the content of the memo or otherwise). Moreover, it is clear from the face of the document that the only issue being discussed in the memo was the design of a "safer cigarette", and had nothing to do with government awareness of health risks.

281 Judgment, para. 256.

282 Judgment, para. 235.

during the Class Period, and about which an informed policy decision was made each time). Not only is it improper to draw the above conclusion from a government policy decision, but the finding itself is expressly contrary to the trial evidence. In particular, it disregards:

(i) the evidence from government and other witnesses to the effect that detailed warning information was specifically considered by the government in the early 1980s but deemed inadvisable for policy reasons – not because of a lack of "awareness" of the risks;[283]

(ii) the Trial Judge's own finding elsewhere in the Judgment concerning the extensive involvement of the Federal government in the area of tobacco regulation (cited above). Indeed, the Federal government was specifically thanked for its substantial assistance in the preparation of the U.S. Surgeon General's landmark 1964 Report on Smoking and Health;[284] and

(iii) the evidence from government witnesses[285] – as confirmed by the documentary record[286] – that legislated warnings were considered at various points over the Class Period (as early as the 1960s), but were not adopted for policy reasons unrelated to "risk awareness".

326. The Trial Judge similarly erred in his discussion of the addiction warning that was introduced in 1994. Specifically, in addressing the level of public awareness concerning the phenomenon of addiction, the Trial Judge concluded – in the face of direct evidence to the contrary – that the government decision to implement the 1994 warning was somehow proof of a lack of both government and public awareness prior to this date:

> "…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."[287]

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283 See, *eg.*, Trial Transcript (Zilkey), December 10, 2013, p. 30, Q. 64. See, also, Trial Exhibit 20799, the 1981 letter from the Director of the Bureau of Tobacco Control to the Assistant Deputy Minister of Health stating that "it would not be advisable to have disease-specific warning information printed on cigarette packages at this time".

284 Trial Exhibit 601-1964, pp. 7-8 pdf.

285 See, *eg.*, Trial Transcript (Lalonde), June 17, 2013, pp. 97-99, 117-119, 130-132; Trial Transcript (Liston), December 11, 2013, QQ 95-99.

286 See, *eg.*, Trial Exhibit 20073, p. 16 pdf.

287 Judgment, para. 127.

327. Notwithstanding the Trial Judge's acknowledgement of the government's devotion of significant resources to the area of tobacco regulation, the Trial Judge inexplicably concluded that the government's general lack of "concern" for the phenomenon of addiction and the policy decision not to implement a warning prior to 1994 could only have been attributable to a "lack of awareness" of the risk.

328. Not only is this reasoning counterintuitive, it is also contrary to the uncontested evidence of the government witnesses who testified during the trial proceedings.

329. For example, the evidence of Dr. Bert Liston, the former Assistant Deputy Minister of Health and Executive Director General of the Health Protection Branch in the 1980s, confirmed that Health Canada specifically studied the phenomenon that became known as "tobacco addiction", and made policy decisions on the basis of this work. In particular, his uncontested evidence confirmed the following:

(i) Throughout most of the 1980s, the Canadian government continued to reject the application of the term "addiction" to smoking on the basis that it was deemed to be inappropriate. Rather, the members of the Health Protection Brand preferred the term "dependence".[288] Indeed, in 1986 Liston specifically inquired of the experts within the Health Protection Branch about the propriety of using the term "addiction", and communicated the general views from within the Department that such terminology was inappropriate.[289] Even after the U.S. Surgeon General proposed the application of the term to the cigarette habit, the scientists within Health Canada rejected its use.[290]

(ii) In the late 1980s, following significant lobbying efforts by health groups to adopt the "addiction" terminology in the smoking context (as was proposed by the U.S. Surgeon General in 1988)[291] – in part due to the term's "provocative" and "controversial" nature[292] – Dr. Liston commissioned the Royal Society specifically to assess whether the smoking habit could be classified as an addiction under the

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288 Trial Transcript (Liston), December 11, 2013, pp. 65-67, QQ. 129-134.

289 Trial Transcript (Liston), December 11, 2013, pp. 69-70, QQ. 139-141, discussing Trial Exhibit 40346.373.

290 Trial Exhibit 40001, p. 2 pdf. See, also, Trial Transcript (Liston), December 11, 2013, pp. 70-75, QQ. 143-157.

291 Trial Transcript (Liston), December 11, 2013, pp. 79-81, QQ. 162-167; Trial Exhibit 20985, p. 1 pdf.

292 Trial Exhibit 40346.381, noting that "use of the term addiction in connection with cigarette smoking is probably somewhat provocative and could lead to controversy".

then-contemporary diagnostic criteria.[293] Notably, the recently-enacted *TPCA* at that time used the term "dependence", signalling the government's position immediately prior to the release of the Royal Society Report.[294]

(iii) Ultimately, the Royal Society Report adopted the addiction terminology. However, in so doing, the Report "reject[ed] existing definitions of 'drug addiction' and substitute[d] a new one".[295] In particular, as described in the preamble to the Report itself, the Royal Society concluded that – consistent with the fact that "earlier definitions of drug addiction have evolved over the past forty years" – a "refinement" of the then-existing conception of addiction was appropriate in order to bring it within the tobacco arena.[296]

(iv) It was on the basis of this Royal Society Report that the Minister of Health in 1989 (Perrin Beatty) first proposed the inclusion of an addiction warning on cigarette packs.[297] Even after the Royal Society Report was released, the position within Health Canada with respect to the use of the term "addiction" in the context of tobacco did not change.[298]

330. In the face of this evidence (*inter alia*) – to which the Trial Judge did not even allude in his Judgment – it is unclear on what basis he could possibly conclude that the absence of an express "addiction" warning until 1994 was tantamount to a lack of government and public awareness of the underlying risk.

331. More generally, any analysis of a manufacturer's duty to inform requires an assessment of the "circumstances", which would necessarily include the role played by the applicable government regulator (in this case, Health Canada). The reasoning applied by the Trial Judge in this case illustrates the hazards of attempting to conduct a "duty to inform" analysis in the abstract, without regard for the evolution of the government's involvement and the broader social context.

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293 Trial Transcript (Liston), December 11, 2013, pp. 80-82, QQ. 166-172.
294 Trial Exhibit 40346.362, p. 2 pdf.
295 Trial Exhibit 20989; Trial Transcript (Liston), December 11, 2013, p. 85, Q. 183.
296 Trial Exhibit 212, p. 7 pdf.
297 Trial Transcript (Liston), December 11, 2013, pp. 90-93, QQ. 197-208; Trial Exhibit 20987, p. 2 pdf (handwriting).
298 Trial Transcript (Liston), December 11, 2013, pp. 93-96, QQ. 209-219; Trial Exhibit 20988.

E. THE TRIAL JUDGE ERRED IN HIS ANALYSIS OF THE CPA

332. At the outset, it is important to recognize that claims under the CPA – if found to be valid – are only available to the Respondents in respect of conduct undertaken by ITCAN at discrete times during the Class Period. In particular, as the Trial Judge acknowledged, the relevant provisions of the CPA did not come into force until April 30, 1980.[299]

333. Accordingly, the CPA cannot form the basis of a class-wide award for collective moral damages in the Blais Action, as the statutory right of action is not even available to large portions of the Class. For example, any Class Member who smoked the requisite "12 pack years" prior to April, 1980 cannot claim under the CPA, and cannot be awarded moral damages for breach of the Act.

334. Moreover, given that the only representations at issue are those communicated after the CPA came into effect (1980), all of the alleged "representations by omission" were communicated after the "knowledge date", *i.e.*, the date on which the Trial Judge concluded that "the public knew or should have known of the risks and dangers of contracting a Disease from smoking".

335. If consumers are already deemed to be aware of the risks, how can the Trial Judge reasonably presume – without evidence – that ITCAN's failure to advise of these known risks was the "cause" of the Class Members' purchasing decisions? This defies logic, particularly when one considers the fact that every "representation" after this date was also accompanied by an express health warning.

336. As discussed below, the Trial Judge committed other fundamental errors in his interpretation and application of the CPA. However, these two preliminary considerations (*i.e.*, the temporal limitations of the Act, and the fact that any "representations by omission" occurred after the "knowledge date") are necessarily fatal to the Trial Judge's presumptions and corresponding conclusion that the Class Members "may claim moral and punitive damages" – collectively – for violations of the CPA.[300]

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299 Judgment, para. 1024. Notably, this is after the "knowledge date" in the Blais Action.
300 Judgment, paras. 517, 541.

(i) The Trial Judge's Presumptions under the CPA Were Unsupported and Inappropriate

(a) Section 228

337. Insofar as section 228 of the CPA is concerned, the Trial Judge appears to suggest that the "representation" in question is in fact an omission, namely the failure to communicate "an important fact". Notably, the specifics of the important fact or facts are never identified, beyond reference to the failure to communicate the "risks and dangers of smoking". Again, the Trial Judge's failure to articulate precisely what should have been communicated (and when) is shocking in a Judgment that condemns the Appellants to pay billions of dollars for an undefined "failure to inform".

338. Nevertheless, on the basis of this deemed omission, the Trial Judge concludes that every Class Member – and indeed, "every member of society" – was a victim of the alleged "representation" on the theory that "no one can see something that is not there".[301]

339. According to the Trial Judge, a "representation by omission" is unbounded, and seemingly does not even require a market activity that is tied to the consumer. Indeed, he appears to suggest that even those who never purchased or even knew about the Appellants' products were nonetheless "victims" of the deemed representations by omission. This clearly cannot be the lens that was contemplated by the drafters of the *CPA*. By extension, the Trial Judge's conclusory statement that the entire Class "saw" the omission is equally untenable.

340. "Representations" for the purposes of the *CPA* can include both positive statements and omissions.[302] However, all claims of "misleading representation" require the Court to undertake an analysis of the "general impression" that those representations would have created in the mind of the average consumer.[303]

341. More fundamentally, the Trial Judge's reasoning reads out of existence the health warnings that appeared on every single cigarette pack and every single cigarette advertisement distributed by ITCAN since the CPA was enacted. Indeed, the Trial Judge

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301 Judgment, para. 513.
302 CPA, s. 216.
303 See, *eg.*, *Richard v. Time*, [2012] 1 SCR 265, 2012 SCC 8 ["*Time*"].

inexplicably ignores the express warnings of "cancer", "lung cancer", "fatal lung disease", and the "addictive" properties of cigarettes, as well as the risk of death / shortened life expectancy, which accompanied ITCAN's "representations".[304]

342. Nevertheless, having presumed that every Class Member "saw" the undefined "representation by omission", the Trial Judge draws the further sweeping presumption that this same omission was the cause of every Class Member's smoking and/or purchasing behaviour (the express health warnings notwithstanding):

> "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.
>
> … 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."[305]

343. For all of the reasons that the Trial Judge erred in his broader causal analysis, so too did he err in his analysis under the CPA. Take, for example, someone who quit smoking prior to 1980 (*i.e.*, prior to the CPA coming into force). How can it be reasonably presumed that a "representation by omission" that occurred in the 1980s was not only seen by such an individual (even though he/she is no longer a consumer of the product), but was also the retroactive "cause" of his/her prior purchasing decisions? Quite simply, this is an obvious impossibility.

344. Moreover, for the reasons described above, the presumption is all the more tenuous when one considers that the "representation by omission" necessarily occurred after the "knowledge date" identified by the Trial Judge.

345. Similarly, the Trial Judge's sweeping causal presumption is belied by the Trial Judge's own finding that detailed warnings about the toxicity of tobacco "would not have

304 Judgment, para. 110.
305 Judgment, paras. 514-515.

stopped all smoking, as evidenced by the fact that, even in the presence of such warnings today, people start and continue to smoke".[306]

346. In an effort to combat the obvious inconsistency arising from these competing findings, the Trial Judge suggests that it "need not be shown that no one would have smoked had the Companies been forthcoming. It suffices to find that proper knowledge was capable of influencing a person's decision to begin or continue to smoke".[307] The problems with this reasoning are twofold:

(i) First, it reduces "causation" to an utterly meaningless construct. Anything is theoretically "capable of influencing" a person's decision-making in the abstract, no matter how indirectly or how insignificantly;

(ii) Second, even if this "capable of influencing" standard was somehow accepted as the appropriate legal standard (which would be extraordinary), surely it could not ground a Class-wide presumption of causation where the Court has already made a finding that all Class Members who are subject to potential "influence" by the lack of risk information are already aware of the selfsame risks.

(b) Section 219

347. The Trial Judge adopts similar (unfounded) presumptions in the context of his analysis of section 219 of the CPA. In addition to the foregoing, he concludes as follows:

> "… 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. This is sufficient proof to establish the probability that the Companies' ads induced consumers to buy their respective products."[308]

348. Notably, in so ruling, the Trial Judge did not even make so much as a passing reference to the extensive evidence proffered by Dr. James Heckman, a Nobel Prize-winning econometrician, which dispositively demonstrated that there was no evidence of impact of advertising on overall consumption rates.[309]

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306 Judgment, para. 803.
307 Judgment, para. 516.
308 Judgment, paras. 538-539.
309 Trial Exhibit 21320.1 (Heckman Report), at para. 32.

349. Accordingly, to the extent that any such presumption could reasonably have been invoked, ITCAN submits that it was clearly rebutted on the evidence.

(c) Section 272

350. Finally, the Trial Judge made three fundamental errors in his adoption of the "irrebuttable presumption of prejudice" under section 272 of the CPA.[310]

1. The Need for a "Legal Interest"

351. First, even if the Trial Judge is correct that certain of ITCAN's representations after 1980 were misleading, this would not automatically give the Respondents standing to claim relief under section 272 of the CPA. Rather, the Supreme Court of Canada made it clear in *Time* that it is necessary for a consumer to demonstrate a "legal interest" in order for a consumer to be entitled to relief under section 272 of the CPA:

> "… only a natural person who has been the 'victim' of a prohibited practice can institute proceedings to have the practice sanctioned by a civil court."[311]

352. The need for a "legal interest" is based on the fact that section 2 of the CPA establishes the basic principle that, except in the specific case of the CPA's penal provisions (which are not at issue in this proceeding), a consumer contract must exist for the CPA to apply.[312]

353. Even though the particular contract in issue may not have to be strictly contemporaneous with the alleged misleading representation, it logically follows that some temporal connection is required to satisfy the requirement that the particular consumer be the "victim" of the misleading representation.

354. Here, the Respondents simply asserted that the legal interest requirement is satisfied because "the class members have all purchased cigarettes", and the Trial Judge appears (implicitly) to have accepted this logic.[313] However, this blanket assertion of legal interest cannot satisfy the test set out by the Supreme Court in *Time*.

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310 See Judgment, paras. 494-509.
311 *Time, supra* note 303, para. 107.
312 *Time*, *supra* note 303, para. 104.
313 At paragraph 508 of the Judgment, the Trial Judge acknowledges ITCAN's expressed concerns about the lack of legal interest. However, his response at paragraph 509 – and specifically the reference to the "structure of the analysis" – does not appear to be borne out in his subsequent analysis.

355. The absurdity of this position is demonstrated by way of a hypothetical example. If the Trial Judge is correct that the advertisements issued by ITCAN between 1980 and 1988 (when advertising ceased) were misleading by virtue of the omission of sufficient health information, Class Members who started smoking and made their first cigarette purchases in 1994 (for example) cannot be said to be the "victims" of the earlier advertisement, even if the most generous interpretation of "legal interest" is adopted.

356. Similarly, a Class Member who started smoking and made their first cigarette purchase before a misrepresentation under the CPA was made by ITCAN obviously cannot be a "victim" of any such representation.[314]

357. In short, it is not sufficient to simply point to a vague representation or omission made some time after the CPA came into force, and then conclude that the mere act of purchasing cigarettes during the last half-century bestows upon every single Class Member the requisite legal interest to claim relief under section 272 of the CPA in relation to that representation.

358. Rather, the Class Members' legal interest can only be established by reference to whether particular cigarette purchases occurred in some temporal relationship with specific representations that were misleading due to omission. The Respondents cannot reasonably satisfy this requirement by citing omissions in the air, and then asserting that all statements made by the Appellants are automatically misleading in relation to all Class Members.

359. It is for this same reason that the fourth threshold condition identified by the Supreme Court in *Time* mandated the existence of a "sufficient nexus between the content of the representation and the goods or services covered by the contract, meaning 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".[315]

360. A representation that is wholly divorced – temporally or otherwise – from a consumer's purchasing behaviour cannot attract the presumption of prejudice under section 272 of the CPA.

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314 In the Blais proceeding, for example, the purchase of cigarettes (and the exposure to any so-called omission to disclose health risks) could conceivably occur entirely prior to the commencement of the enactment of the CPA. In particular, a Class Member could have quit smoking prior to 1980 but have been diagnosed after 1995, and still have an entitlement.

315 *Time, supra* note 303, para. 124.

361. The above position is further supported by the ruling in *Telus,* where the Court refused to award moral damages for breach of the CPA because the evidence did not support such an award. In reaching this conclusion, the Court stated that the absolute presumption of prejudice under section 272 of the CPA does not oblige the Court to automatically award moral damages in every case.[316] In spite of the presumption and the need to interpret the CPA liberally, a claim for moral damages is subject to the substantive law and ordinary requirements of proof. Even though moral damages may be difficult to quantify, they must be proved on a balance of probabilities based on the evidence.[317]

362. Given the complete absence of a rational connection between the purchasing decisions of large portions of the Class and any alleged misrepresentations under the CPA, as well as the Respondents' wholesale failure to prove moral damages, the statutory presumption cannot be invoked on a Class-wide basis and collective recovery cannot be awarded in the circumstances of these proceedings.

2. The Inapplicability of Section 272 to Extra-Contractual Claims

363. Second, the case law does not support the application of the "irrebuttable presumption" in the context of extra-contractual relief. Indeed, as the Trial Judge initially conceded, the Supreme Court's comments in *Time* confirm that section 272 of the CPA is limited to purely contractual remedies.[318]

364. The Trial Judge then suggested that there is no logical reason for such a limitation, and expanded the presumption's application to these proceedings. However, in so doing he once again failed to acknowledge the importance of establishing the requisite "nexus", which is – in part – ensured in the contractual context.

3. The Inapplicability of Section 272 to Punitive Damages

365. Lastly, the Trial Judge improperly extended the presumption of prejudice further so as to ground an award of punitive damages in the context of an extra-contractual fault, again contrary to the findings of the Supreme Court of Canada.[319]

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316 *Martin c. Société Telus Communication*, 2014 QCCS 1554, at para. 91 ["*Telus*"].
317 *Telus, ibid.*, para. 93. See also *Laflamme c. Bell Mobilité inc.,* 2014 QCCS 525*,* at paras. 96 and 97; and *Union des consommateurs c. Vidéotron*, s.e.n.c., 2015 QCCS 3821, at paras. 86-95.
318 Judgment, paras. 498-499.
319 *Time*, *supra* note 303.

366. Punitive damages, like compensatory damages, cannot be awarded "in the air". Parties must demonstrate, as a threshold matter, the requisite legal interest to claim such damages under section 272 of the CPA, in addition to satisfying the other pre-requisites for establishing breach of the CPA.

367. Section 2 of the CPA (which is the source of the legal interest requirement) applies to establish entitlement to all of the remedies under section 272 of the CPA, including punitive damages. This is confirmed by the Supreme Court's summary of principles applicable to an award of punitive damages:

> "Once an enabling legislative provision has been identified, the court must first determine whether the plaintiff has the interest required to claim punitive damages under that provision."[320]

368. Accordingly, the Trial Judge's failure to establish an identifiable legal interest on behalf of the entire Class – including those who made their purchasing decisions decades before or after the alleged misrepresentations – is necessarily fatal to his award of both compensatory and punitive damages.

(ii) The Trial Judge Misapplied Section 219 of the CPA

369. The Trial Judge concluded that a subset of ITCAN's ads violated section 219 of the CPA by using "attractive, healthy-looking models and healthy-looking environments" which gave the impression that "smoking is not harmful".

370. Notably, the Trial Judge made this finding notwithstanding the fact that:

(i) all such ads included an express warning about the health risks of smoking;

(ii) all such ads were published after the date on which the Trial Judge himself found that the public knew – or should have known – about the material risks of smoking; and

(iii) the Trial Judge dismissed the Respondents' various civil claims in respect of these (and other) marketing materials communicated during the Class Period, concluding that there was "no fault on the Companies' part with respect to conveying

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320 *Ibid,* at para. 179.

false information about the characteristics of their products" (Common Question E),[321] and similarly nothing wrong with "portraying smoking in a positive light".[322]

371. With respect to the obvious inconsistency between his rulings in respect of Common Question E and section 219 of the CPA, the Trial Judge merely asserted that the earlier finding was "relevant" to the analysis under section 219 of the CPA, but "in light of sections 216 and 218, it is not conclusive. A different test is called for under the CPA".[323] However, he cites no authority for this "different test", nor does he try to reconcile his approach to the CPA with the seemingly contrary view articulated by the Supreme Court in *Time*, namely that "the exercise of the recourse [under the CPA] is subject to the general rules of Québec civil law".[324]

372. Moreover, the Trial Judge's abstract finding that certain of ITCAN's advertisements might give rise to a "false or misleading impression to a credulous and inexperienced consumer" – even if it could be substantiated on the evidence – does not provide a basis for any Class-wide conclusions. As mentioned, the relevant provisions of the CPA did not come into force until 1980. Moreover, ITCAN did not advertise its products after 1988, except for a brief period between December 1995 and April 1997.[325]

373. Accordingly, at least insofar as section 219 of the CPA is concerned (*i.e.*, false or misleading representations to a consumer), any findings are necessarily limited to the period between 1980 and 1988, and for a brief period between 1995 and 1998.

374. The breadth of the Trial Judge's conclusions necessarily becomes further circumscribed when one considers the finding by the Trial Judge that not every advertisement during this period of time constituted a violation of section 219 of the CPA.[326] To the contrary, he acknowledged that certain of ITCAN's ads during this period were "neutral" and did not constitute violations of section 219 of the CPA.

375. Accordingly, the Trial Judge's conclusions as to ITCAN's breach of section 219 of the CPA are limited to an undefined subset of advertisements that were distributed in the 1980s and (possibly) for a brief period in the 1990s.

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321 Judgment, para. 438.
322 Judgment, para. 384.
323 Judgment, para. 524.
324 *Time*, *supra* note 303, at para. 126.
325 Judgment, para. 523.
326 Judgment, paras. 533, 534.

376. However, notwithstanding these clear limitations, the Trial Judge inexplicably concludes that "all Members would have seen [the advertisements]".[327] This is clearly in error. Indeed, the only reasonable conclusion from the evidence is that all Class Members did not in fact see the impugned advertisements, for the following reasons (*inter alia*):

(i) Class Members who started smoking – or, indeed, ceased smoking – prior to the 1980s clearly did not see or rely upon the advertisements in question;

(ii) Having acknowledged that only a subset of ITCAN's advertisements were in violation of section 219 of the CPA, the Trial Judge only cited three ITCAN advertisements as evidence of such violation. Two of these were from 1979, before the CPA was enacted, and one from 1987. What is more, they implicated only a single ITCAN brand (*i.e.*, Player's Light); and

(iii) The Respondents tendered no evidence indicating how many – if any – Class Members saw the advertisements in question, let alone whether such individuals interpreted and relied upon them in a manner consistent with the Trial Judge's presumption of impact. Indeed, they did not even tender the most basic evidence relating to circulation / publication of the advertisements.

377. In an effort to combat the inevitable conclusion that the impugned advertisements clearly did not have Class-wide impact, the Trial Judge attempted to draw on the evidence of Professor Flaherty – an expert whose evidence he dismissed earlier in the Judgment in the context of the Professor's detailed evidence about the widespread communication of health risks during the Class Period.

378. Notwithstanding this earlier rejection of his evidence – and the fact that Professor Flaherty did not in any way opine on the scope or magnitude of Class Member exposure to tobacco advertising – the Trial Judge concluded that since the Appellants "admit that all Members would have seen newspaper and magazine articles warning of the dangers of smoking" and since the "ads appeared, *inter alia*, in the same media, it is reasonable to conclude that all Members would have seen them, as well".[328]

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327 Judgment, para. 537.
328 Judgment, para. 537.

379. First of all, this statement represents a clear mischaracterization of the record. There is no evidence whatsoever about the circulation of the advertisements in question.[329] The record merely indicates that the impugned advertisements specifically identified by the Trial Judge were produced by ITCAN in the years 1979 and 1987, respectively.

380. Moreover, even if one assumes there were other (unidentified) advertisements communicated by ITCAN which also contravened the CPA, we know that they would have necessarily appeared after 1980 (*i.e.*, the date of enactment of the CPA) in order to be legally relevant. Professor Flaherty's evidence does not speak to post-1980 media exposure.

381. More importantly, Professor Flaherty's evidence was not that every Class Member saw every media publication cited in his report. This is a fundamental misapprehension of the expert's evidence, and calls into question the Trial Judge's earlier analysis of such evidence. Rather, the breadth of the media coverage was used by the expert as a proxy for the public awareness of the underlying issues being discussed.

382. Put another way, Professor Flaherty opined that, given the breadth of media coverage of smoking risks throughout the Class Period, it would have been extremely unlikely that someone could have avoided all of the articles in all of the publications during the relevant periods – or otherwise been oblivious to a subject that was part of the popular discourse – so as to be able to claim that they were unaware of the issue of smoking risks.[330]

383. Accordingly, Professor Flaherty's evidence offers no basis whatsoever on which the Trial Judge could reasonably conclude that all Class Members saw the subset of advertisements that were deemed to be in violation of section 219 of the CPA.

F. THE TRIAL JUDGE ERRED IN HIS ANALYSIS OF THE *CHARTER*

384. The Trial Judge's analysis of the Québec *Charter* was scant. Indeed, with virtually no analysis whatsoever – limited to 9 paragraphs in the Judgment – the Trial Judge concluded that ITCAN's faults give rise to both "compensatory damages" and "punitive damages" under the *Charter* on the basis of the following self-fulfilling logic:

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329 This is particularly true given the fact that the Trial Judge does not provide an exhaustive list of the advertisements that are deemed to have been violations of the CPA.

330 Trial Exhibit 20063 (Flaherty Report), pp. 64-65.

> 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.
>
> 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.[331]

385. In other words, because the Trial Judge found that ITCAN had committed faults that impacted Class Members' "health and well-being", so too did he find a violation of the *Charter*, which in turn justified a (collective) award of compensatory and punitive damages.

386. For the reasons previously articulated, the starting premise of this reasoning is untenable. More specifically, the Trial Judge's false dichotomy between the "failure to inform fault" under Article 1469 CCQ and the parallel "general fault" under Article 1457 CCQ is unsustainable, both as a matter of law and as a matter of fact. For this reason alone, his derivative *Charter* analysis (or lack thereof) is also unsustainable.

387. However, over and above this fundamental legal error, the Trial Judge's *Charter* analysis collapses on itself for a number of independent reasons, each of which is fatal to the Respondents' claims.

388. Foremost among these errors is the Trial Judge's failure to address the temporal limitations of the Respondents' *Charter* claims. In particular, he expressly conceded that the *Charter* only came into force on July 28, 1976, which – as he later observes – "excludes from 50 to 60 percent of the Class period".[332] Having acknowledged this limitation, however, he provided no viable explanation as to how such a claim could possibly ground Class-wide recovery.

389. Indeed, the Trial Judge's only apparent attempt to address this seemingly insurmountable temporal hurdle arises in the context of his discussion of damages quantification, where he simply notes the following:

> Admittedly, this excludes from 50 to 60 percent of the Class period but, barring issues of prescription, it makes little difference to the overall

331 Judgment, paras. 483-484.
332 Judgment, paras. 1024-1025.

> 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.[333]

390. In other words, the Trial Judge granted collective recovery to the entirety of the Class – including to those members whose claims were grounded in conduct that pre-dated the enactment of the Québec *Charter* – on the premise that the post-enactment period of "offensive conduct" was "sufficiently long". This reasoning does not apply any form of legal rationale that is recognized at law.

391. Neither moral nor punitive damages can be awarded until all three elements of civil liability – namely, fault, injury and causation – have been sufficiently proven.[334] Indeed, a claim for punitive damages under the *Charter* – which is an exceptional remedy[335] – may only be brought by a victim of a fault/tort:

> However, care must be taken not to give exemplary damages a subsidiary criminal justice role … [A]s explained by the Ontario Law Reform Commission in a report on such damages:
>
> > …punitive damages are not an inducement to the general citizenry to enforce the criminal law for profit. The claim may be brought only by the victim of a tort, and damages may be awarded only in reference to the conduct that affected the victim.[336]

392. Here, the Trial Judge made no attempt to establish any of the three elements of civil liability in the context of his assessment of whether there had been an unlawful interference with the right to life, security and integrity of the Class Members. To the contrary, he implicitly disclaimed these elements in respect of more than 50% of the Class.

393. Similarly, the Trial Judge's blanket statement that ITCAN's faults constituted "an unlawful interference with the right to life, security and integrity of the Members over the time that they lasted" entirely glosses over the requirement that the Trial Judge make a

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333 Judgment, para. 1025.

334 *Béliveau St-Jacques v. Fédération des employés et employées de services publics inc.*, [1996] 2 SCR 345, 1996 CanLII 208 (SCC), at para. 27 (L'Heureux-Dubé, dissent); *de Montigny v. Brossard (Succession)*, [2010] 3 SCR 64, at para. 40 ["*de Montigny*"].

335 The Trial Judge acknowledges the exceptional nature of punitive damages at para. 1018 of the Judgment. See also, *Time*, *supra* note 303, at para. 150; *de Montigny, supra* note 334, at para. 48; *Dion v. Compagnie de services de financement automobile Primus Canada*, 2015 QCCA 333, at para. 121, leave to appeal to SCC refused, 2015 CanLII 60500 (SCC); *France Animation, s.a. v. Robinson*, 2011 QCCA 1361, at para. 236, reversed in part in *Cinar Corp., supra* note 142.

336 *de Montigny, supra* note 334, at para. 54.

determination that Class Members' rights were in fact infringed by the conduct at issue. Instead, he focuses entirely on the actions of ITCAN, without regard for the corresponding impact that such actions had on the Class Members.

394. Indeed, by his own admission, the deemed "failure to inform" had no impact on Class Members after 1980 (or after 1996, in respect of addiction). He suggests at one point that "a party's knowledge is less relevant" in the context of breaches of the CPA and the *Charter*,[337] but cites no authority for this bald assertion.

395. In truth, the question of Class Member knowledge of the risks is directly relevant to the *Charter* analysis, as it goes to the very heart of the question of whether there has been an "infringement". If a party is aware of certain risks, the failure of another not to advise of such known risks cannot reasonably be said to be an infringement of their rights to "life, security or integrity".

396. By completely disregarding the central inquiry of whether ITCAN's faults had any causal impact on the Class Members, or whether such Members suffered an infringement of their rights as a result, the Trial Judge failed to conduct the requisite analysis under the *Charter*.

> Under s. 49 of the Québec *Charter*, there is a right to obtain compensation for the prejudice caused by unlawful interference with human rights. However, the Québec *Charter* has not created an independent, autonomous system of civil liability that duplicates the general system … The general principles of civil liability still serve as a starting point for awarding compensatory damages for interference with a right ... Civil liability actions that are based on interference with a right … are therefore a point of intersection between the Québec *Charter* and the *Civil Code*. This convergence of instruments must be considered in defining the three constituent elements of civil liability, namely fault, injury and causal connection.[338]

397. Lastly, an award of punitive damages under the *Charter* requires an express finding as to intentionality on the part of the wrongdoer:

> Unlike an award of compensatory damages, an award of exemplary damages under the second paragraph of s. 49 of the *Charter* depends not on the extent of the prejudice resulting from the unlawful interference, but on the intentional nature of that interference. Since, as stated above, unlawful interference is the result of wrongful conduct that infringes a

337 Judgment, para. 140.
338 *Bou Malhab, supra* note 16, at para. 23.

> *Charter* right, it is therefore the result of that conduct that must be intentional. In other words, for unlawful interference to be characterized as "intentional", the person who committed the interference must have desired the consequences that his or her wrongful conduct would have.
>
> From this perspective, in interpreting the expression "unlawful and intentional interference", it is important not to confuse the intent to commit a wrongful act with the intent to cause the consequences of that act. In this regard, the second paragraph of s. 49 of the *Charter* could not be any clearer: it is the unlawful interference -- and not merely the fault -- that must be intentional.[339]

398. Alternatively, certain cases have adopted a less stringent intentionality requirement whereby the wrongdoer must be shown to have acted "with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause",[340] or "the fault committed is gross to the point that the mind cannot imagine that the person who committed it could have failed to realize from the outset that it would produce the harmful consequences that resulted from it".[341]

399. In these proceedings, neither test for intentionality has been satisfied. To the contrary, the Trial Judge's findings in respect of ITCAN actually disclaim any such "intentional" misconduct:

> 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.[342]

400. Accordingly, the Respondents' claims under the *Charter* are not sustainable, even on the face of the Judgment.

G. THE TRIAL JUDGE ERRED IN HIS FINDINGS WITH RESPECT TO ADDICTION

401. At the outset of his analysis, the Trial Judge acknowledged that a "workable definition" of addiction / tobacco dependence was an essential prerequisite to deciding several fundamental questions in the Létourneau Action, including Class membership.[343]

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339 *St-Ferdinand*, *supra* note 153, at paras. 117-118
340 *St-Ferdinand*, *supra* note 153, at para. 121.
341 *St-Ferdinand*, *supra* note 153, para. 112, citing *West Island Teachers' Association v. Nantel*, 1988 CanLII 795 (QC CA), [1988] RJQ 1569 (CA), Chevalier J.
342 Judgment, para. 485.
343 Judgment, para. 771.

402. However, the definition ultimately adopted by the Trial Judge – namely, a four-year period of smoking – was far from "workable". Rather, it reduced the phenomenon of "addiction" to a mathematical metric that was entirely removed from all notions of injury or prejudice. Accordingly, the adopted definition similarly rendered the Létourneau Action meaningless.

403. What is more, the chosen metric (*i.e.*, 4 years of daily smoking) was in no way grounded in the evidence. This four-year period was not even mentioned in the two reports filed by the Respondents' expert, Dr. Negrete, upon whom the Trial Judge purports to rely almost entirely.

404. To the contrary, the concept came from a singular academic article – authored by a third party who did not testify in these proceedings (the "DiFranza Article") – which was filed by Respondents' counsel on the morning of Dr. Negrete's testimony.[344]

405. Upon announcement of the Respondents' stated intention to file this unqualified third-party article, the Appellants raised a number of objections, including the following (*inter alia*):

(i) The article was being tendered without prior notice to the parties;

(ii) The article did not form part of the expert's foundation materials; and

(iii) The article was authored by someone who was not testifying, and therefore constituted "back door" expert testimony.[345]

406. All of these objections were dismissed by the Trial Judge, which ruling was in itself an error of law.[346] Moreover, the Trial Judge compounded this error by relying on this singular article as the basis for his ultimate definition of tobacco dependence, to the exclusion of the trial evidence. This in itself constitutes a further error of law (and highlights the very concerns expressed by the Appellants about the use of "back door" expert evidence).[347]

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344 Judgment, paras. 773-774.
345 Trial Transcript (Negrete), March 20, 2013, pp. 118-123, QQ. 217-218. Exhibit 1471.
346 For this reason, ITCAN appeals the Trial Judge's admission of Exhibit 1471 into evidence.
347 *McTear v. Imperial Tobacco Limited*, [2005] CSOH 69, paras. 6.110-6.111.

407. The Trial Judge's conception of "tobacco dependence" reflects a number of factual and legal errors, including the following (*inter alia*):

(i) The Trial Judge accepted what he incorrectly called "Negrete's opinion" on the four-year initiation period to nicotine dependence, notwithstanding the fact that even Dr. Negrete admitted that this is the period when "the first verifiable symptoms of dependence" appear, not when dependence is established;[348]

(ii) The Trial Judge relied on a source that was, on its face, inherently unreliable as a matter of evidence. The "four-year period" referenced in the DiFranza Article was sourced to a prior publication from yet another third party. DiFranza himself is a family doctor (not a psychiatrist). Moreover, DiFranza relied on an isolated and unsupported comment from an historic article on social aspects of smoking that, on its face, was not written for the purpose of defining a period to addiction and was definitively not based on any scientific study; and

(iii) The Trial Judge ignored the clear evidence that no recognized professional or professional body has ever attempted to scientifically define the "average" time to addiction, because – as the Appellants' experts explained – there is no such thing. In response to this testimony, the Trial Judge merely criticized the witnesses for not proffering their own estimate of the "average time to addiction" to the Court.

408. Ultimately, the Trial Judge committed manifest and compounding errors by failing to even address the various challenges to the four-year hypothesis. Rather, he simply elected to "prefer" Dr. Negrete's opinions – or, more accurately, the third party opinion of the author of a singular article filed on the morning of Dr. Negrete's testimony – to the clear and convincing evidence of Dr. Davies (a Professor of Psychology at the University of Strathclyde in Glasgow, and Director of the Centre for Applied Social Psychology) and Dr. Bourget (a medical doctor with a specialization in psychiatry and a professor at the University of Ottawa) on "all matters dealing with dependence".[349]

409. The Trial Judge committed a further error by purporting to diagnose dependence on a Class-wide basis without reference to the individual Class Members and, most notably, without any regard for the need for individual diagnosis.

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348 Trial Transcript (Negrete), March 20, 2013, p. 117, Q. 215.
349 Judgment, para. 776.

410. The trial evidence clearly confirmed that while it may be possible to estimate prevalence of dependence across a population, it is impossible to diagnose dependence in a particular group of people "in the aggregate". All experts – including Dr. Negrete – agreed that the determination of "dependence" is made on the basis an individual clinical diagnosis.[350] The Trial Judge's approach to the Létourneau Action utterly disregards this uncontested evidence.

411. The Trial Judge implicitly recognized that the evidentiary record does not support the Class-wide conclusions that were urged upon him by the Respondents:

> [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.
>
> …
>
> [785] It is probable, therefore, that Québecers 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". Given the absence of direct proof on the point, the Court must estimate what that figure should be.

412. Nevertheless, the Trial Judge ultimately adopted the Respondents' conclusory contention that "95% of daily smokers are nicotine dependent".[351] The adoption of this metric as a basis for disease diagnosis on a Class-wide basis fails to address the following:

(a) This reliability of this 95% figure was completely undermined on cross-examination;[352]

(b) The DSM-V, the "flagship diagnostic manual" of the American Psychiatric Association upon which the Trial Judge expressly relies,[353] establishes criteria for the diagnosis of dependence which mandate individual clinical assessment;[354] and

(c) The DSM-V states that the prevalence of symptoms of dependence among current daily smokers is approximately 50%.[355]

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350 Trial Transcript (Negrete), March 20, 2013, at p. 101, QQ. 193-195; Trial Transcript (Negrete), April 3, 2013, pp. 163-164, Q. 509.
351 Judgment, para. 784.
352 Trial Transcript (Negrete), March 21, 2013, pp. 26-27, 94-95, 100-109.
353 Judgment, para. 148.
354 Trial Exhibit 40499, at p. 14 (p. 56 pdf).
355 Trial Exhibit 40499, at p. 576 (p. 164 pdf)

413. The Trial Judge's conclusion that effectively all daily smokers are "tobacco dependent", grounded in his desire to treat all Class Members in the aggregate, disregards the need for individual diagnosis and reduces the very notion of dependence to an essentially meaningless metric. Accordingly, it represents a manifest error of both fact and law.

H. THE TRIAL JUDGE ERRED IN HIS ANALYSIS OF ITCAN'S DOCUMENT RETENTION PRACTICES

414. Starting at paragraph 357 of the Judgment, the Trial Judge purports to provide an analysis of the evidence concerning ITCAN's historical document retention practices. In so doing, the Trial Judge commits a number of serious and manifest factual and legal errors.

415. Perhaps most startling among these errors relates to a material omission, namely the Trial Judge's failure to acknowledge that:

(i) all of the "destroyed" documents referenced by the Trial Judge were ITCAN's duplicate copies of R&D research reports belonging to British American Tobacco ("BAT"), the originals of which were maintained by BAT;[356]

(ii) copies of all such documents were specifically provided to the Respondents, and were in fact filed as trial exhibits;[357] and

(iii) the documents in question were in the public domain – most notably by means of public on-line databases – for years prior to the trial, and continue to be available today.

416. Accordingly, the parties to these proceedings had copies of every research report that is the subject of the 4-page discussion in the Judgment under the heading "*The Role of Lawyers*"[358] – a fact which the Trial Judge failed to mention in his Judgment.

417. The very fact that the Respondents were not deprived of access to the documents at issue raises the question of why the Trial Judge felt compelled to embark on a discursive review of ITCAN's historical retention practices and possible production (or lack thereof) in other proceedings.

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356 Trial Exhibit 57; Trial Exhibit 341; Trial Transcript (Barnes), June 18, 2012, p. 33, Q. 85.
357 Trial Exhibits 58.1 to 58.60 and 59.1 to 59.41.
358 Judgment, pages 84-88.

418. Indeed, the entire diversion in the middle of the Judgment, which then features prominently in the discussion of ITCAN's moral and punitive damages, appears to be wholly unrelated to any of the material facts in issue.

419. In the context of his analysis, the Trial Judge also made a number of unfair and unjustified derogatory remarks about ITCAN witnesses subpoenaed by the Respondents solely in respect of this side issue, notwithstanding their advanced age and ill health. ITCAN respectfully submits that he erred in his treatment of evidence in this regard.

420. The Trial Judge also erred in his review of the status of document production in other court proceedings (again, to the extent that such matters are of any relevance to these proceedings). In particular, the Trial Judge cited a short passage from the testimony of Mr. Lyndon Barnes about the *Spasic* proceedings.[359] What he surprisingly did not cite, however, was the extensive documentary and other evidence adduced during the trial which dealt specifically with the treatment of the BAT research reports in the *Spasic* proceedings.

421. In particular, the Trial Judge failed to mention the fact that ITCAN produced to the Respondents and the Court a copy of the Affidavit of Documents in *Spasic*, which specifically listed the "destroyed" BAT research reports.[360]

422. Notwithstanding this evidence to the contrary, the Trial Judge concluded that "ITL's actions in this regard constitute an unacceptable, bad-faith and possibly illegal act designed to frustrate the legal process" (seemingly drawing conclusions about Ontario practice in so ruling).

423. Notably, these conclusions as to ITCAN's intention are drawn primarily from foreign company documents filed by the Respondents.[361] Moreover, although the Trial Judge went so far as to insinuate "possibly illegal" conduct – in the face of clear evidence that ITCAN complied with all legal obligations with respect to document retention, at all times – he made no findings of fault or wrongdoing.

424. Inexplicably, the Trial Judge went further and asked whether the engagement of outside counsel was done for the purposes of claiming professional secrecy.

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359 Judgment, para. 368
360 Trial Exhibit 58A.
361 See Judgment, paras. 360-365.

Notwithstanding the fact that this finding was not requested by the Respondents, and his own acknowledgement that "there is no evidence that ITL has ever raised the objection based on professional secrecy",[362] the Trial Judge concluded that "the Court is compelled to draw an adverse inference with respect to ITL's motives".[363] Respectfully, there is no basis for this inference in fact or in law.

425. Ultimately, the Trial Judge's findings with respect to ITCAN's document retention practices – which themselves represent palpable and overriding errors of fact – fail to establish any form of factual or legal nexus between the impugned acts and the matters at issue in these proceedings. In particular, there is no suggestion that the destruction of copies of the BAT research reports had any bearing on Class Member awareness of smoking risks.

426. Accordingly, the Trial Judge committed a further error of law by invoking the above findings as the basis for increasing ITCAN's liability for compensatory damages.

427. Notably, the Respondents expressly disclaimed any claim for damages in respect of these allegations.[364] Indeed, in the context of an earlier interlocutory motion, the Respondents acknowledged that ITCAN had no legal obligation to retain the research reports.[365] Nevertheless, the Trial Judge exercised his "discretion" to increase ITCAN's share of liability for moral damages to 67% (notwithstanding a deemed 50% average market share over the Class Period) on the supposed "bad-faith efforts to block court discovery of research reports"[366] (notwithstanding the fact that the reports were produced in these very proceedings).

428. With respect, this purported use of discretion is unfounded in law, and amounts to an award of free-standing compensatory damages – on a collective basis, in respect of events that took place at a discrete point in time during the Class Period and prior to the commencement of this litigation – for "spoliation". Such a finding represents an error of law.

429. Simply put, there is no cause of action or "fault" that can be grounded in spoliation. It is – at most – an evidentiary presumption.

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362 Judgment, para. 370.
363 Judgment, para. 377.
364 See Judgment, paras. 53-55.
365 *Conseil québécois sur le tabac et la santé c. JTI-Macdonald Corp.*, 2013 QCCS 1924, at paras. 52-55.
366 Judgment, para. 1010.

430. Moreover, it is not a ubiquitous presumption that applies whenever potentially relevant documents are destroyed or otherwise unavailable to litigants (which, notably, was not the case in this litigation). Rather, companies are free to dispose of documents in the ordinary course of business, absent an event that creates a positive duty to preserve documents.[367]

431. There is no general obligation to preserve documents indefinitely – even documents that may eventually be of assistance to future (unknown) litigants. It is for this very reason that parties wishing litigants to preserve documents are required to seek an order under Article 438 CCP.[368] The absence of a free-standing "obligation to preserve" has similarly been recognized in the jurisprudence from other Canadian provinces.[369]

432. The case law further establishes that a positive duty of preservation only arises in the context of actual or contemplated litigation that might reasonably engage the subject matter of the documents in question. Canadian courts have articulated this threshold requirement in various terms, requiring litigation to have been "existing or pending", "ongoing or contemplated", or "threatened or reasonably apprehended".

433. These articulations essentially amount to the same test, namely that there must have been a specific proceeding that existed, or was reasonably apprehended, at the time of destruction.[370] Notably, this threshold test has been expressly applied in the context of product liability litigation involving the historical destruction of scientific studies.[371]

434. The record in these proceedings is clear and uncontroverted: ITCAN developed and implemented a new document retention policy between 1990 and 1993 (*i.e.*, long before these proceedings were commenced), in response to a request from BAT.[372] In

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367 *Centre maraîcher Eugène Guinois jr. inc. c. Semences Stokes ltée*, 2009 QCCA 2313 at para. 81.

368 See, also, *Jacques c. Ultramar ltée*, 2011 QCCS 6020 at paras. 8-9

369 *Patzer v. Hastings Entertainment Inc.*, 2010 BCSC 426 at para. 105; affirmed 2011 BCCA 60 at paras. 30-34: "…there is no common law duty to preserve property which may possibly be required for evidentiary purposes".

370 *St. Louis v. R*, 1896 CarswellNat 23, 25 SCR 649 (SCC), 1896 CanLII 65 (SCC) at pp. 670-671; *McDougall v. Black and Decker Canada Inc.*, 2008 ABCA 353 at para. 29; *Ross and Anglin Ltd. v. Thompson*, 2012 QCCS 2529 at paras. 68-69; *Dyk v. Protec Automotive Repairs*, 1997 CanLII 2114 (BC SC) at para. 3.

371 *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at para. 306.

372 Trial Transcript (Barnes), June 18, 2012, pp. 50-53 and 79-81; Trial Transcript (Barnes), June 19, 2012, p. 22; Transcript of Deposition of John Meltzer on March 6th, 2012, Trial Exhibit 510 at pp. 15-16 and 24-26; Trial Transcript (Ackman), April 2, 2012, pp. 169-170; Imperial Tobacco Ltd. Department of Research and Development Document Retention Policy, Trial Exhibit 341.

asking ITCAN to develop an R&D document retention policy, BAT made it clear that ITCAN should consider local laws and regulations, and, in particular, the legal requirements regarding the retention of documents for the purposes of litigation. In addition, it was always the intention that the originals of the R&D documents would be retained by BAT in England.[373]

435. Most importantly, at the time that the documents in question were destroyed (between 1990 and 1993), there was no ongoing or contemplated litigation that might engage any positive duty of retention. The Respondents did not identify any such proceedings, nor did the Trial Judge.

436. Rather, the Trial Judge simply made the finding that the rationale behind the retention policy was to avoid the production of certain BAT documents in the context of future (hypothetical) Canadian litigation. Whether or not this finding of fact is accurate and supported by the evidence, it clearly does not provide a legal basis to award damages to the Respondents.

I. THE TRIAL JUDGE ERRED IN HIS "CONSPIRACY" ANALYSIS

437. At the outset of his analysis of Common Question F (regarding allegations of maintenance of a "common front"), the Trial Judge notes that "the relevance of this question is not so much in determining fault as in finding the criteria to justify solidary (joint and several) condemnation among the Companies under Article 1480".[374]

438. As the Trial Judge correctly acknowledges, "conspiracy" is not a free-standing fault under Québec law. However, for a finding of "conspiracy" to have any legal significance – under Article 1480 CCQ or otherwise – it necessarily entails something more than a mere finding that multiple defendants co-ordinated with one another. In failing to acknowledge this fact, the Trial Judge's limited analysis of Common Question F fell short.

439. Moreover, the Trial Judge's finding that the Appellants "maintained a common front" was based purely on a selective, "impressionistic" reading of certain historical documents. Indeed, having acknowledged limits of a "conspiracy" finding under Québec law (limited to Article 1480 CCQ), the Trial Judge purported to make factual findings

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373 Transcript of Deposition of John Meltzer on March 6th, 2012, Trial Exhibit 510 at pp. 26-27; Trial Transcript (Descôteaux), March 13, 2012, p. 190.

374 Judgment, para. 439.

based primarily on his interpretation of the documentary record from the 1960s and 1970s, without so much as a passing reference to witness testimony.

440. What is more, the conclusions drawn by the Trial Judge as a result of this document reading exercise were wholly unsupported by the evidence,[375] and often times were directly contradictory to the direct, uncontroverted witness testimony.

441. For example, the Trial Judge reviewed a subset of documents purportedly with a view to determining the history and role of the CTMC.[376] However, he did so without once referencing the extensive testimony from the various CTMC and government representatives who specifically testified about the formation, structure and operations of the industry association (including Mr. William Neville, a former Chief of Staff to the Prime Minister whose testimony was praised by the Trial Judge during the trial).[377]

442. Notably, many of the findings by the Trial Judge run completely contrary to the sworn testimony of Mr. Neville and others, including the following:

(i) Mr. Neville's evidence that the CTMC was a "trade association" akin to others he had worked with, whose main function was to represent the industry in discussions with the government;[378]

(ii) Mr. Neville's evidence that the CTMC engaged in traditional lobbying activities,[379] in which context they did not deny the risks associated with smoking;[380]

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375 For example, the Trial Judge draws the sweeping conclusion – solely from his selective documentary review – that the Canadian tobacco industry, "through the CTMC", sought to delay or water down risk information obtained by the public, but fails to identify any relevant evidence (documentary or otherwise) to support this conclusion. He merely references: (i) an internal memo from RJRM, (ii) the reaction of the CTMC to the reports of the Surgeon General and the Royal Society in the late 1980s regarding addiction (discussed herein); and (iii) a singular letter to the Minister of Health regarding proposed legislated warnings, which notably was not introduced into evidence for truth of contents (*i.e.*, Exhibit 841-2M), although it was improperly relied on by the Trial Judge for its contents. Even if accepted for truth of contents, none of these documents supports his ultimate conclusions about the CTMC.

376 Judgment, paras. 451-475.

377 Trial Transcript (Neville), June 7, 2012, at p. 318, QQ. 881-883.

378 Trial Transcript (Neville), June 6, 2012, p. 14, Q. 23. See, also, Trial Transcript (Neville), June 7, 2012, pp. 278-279, QQ. 750-753. Mr. Neville explained that industry associations such as the CTMC are not only common, but also advantageous to governments insofar as they allow for a single point of contact with an industry.

379 Neville later described the CTMC's lobbying activities in the following terms: "I was acting on behalf of a legal industry, yes, who had a right... every right to put its views into the public policy debate, and who was trying to seek a... in fact, everything I was doing was to try and find a reasonable accommodation between the political and policy needs of the Government and my client, as I did in all the public affairs consulting I did." See Trial Transcript (Neville), June 6, 2012, p. 92, Q. 317.

380 Trial Transcript (Neville), June 6, 2012, p. 45, QQ. 103-104.

(iii) Mr. Neville's disclaimer of any efforts by the CTMC to limit the "diffusion of information with respect to health risks",[381] or to otherwise curb the rising "social unacceptability" of smoking;[382]

(iv) Mr. Neville's disclaimer of any effort on the part of the CTMC to "manufacture a collective [industry] view" on smoking and health issues, in which context he also observed that during his tenure "the subject of smoking and health and what should be said or not said about it was never on the agenda of the CTMC";[383]

(v) The evidence of Dr. Bert Liston, the former Director General of Health Canada's Environmental Health Directorate (1972-1974) and late the Executive Director General of the Health Protection Branch (1981-1984), who characterized his experience in dealing with CTMC being akin to the relationship that Health Canada had with food industries, drug industries, medical device industries".[384]

(vi) Dr. Liston's testimony confirming that, during his tenure, Health Canada never considered that any of its regulatory or tobacco control requirements were not being met through the voluntary measures that the CTMC had put in place,[385] and the "high degree of compliance" by the CTMC;[386]

(vii) Dr. Liston's evidence confirming that representatives of Health Canada were directly involved in the development of the Voluntary Codes,[387] and his confirmation that the eventual imposition of a legislative scheme in the late 1980s was not motivated by a perceived failure by the CTMC or a breach of the voluntary regime by its members, but rather by political interests within the government;[388]

(viii) The evidence of Marc Lalonde – a former political advisor to the Prime Minister's Office under Prime Minister Lester B. Pearson, the Principal Secretary under Prime Minister Pierre E. Trudeau, and the Minister of Health and Social Welfare from 1972 to 1977 – confirming that the government during his tenure as

381 Trial Transcript (Neville), June 6, 2012, p. 269, Q. 1001.
382 Trial Transcript (Neville), June 6, 2012, p. 55, Q. 147.
383 Trial Transcript (Neville), June 7, 2012, p. 259, Q. 666.
384 Trial Transcript (Liston), December 11, 2013, p. 55, Q. 97.
385 Trial Transcript (Liston), December 11, 2013, pp. 56-57, Q. 99.
386 Trial Transcript (Liston), December 11, 2013, pp. 54-55, Q. 95.
387 Trial Transcript (Liston), December 11, 2013, pp. 59-61, QQ. 108-114.
388 Trial Transcript (Liston), December 11, 2013, p. 58, QQ. 103-105. See, also, p. 63, Q. 120.

Minister of Health successfully regulated the tobacco industry by means of co-operative initiatives with the CTMC and, in particular, the development and evolution of the Voluntary Codes;[389]

(ix) Mr. Lalonde's testimony about the material benefit that the government derived from the existence of the CTMC, which facilitated the government's regulatory objectives;[390] and

(x) Mr. Lalonde's testimony confirming the diligence of the CTMC and its members, noting that he never doubted the sincerity or commitment of the CTMC in its collaboration with the government.[391]

443. The Trial Judge made no attempt to reconcile any of this uncontradicted evidence – from multiple third party witnesses – with the antithetical conclusions he purported to draw from his independent and erroneous review of dated documents. Accordingly, the Trial Judge's factual findings represent a clear error, and their subsequent application under Article 1480 CCQ (and more broadly) constitutes an error of law.

444. Similarly, the Trial Judge relied on his subjective review of a 1962 Policy Statement as the basis for a finding of conspiracy. As described in greater detail below, not a single trial witness was able to comment directly on the dated "Policy Statement", nor its origins, rationale, evolution or implementation.[392]

445. On its face, the stated rationale for the Policy Statement was the very antithesis of what the Trial Judge concluded:

> 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.[393]

446. Notably, at trial the Respondents advanced a claim against ITCAN and the other Appellants for publishing these allegedly "misleading" tar and nicotine numbers after

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389 Trial Transcript (Lalonde), June 17, 2013, pp. 110-112, QQ. 159-160; see also Trial Exhibit 20083 and Trial Exhibit 20082.1.
390 Trial Transcript (Lalonde), June 17, 2013, p. 55, Q. 88.
391 Trial Transcript (Lalonde), June 18, 2013, pp. 31-32, Q. 13; see also Trial Exhibit 20118.1.
392 As described below, the document was filed by the Respondents (over the Appellants' objections) via a witness who disclaimed any knowledge of the document whatsoever.
393 Trial Exhibit 154, p. 2

1974, notwithstanding their parallel claim that an industry agreement to refrain from publicizing these selfsame numbers in 1962 was also somehow wrongful.

447. These contradictory allegations illustrate the "buckshot" approach adopted by the Respondents with respect to the Appellants' activities over the 50-year Class Period. More importantly, the above illustrates the dangers of a Trial Judge relying on a subjective documentary review of a single document dating from half a century ago, without the benefit of any witness testimony, as the basis for his legal conclusions.

J. THE TRIAL JUDGE ERRED IN HIS ANALYSIS OF PUNITIVE DAMAGES

448. The Trial Judge's award of punitive damages is premised on a number of fundamental legal errors, each of which independently undermines the ultimate award.

449. Where a lower court has committed an error of law in its award of punitive damages, or the "amount is not rationally connected to the purposes for which the damages are awarded, namely prevention, deterrence (both specific and general), and denunciation", an appellate court should intervene.[394]

450. Punitive damages are an extraordinary remedy. Their award must be specifically justified on one of the articulated grounds.[395]

451. In the class actions context, punitive damages cannot be awarded in the abstract, on a basis and in a quantum that simply presumes that the plaintiffs have proved both causation and injury in relation to all class members. Rather, there must be specific evidence upon which the court can draw to substantiate the ultimate award.

452. In this case, the Trial Judge's award of punitive damages is both factually and legally unsustainable.

453. As a preliminary matter, the Trial Judge incorrectly applied the threshold criteria established pursuant to Article 1621 CCQ. His assessment is premised on the assumption that the two class proceedings – and the two distinct Classes – can and

394 *Bank of Montreal v. Marcotte*, [2014] 2 SCR 725, 2014 SCC 55 at para. 98, citing *Cinar Corp., supra* note 142.
395 *de Montigny*, *supra* note 334, at para. 51.

should be treated as a singular unit for the purposes applying the criteria set out in Article 1621 CCQ, including considerations such as the "severity of fault". This is in error.

454. The Trial Judge's punitive damages assessment is also unsustainable as a purely evidentiary matter.

455. Given the current degree of government regulation of almost every representation that ITCAN can make in selling its products (which are sold in the absence of marketing promotion), it is manifestly unnecessary to impose punitive damages in order to deter future misleading representations to the extent any previously existed.[396] Of particular note in this regard is the Trial Judge's own admission that the warnings of "today" are adequate.[397]

456. The Trial Judge implicitly acknowledges that further "deterrence" of ITCAN is not warranted when he concludes that the primary motivation for awarding punitive damages in this context is the need to deter "other industries".[398]

457. With respect, the financial sanction of ITCAN on an unprecedented level for historical conduct that dates back half a century (by virtue of a unique statutory suspension of prescription periods) cannot reasonably be justified on the basis of a concern that "other industries" require deterrence.

458. In addition to the foregoing errors of principle, the Trial Judge committed a number of additional legal errors in his award of punitive damages:

(i) Limited Application of the Authorizing Statutes

459. In awarding an unprecedented level of punitive damages, the Trial Judge relied exclusively upon the provisions of the CPA and the Québec *Charter*. In so doing, he expressly acknowledged that neither statute "was in force during the entire Class Period… Consequently, the punitive damages here must be evaluated with reference to the Companies' conduct only after [the dates of legislative enactment]".[399]

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396 It has been held that where a Defendant ameliorates its practices before judgment, punitive damages are not warranted in order to deter future prohibited practices, even where the practices in question showed serious negligence or ignorance by the Defendant: *Dion v. Compagnie de services de financement automobile Primus Canada*, 2013 QCCS 3654, affirmed 2015 QCCA 333, para. 132, leave to appeal to SCC refused, 2015 CanLII 60500 (SCC).

397 Judgment, para. 803.

398 Judgment, paras. 1035-1037.

399 Judgment, para. 1024.

460. However, having established this governing maxim, the Trial Judge's analysis departs from his own limitations by citing conduct that occurred "over the Class Period".[400] Similarly, the list of historical acts and omissions by ITCAN summarized at paragraph 1077 of the Judgment – upon which he grounds the award for punitive damages – includes events that pre-date the enactment of one or both statutes.[401]

461. More generally, a review of the conduct by ITCAN that is identified in the Judgment as being "wrongful" generally pre-dates the 1980s, though admittedly not exclusively so. Indeed, even the "knowledge date" – when the Trial Judge concluded that the public was aware of the material risks of smoking – pre-dates the enactment of the relevant provisions of the CPA.

(ii) Award of Punitive Damages in the Létourneau Action in the Absence of the Constituent Elements of Fault

462. The Trial Judge starts his analysis from the premise that "causation relates only to compensatory and not punitive damages".[402] In so doing, he errs by seeking to assess punitive damages in isolation from the related considerations of causation and fault.

463. In essence, the Trial Judge awarded punitive damages in the Létourneau Action as a "back door" to awarding compensatory damages, in circumstances where the Respondents had not established the requisite elements of individual causation and injury to justify such an award.

464. As the Trial Judge acknowledged, any attempt to "put a number to the moral damages actually suffered by the Létourneau Class would be pure conjecture on our part".[403] In other words, the Trial Judge concluded that the Respondents had not discharged their burden to prove causation and injury in respect of the Class Members. This finding alone should preclude any attempt to award punitive damages "in the air". As the Supreme Court noted in *de Montigny*, an award of punitive damages can only be sustained where there exists "evidence of all the constituent elements (fault, prejudice, causal connection) of liability…"[404]

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400 Judgment, para. 1038.
401 For example, the "Policy Statement" was issued in 1962; the statements by Green and Gibb took place in 1977; the impugned statements by Paul Paré took place in the late 1960s and early 1970s.
402 Judgment, para. 654.
403 Judgment, para. 956.
404 *de Montigny*, *supra* note 334, at para. 40.

465. The fact that an award of compensatory damages has not been – or cannot be – made remains highly relevant to assessing the availability of punitive damages and the quantum of such award. Punitive damages cannot be awarded in a manner that expressly or implicitly assumes that Respondents have actually proven causation and resulting damage in factual circumstances where they have not done so.

466. In other words, unless causation and injury in relation to each Class Member have been proven, it cannot be "presumed" that any conduct of the Appellants had the effect of causing Class Members to suffer injury. Notably, Section 15 does not assist the Trial Judge with respect to punitive damages.

(iii) Quantum

467. The punitive damages award notionally imposed on ITCAN amounted to $725 million, only 10% of which was actually awarded. This lesser amount of $72.5 million – awarded in the Létourneau Action – represents an amount that is 50 times greater than the largest punitive award ever previously awarded in Québec,[405] and the full punitive award dwarfs the largest punitive damages award in Canadian history by a multiple of several hundreds.

468. Simply put, the award is entirely inconsistent with the principles articulated by the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.* requiring "proportionality", "rationality" and "restraint".[406] Notably, the Supreme Court has confirmed that "an appellate court is entitled to intervene if the award exceeds the outer boundaries of a rational and measured response to the facts of the case".[407]

469. The Trial Judge's *ex post* rationalization of the award based on the "per member" amount is not only inconsistent with governing legal principles, but is also contrary to his own reasoning.

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405 *Option Consommateurs c. Service aux marchands détaillants ltée (f.a.s. Household Finance)*, 2006 QCCA 1319, leave to appeal to SCC refused, [2006] SCCA No. 491 (punitive damages award of approximately $2.6 million); *Brault & Martineau c. Riendeau*, 2007 QCCS 4603 (punitive damages award of $2 million), affirmed on appeal, 2010 QCCA 366.

406 *Whiten v. Pilot Insurance Co*., [2002] 1 SCR 595, 2002 SCC 18, at paras. 66-76 ["*Whiten*"].

407 *Whiten*, *supra* note 406, at para. 76.

470. The Trial Judge rightly observes that "punitive damages are not based on a per-member or per-class metric".[408] Nevertheless, he proceeds to adopt a "per member" metric to provide a "sense of proportionality", concluding that the award is "hardly an irrational amount".[409]

471. Punitive damages are solely referential to the conduct of the defendant, without regard for how many plaintiffs are seeking relief. Accordingly, the size of the ultimate award is not dependent upon the size of the class.

472. Contrary to the reasoning adopted by the Trial Judge, the punitive award must be justifiable as a stand-alone award, whether the proceedings involve a single plaintiff or many. For the reasons set out above, the Trial Judge's award cannot be so justified.

473. The award of punitive damages in this case has the potential to fundamentally alter the damages landscape in Québec – and indeed in Canada – by moving the Canadian judicial system towards a damages model that has previously been expressly rejected by the Canadian courts.[410]

K. THE TRIAL JUDGE ERRED IN HIS PRESCRIPTION ANALYSIS

474. Even accepting the Trial Judge's invocation of section 27 of the TRDA in respect of the claim for moral damages in the Blais Action, the Trial Judge erred in his disregard for the impact of prescription on both classes.

475. In particular, the Trial Judge erred by amending the Class definitions to allow for the addition of new Class Members in a manner that "suspended" – without legal justification – the prescription periods that would otherwise have been applicable to such claims. Consumers whose claims arose after the commencement of these proceedings in 1998 but were prescribed in the intervening period (*i.e.*, before the Class amendments in 2014) had their claims against the Appellants suddenly "revived" by the Trial Judge by virtue of the fact that they were now rolled into the newly defined Class.

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408 Judgment, para. 1085.
409 Judgment, para. 1081.
410 *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CanLII 59 (SCC) at paras. 196-198, discussing the need for there to be a "rational purpose" to any punitive damages award, which should only be granted in exceptional circumstances where there is egregious conduct worthy of deterrence and where the compensatory damages are themselves insufficient to fulfill such purpose.

476. The Trial Judge himself found that as of January 1, 1980, "the public knew or should have known of the risks and dangers of contracting a Disease from smoking".[411] Nevertheless, in the face of this finding of fact and the Respondents' own concession regarding punitive damages, the Trial Judge inexplicably found that there were no prescription limitations applicable to the Blais Action. At the very least, the Trial Judge's finding of fact regarding public awareness of the risks should have imposed a burden on the Class Members to tender evidence as to why their claims for "failure to inform" were not prescribed by Article 2904 CCQ (*i.e.*, why it was "impossible in fact" for them to have commenced a claim sooner). No such evidence was tendered.

477. Further, with respect to the Létourneau Action, the Motion for Authorization to Institute a Class Action was served on September 30, 1998. Applying the three-year prescription period, any claims that could have been brought prior to September 30, 1995 are necessarily prescribed (a fact conceded by the Respondents, at least with respect to claims for punitive damages).[412] The evidentiary record confirms that all claims in the Létourneau Action are necessarily prescribed, notwithstanding the Trial Judge's findings to the contrary.

478. An express addiction warning was implemented on September 12, 1994.[413] Accordingly, any claims for breach of the "obligation to inform" – which the Trial Judge declared was "synonymous with 'duty to warn'" – were necessarily prescribed by September 12, 1997, such that no damages (punitive or otherwise) can be awarded in respect thereof.

479. The Trial Judge sought to circumvent this legal hurdle by unilaterally concluding – without any evidence whatsoever – that "it would have taken one or two years for the new Addiction warning to have sufficient effect".[414] This finding was clearly an attempt to address the obvious prescription issues facing the Létourneau Class.

480. On the basis of this unprincipled reasoning, the Trial Judge ultimately invoked the deemed "knowledge date" of March 1, 1996 as the operative date for prescription

411 Judgment, para. 820.
412 Judgment, para. 889.
413 Judgment, para. 129.
414 Judgment, para. 130.

purposes,[415] apparently on the (unfounded) presumption that not a single Class Member would have been aware of the risk of addiction prior to this date, notwithstanding the express pack warnings.

481. This conclusion is clearly contrary to both the factual and expert evidence adduced at trial, as well as common sense.

L. THE TRIAL JUDGE ERRED IN HIS APPORTIONMENT OF LIABILITY FOR MORAL DAMAGES

482. The Respondents expressly sought an apportionment of liability for moral damages as between the Appellants on the basis of market share.[416] ITCAN's average market share during the Class Period was found to be approximately 50%.

483. The Trial Judge erred in disregarding this express request for allocation of liability and, instead, unilaterally exercising his purported "discretion" to increase ITCAN's relative share to 67%.[417]

484. He similarly erred in allocating moral damages on the basis of considerations that are wholly irrelevant to compensatory awards, including the issue of "document destruction" (which – as discussed above – is in no way tied to Class Members' injuries or ITCAN's deemed faults).

485. The Trial Judge's purported reliance on section 23 of the TRDA in this regard is similarly in error, as that section: (a) does not apply to the present circumstances (where solidary liability has been imposed, and market share determinations have been made), and (b) does not authorize the discretionary exercise undertaken by the Trial Judge, even if the section is found to be generally applicable.

486. As the Trial Judge's re-allocation of liability as between the parties was not requested by the Respondents, who sought allocation solely on the basis of market share, his ruling amounts to a decision that is *ultra petita* and contrary to Article 468 CCP.

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415 Judgment, para. 887. As noted above, the Trial Judge's prescription analysis was seemingly undertaken without any regard for the "knowledge date" in the Blais Action.
416 Judgment, para. 1007.
417 Judgment, paras. 1010-1011.

487. Moreover, as ITCAN was not provided with an opportunity to be heard on this "discretionary" re-allocation of liability for compensatory damages, the ruling also amounts to a violation of the *audi alteram partem* rule.

M. THE TRIAL JUDGE ERRED IN HIS INTEREST CALCULATION

488. The Trial Judge's approach to interest also represents a clear error of law.

489. In particular, he calculates interest on the moral damages award in the Blais Action from the date of service of the Motion for Authorization.[418] However, he does so in the context of a Class Proceeding where diagnosis of Disease (and thus crystallization of a claim) can occur at any point up to March 12, 2012.[419]

490. Accordingly, the Trial Judge imposed interest on ITCAN as of 1998 in respect of all claims, notwithstanding the fact that at least a portion of the Class did not even have a claim against ITCAN until some point after this date. This calculation is in error.

N. THE TRIAL JUDGE MADE PALPABLE AND OVERRIDING EVIDENTIARY AND FACTUAL ERRORS

491. In addition to the material legal and factual errors identified above, the Trial Judge committed a number of additional palpable and overriding errors with respect to the evidentiary record during the course of the trial and in the context of his Judgment:

(i) The Trial Judge's Reliance on Article 2870 CCQ Was in Error

492. On January 10, 2013, January 28, 2013 and May 27, 2014, the Trial Judge rendered three separate interlocutory judgments in respect of the Respondents' liberal use of Article 2870 CCQ in these proceedings. These judgments were in error by virtue of the Trial Judge's disregard for the requirements of Article 2870 CCQ with respect to authenticity and reliability.

493. In permitting a document to be filed under Article 2870 CCQ, the Court is required to ensure the following:

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418 Judgment, para. 1014.
419 Judgment, para. 845.

> The court shall, however, ascertain that it is impossible for the declarant to appear as a witness, or that it is unreasonable to require him to do so, and that the reliability of the statement is sufficiently guaranteed by the circumstances in which it is made.

494. Article 2870 CCQ is an exception to the cardinal rule of Article 2843 CCQ, which stipulates that hearsay is prohibited and confirms the right of each party to a trial to cross-examine a witness.

495. As with any other exception, Article 2870 CCQ must be interpreted restrictively.[420] It is a targeted evidentiary tool that allows the moving party to adduce reliable and relevant statements – devoid of opinion and hearsay – for an express purpose. It is not a *carte blanche* to adduce a host of dated records *en masse*.[421]

496. As evidenced by the Trial Judge's liberal application of Article 2870 CCQ to allow documents to be entered into evidence – resulting in a total of 381 exhibits being filed into the record by the Respondents – the foregoing principles of restraint were manifestly not adhered to by the Trial Judge during the course of these proceedings.

(ii) The Trial Judge Erred in Accepting Hearsay Documentary Evidence Without Witness Testimony

497. Throughout the trial proceedings, ITCAN objected to the Respondents' repeated filing of documentary evidence in the absence of a witness. In response, the Trial Judge consistently disregarded such expressions of concern, to the point of calling ITCAN's position "abusive". This disregard for witness testimony and the Trial Judge's willingness to draw factual and legal conclusions from a purely documentary review – without qualifying witness testimony – represents a manifest error of fact and law.

498. The prejudice visited upon ITCAN as a result of this evidentiary approach is illustrated by the Trial Judge's analysis of the "1962 Policy Statement".[422] In particular,

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420 *Iredale v. Stroll*, 2008 QCCS 2702 at paras. 25-30.

421 *Couillard v. Québec (Agence du Revenu)*, 2012 QCCQ 4334; *Iredale v. Stroll*, 2008 QCCS 2702; *Lefebvre v. Compagnie d'assurance Wawanesa*, 2012 QCCS 2871 at paras. 20-21; *Cannon v. Canada (Procureur général)*, 2012 QCCA 1241 at para. 37; *Itenberg v. Breuvages Cott inc.*, 2000 CanLII 7586 (QC CA).

422 Judgment, paras. 441-450.

the Trial Judge drew a series of adverse conclusions about historical conduct that took place more than 50 years ago based solely on historical documents.

499. Although no witness was able to speak to the events surrounding the Policy Statement or provide any meaningful evidence about the document itself (as discussed below), the Trial Judge made findings about ITCAN's "state of mind" and intent based purely on his limited review and interpretation of the documentary record.[423]

500. Moreover, his review of the record is highly selective. In particular:

(i) He disregards the express statements in the document regarding the rationale for the policy, namely a desire to avoid impressions that "may be misleading to the consumer and therefore contrary to the public interest",[424] and instead relies upon surrounding correspondence (the author and the recipients of which did not testify) to draw conclusions which are directly contrary to the words on the page; and

(ii) He ignores the extensive evidence regarding the rationale for the policy against the publication of tar and nicotine yields, namely the desire to avoid the "tar derby" that had taken place in the U.S. – prompting FTC intervention[425] – and the concern for the lack of standardized yield measurements.[426]

501. Notwithstanding the above evidence, the Trial Judge concludes that "it appears to be incontrovertible that, by adhering to the Policy Statement, these companies colluded among themselves in order to impede the public".[427] Not only is such a finding far from "incontrovertible", it is unsubstantiated by the evidence (to say nothing of the inherent inconsistency arising from the Respondents' parallel allegations against ITCAN for eventually publishing the tar and nicotine numbers on the packs in later years and promoting cigarettes on this basis).

502. A similar disregard for witness testimony and properly qualified documents manifests itself in the Trial Judge's review of ITCAN's historical "knowledge" of smoking

423 See, *eg.*, Judgment, para. 446, where the Trial Judge speaks about ITCAN's "concerns" and "motivation".
424 Trial Exhibit 154.
425 Trial Transcript (Dixon), September 17, 2013, pp. 80-81; Trial Exhibit 20051, p. 4.
426 Trial Exhibit 154, p. 2.
427 Judgment, para. 449.

risks. At paragraphs 55 to 59 of the Judgment, for example, the Trial Judge purports to summarize ITCAN's state of knowledge in the early part of the Class Period by exclusive reliance on BAT documents, without reference to a single witness. BAT was not a party to these proceedings, and the Trial Judge offered no basis on which the Court could presume the knowledge and conduct of a foreign entity could simply be imputed to ITCAN (particularly without qualifying witness testimony).

503. More generally, the Trial Judge's repeated reliance on draft and/or unproven documents for the "truth of contents" is equally prejudicial and constitutes an error of law.[428]

504. Throughout the course of the trial, thousands of documents – including many emanating from non-parties – were tendered into evidence by the Respondents without a witness who could properly speak to the document, and often times in the absence of any witness whatsoever. The Trial Judge's reliance on such documents in his Judgment was clearly in error.

505. In a similar vein, the Trial Judge repeatedly conflated internal documents with external messaging, such that the content of all company documents was deemed to have been received by Class Members. This is a clear error, which has the effect of misconstruing the evidentiary record.

506. The Trial Judge's analysis of "what ITL said publicly about the risks and dangers"[429] is particularly illustrative of his disregard for what was actually seen or heard by the Class Members:

(i) He cites extensively to a radio interview from Vancouver as evidence of the "typical" statements made by ITCAN, but acknowledges that the statement itself "did not have any direct effect in Québec";

(ii) He reviews internal company communications and draft / unpublished policy statements, but treats them as being tantamount to "public statements"; and

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428 At paragraph 253 of the Judgment, for example, the Trial Judge draws adverse inferences about ITCAN on the basis of an internal policy document that was clearly a draft, and which witnesses testified was never finalized and never distributed (see, *eg.*, Trial Transcript (Kalhok), April 18, 2012 at pp. 79-80, QQ. 163-164 (discussing Trial Exhibit 125A, an earlier iteration of Trial Exhibit 28A cited by the Trial Judge)).

429 Judgment, paras. 243-270.

(iii) He points to a handful of direct communications between ITCAN representatives and third parties, and again treats these as having been broadly disseminated without any evidentiary basis for doing so.

507. In summary, the Trial Judge's reliance on his own interpretation of the documentary record – to the exclusion of witness testimony – represents a clear error of fact and law.

(iii) The May 2, 2012 Interlocutory Judgment Was in Error

508. On May 2, 2012[430], the Trial Judge rendered an interlocutory judgment dealing with the admissibility of documents into evidence in the absence of a qualified witness (the "May 2nd Judgment"). In essence, the May 2nd Judgment had the effect of permitting the Respondents to enter into evidence as "authentic" any document found in ITCAN's files, regardless of their underlying authenticity or reliability.

509. The motion arose following sweeping requests from the Respondents to admit huge swaths of their productions under Article 403 CCP – in the context of a disagreement between the parties as to the evidentiary implications of an admission under Article 403 CCP – in response to which ITCAN demanded that the Respondents prove the documents through a properly qualified witness.[431] In part, this demand was grounded in ITCAN's concerns about the reliability of certain documents, many of which were decades old and of unknown origins.

510. In his May 2nd Judgment, the Trial Judge not only concluded that the entirety of ITCAN's corporate file was to be admitted under 403 CCP, but he also deemed ITCAN to have been "abusive" within the meaning of Articles 54.1 and 54.3 CCP by virtue of their insistence on formal evidentiary procedures.

511. Under the May 2nd Judgment, all documents found in ITCAN's files – whether partial or complete, signed or unsigned, draft or final, from an unknown origin or an unknown date – were deemed "authentic" within the meaning of Article 403 CCP. What

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430 *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2012 QCCS 1870.

431 May 2nd Judgment, paras. 29-33; see Pre-Trial Transcript (Case Management), February 16, 2012, pp. 200-206.

is more, as explained more fully below, the May 2nd Judgment had the effect of admitting many of these documents into the record without qualification.[432]

512. This dismissive approach to the evidentiary requirements by the Trial Judge was clearly in error, and his ruling under Article 54 CCP was wholly unjustified.

(iv) The Trial Judge's Disregard for the Rules of Evidence Had a Material Adverse Impact on the Appellants

513. All of the foregoing errors are by no means "theoretical". To the contrary, the Trial Judge's disregard for the rules of evidence manifestly prejudiced the Appellants.

514. Take, for example, the Trial Judge's reliance on the "1962 Policy Statement" (discussed above) and its alleged appendices as the basis for finding that the Appellants "maintained a common front".[433] The Policy Statement was first put to Mr. Kalhok (a former employee of ITCAN), who expressly stated that he had never seen it, and was not aware of its existence.[434] ITCAN objected to the filing on the basis that Mr. Kalhok could not speak to the document and was therefore not the proper witness to qualify it. The Trial Judge admitted the document as an exhibit, but assigned it an "R" designation to indicate that it was simply in the record for identification purposes (and was not a full exhibit that could be relied upon for truth of contents).[435]

515. Thereafter, Ms. Polet – whose employment with ITCAN long post-dated the documents in question – was presented with a copy of the Policy Statement and similarly disclaimed any knowledge of it.[436] Nevertheless, the Trial Judge inexplicably removed the "R" suffix that had previously been applied and allowed the document to be entered into the record as a full exhibit, purportedly on the basis of his May 2nd Judgment (again, over ITCAN's objections that this was clearly not a witness who could speak to the document). Notably, the exhibit was not assigned a "2M" suffix, but was somehow entered as a full exhibit, which is seemingly at odds with even the May 2nd Judgment.[437]

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432 813 documents were filed under the May 2nd Judgment, many of which eventually made their way into the record as "full" exhibits without a qualifying witness.

433 Judgment, paras. 441-450, discussing Trial Exhibits 154, 154A and 154B-2M.

434 Trial Transcript (Kalhok), April 17, 2012, pp. 157-159, QQ. 493-499; p. 163, Q. 511; p. 167, Q. 526.

435 Trial Transcript (Kalhok), April 17, 2012, pp. 161-162. Notably, this was prior to the May 2nd Judgment.

436 Trial Transcript (Polet), June 5, 2012, pp. 121-122, QQ. 452-463.

437 Although a duplicate copy of this exhibit was also filed as Exhibit 40005A-1962, this "re-filing" of Trial Exhibit 154 with a new exhibit number was done at the request for the Trial Judge for administrative ease. See Trial Transcript (Document Production), September 5, 2012, at pp. 125-127.

516. The very same process was followed with respect to the document that was asserted to be Appendix "A" to the Policy Statement, also expressly relied upon by the Trial Judge.[438] In particular: the document was put to Mr. Kalhok, he disclaimed any awareness of the letter, the Respondents nonetheless sought to file it as an exhibit, the Appellants objected, and the Trial Judge dismissed the objections.[439] Although the document was initially assigned an "R" designation, this notation was later removed at the request of Respondents' counsel, without apparent justification and without any witness further qualifying or testifying about the document.[440]

517. The Respondents subsequently sought to file what they claimed was a further appendix to the Policy Statement, but did so without any witness whatsoever.[441] At various points during the trial,[442] the Respondents filed *en masse* documents found in the productions, in the absence of a witness, a 2870 motion or any other procedural vehicle. The Trial Judge allowed these "bulk filings" to take place, purportedly on the understanding that they were not being admitted as full exhibits (hence the "2M" suffix).

518. However, as is apparent from the face of the Judgment, this apparent distinction had no practical significance. In particular, the additional appendix to the Policy Statement (Exhibit 154B-2M) – which was filed in the context of a bulk "filing" by the Respondents – was eventually expressly relied upon by the Trial Judge in his Judgment.[443]

519. Ultimately, therefore, the Trial Judge specifically relied upon the 1962 Policy Statement and its alleged appendices – all of which were filed into the record without a single witness who could even identify them, let alone meaningfully speak to them – as a free-standing basis for factual findings and eventual legal conclusions.

520. Although there were numerous other examples throughout the trial where the Trial Judge's disregard for the rules of evidence materially prejudiced the Appellants, the foregoing example serves to illustrate the legal errors identified above.

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438 Judgment, para. 446.
439 Trial Transcript (Kalhok), April 18, 2012, pp. 18-20.
440 Minutes of Trial, September 7, 2012, p. 7 (15h49).
441 Trial Transcript (Document Production), September 7, 2012, p. 41.
442 There were 17 separate "bulk filings" by the Respondents, resulting in the filing of 870 exhibits.
443 Judgment, para. 447.

(v) The Trial Judge Improperly Disregarded the Appellants' Witnesses

521. Throughout the Judgment, the Trial Judge makes dismissive and often times derogatory remarks about ITCAN's fact and expert witnesses.[444] Moreover, the testimony of those witnesses who are not expressly disclaimed by the Trial Judge – such as the various ITCAN scientists and researchers, numerous government witnesses, and a Nobel Prize-winning econometrician – does not receive so much as a passing mention in the Judgment.

522. Conversely, the Trial Judge universally accepted every single expert witness to testify for the Respondents, even where their evidence had to be taken "on faith" (in the case of Dr. Siemiatycki) or where their evidence went beyond their stated area of expertise and mandate (Dr. Proctor).

523. The Trial Judge's treatment of the Appellants' witnesses was also internally inconsistent. On numerous occasions he purported to dismiss their evidence in its entirety – to the extent that it was contrary to the Respondents' position – but then selectively used the very same testimony, either by analogy or directly, in order to support a position that was contrary to their sworn testimony or in support of a desired "presumption". Such was the case with, for example, Professor Flaherty, Dr. Mundt, Dr. Bourget and Dr. Davies (*inter alia*).

524. Similarly, the Trial Judge incorrectly claimed that many of the Respondents' propositions were "uncontradicted", when the evidentiary record clearly indicates otherwise. With respect to the "impact" of addiction in the Létourneau Action, for example, the Trial Judge relied exclusively on Negrete's opinion as to "injury" on the basis that "the Companies made no proof to contradict" his position.[445] However, the expert evidence of Dr. Davies and Dr. Bourget expressly contradicted Dr. Negrete on this very issue.[446] Accordingly, the Trial Judge's assertion of "uncontradicted evidence" is in error.

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444 This Court has recently confirmed that appellate intervention is appropriate where a trial judge is unfairly critical of an expert: *Vidéotron, s.e.n.c. v. Bell ExpressVu, l.p.*, 2015 QCCA 422.

445 Judgment, paras. 667 and 816.

446 In particular, the experts both confirmed that: there is no loss of freedom or loss of capacity, no loss of autonomy, no loss of judgment, not all smokers experience withdrawal symptoms, no reason to believe that smokers experience intolerable negative moods when quitting smoking. Both experts also pointed to the positive evidence that differences in perceived quality of life between smokers and ex-smokers were relatively small and explained in the majority of cases by variation in age, housing and economic status (see: Trial Exhibit 40497 (Bourget Report), pp. 5, 19, 22, 23, 34; Trial Exhibit 21060 (Davies Report), pp. 3 and 7).

525. This differential treatment of witnesses represents a manifest error on the part of the Trial Judge insofar as it was not justified on the record before him. Moreover, the inconsistent use of evidence for propositions that counter the underlying testimony is similarly in error.

PART IV – CONCLUSION

526. For the reasons set out herein, ITCAN requests that this Honourable Court:

GRANT the present Appeal;

REVERSE the Judgment in the cases bearing numbers 500-06-000076-980 and 500-06-000070-983; and

DISMISS Respondents' proceedings against the Appellant, ITCAN.

THE WHOLE WITH COSTS.

Montréal, this 11th Day of December, 2015

Osler, Hoskin & Harcourt LLP
Counsel for Appellant Imperial Tobacco Canada Ltd.

PART V – AUTHORITIES

Jurisprudence *(cont'd)* **Paragraph(s)**

Jurisprudence *(cont'd)* **Paragraph(s)**

Jurisprudence *(cont'd)* **Paragraph(s)**

Jurisprudence *(cont'd)* **Paragraph(s)**

Jurisprudence *(cont'd)* **Paragraph(s)**

Jurisprudence *(cont'd)* **Paragraph(s)**

Doctrine

Doctrine *(cont'd)* **Paragraph(s)**

COUNSEL'S CERTIFICATE

We undersigned, Osler, Hoskin & Harcourt LLP, do hereby certify that the above Factum of the Appellant Imperial Tobacco Canada Ltd. does comply with the requirements of the *Rules of the Court of Appeal of Québec in Civil Matters*.

Montréal, this 11th Day of December, 2015

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Counsel for Appellant Imperial Tobacco Canada Ltd.