Historic Quebec lawsuit against tobacco companies: The Superior Court awards more than $15 billion in damages

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In a decisive victory for the Plaintiffs in class actions against the three Canadian leading tobacco companies[1], the Québec Superior Court ordered the Defendants to pay more than 15 billion dollars in moral damages[2] and punitive damages. There were more than 253 hearing days[3] and 16 years of proceedings.

THE ACTIONS

In February 2005, Justice Pierre Jasmin authorized two class actions against JTI-Macdonald (JTM), Imperial Tobacco (ITL) and Rothmans, Benson & Hedges (RBH).

The first class represented by Cécilia Létourneau, was instituted on behalf of 918,000 smokers addicted to cigarettes. They claimed $5 000 per member as moral damages and $5 000 as punitive damages.

The other class action introduced by the Conseil québécois sur le tabac et la santé (CQTS), and more widely known as the Blais case, was instituted on behalf of nearly 100,000 smokers and ex-smokers who had developed lung and throat cancer or emphysema. The amount claimed was of $100,000 in moral damages and $5,000 in punitive damages per class member. The Plaintiffs had waived any right to make individual claims for compensatory damages.

The two class actions, spanning between 1950 and 1998[4], were joined for trial.

THE JUDGEMENT

In a 276 pages decision, Justice Brian Riordan ruled that the Companies had knowledge of the harm caused by smoking, deliberately withheld critical information and knowingly made false and misleading public statements.

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The Court reviewed the conduct of each Company and found as follows:

> The Companies manufactured and sold a product which was hazardous and harmful to the health of the consumers.
> The Companies had knowledge of the risks and dangers associated with the use of its product.
> The Companies trivialized the risks and dangers of smoking and failed to disclose information on the subject during the entire duration of the class proceedings.
> Beginning in 1962, the Companies conspired to prevent users of their products from becoming aware of the inherent hazards of such use.
> The Companies interfered with the right to life, personal security and inviolability of the Class Members, intentionally, prioritizing profit over health.

FAULT

The Companies were found to have engaged in serious misconduct under the *Civil Code of Québec*, the *Consumer Protection Act* (CPA) and the *Charter of Human Rights and Freedoms*, thus incurring liability for moral and punitive damages.

The Court found that the companies:

> Contravened their general duty not to cause injury to another person[5].
> Contravened the duty of a manufacturer to inform its customers of the risks and hazards involved in using its products[6].
> Unlawfully interfered with a right under the Quebec Charter[7].
> Engaged in a prohibited practice under the *CPA*[8].

PARTIAL EXONERATION

Knowledge by a consumer of a product's defect and its continuous use can release the manufacturer of its liability[9]. However, Justice Riordan specified that in the case of products hazardous to the physical well-being of the consumers, the test to assess public knowledge is more "stringent" and requires higher standards. Despite warnings on tobacco packages since 1972, such statements were found to be incomplete and insufficient by the Court.

The Court determined that, as of January 1, 1980, consumers knew or should have known the risk of contracting tobacco related diseases[10], and, as of March 1, 1996, of the risks of becoming addicted to tobacco. Therefore, members who started and continued after these periods[11] committed a contributory fault. The Court apportioned 80% of the liability after the above dates to the Companies and 20% to the members.

CAUSATION

The Court concluded that faults committed by the Companies caused members to smoke. Justice Riordan favoured the "it-stands-to-reason" test stating that the presence of other external factors leading to smoking did not have the effect of discharging the Companies from their liability. It was found that presumptions were not required to eliminate all other possibilities insofar as the Plaintiffs had shown that the Companies' faults led in a logical, direct and immediate way to the members' smoking.

With respect to the Blais case, Justice Riordan agreed that epidemiological evidence is sufficient to prove individual causation of tobacco related disease. He however specified that this evidence is permitted because of the application of article 15 of the *Tobacco-Related Damages and Health Care Costs Recovery Act*[12] which allows causation to be proved "on the sole basis of statistical information".

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DAMAGES

The Court orders collective recovery (aggregate damages) if the evidence allows for an assessment of the total amount of members' claims with sufficient accuracy[13].

For the *Letourneau* case, despite the fact that the three components of liability were found to be present, the Court did not allocate moral damages because the evidence did not allow for sufficient accuracy among class members as to the nature and degree of such damages.

For the *Blais* case, the Court awarded solidary moral damages in the amount of $6,858,864,000[14]. The respective liability of the Defendants was established to be 67% for ITL, 20% for RBH and 13% for JTM.

In addition, The Court found that all three companies had engaged in a reprehensible conduct which warranted an award of punitive damages against them under both the Quebec Charter and the CPA. In light of the parties' conduct and their ability to pay, the judge ordered the Defendants to pay $1,31 billion in punitive damages[15] to the members of the two classes based on one year of before-tax profits for each Defendant.

It should be noted that in Quebec, in cases of collective recovery where individual liquidation is ordered, the Court has discretion to not return the unclaimed portion to the Defendants. It disposes of the unpaid funds taking into consideration the interest of the members[16]. The balance is usually allocated as a Cy-Près donation to non-profit organizations whose activities are related to the interests of the class members.

INITIAL DEPOSIT

A judgement ordering a collective recovery of claims orders the debtor either to deposit the established amount, or to carry out a determined reparatory measure, or both. In order to ensure that the victims would be compensated and suspecting that the Companies would not remain in business if they deposited the full amount, the Court fixed an initial deposit of $1 billion. Should these amounts be insufficient, the judge reserved the right for the Plaintiffs to request additional sums.

PROVISIONAL EXECUTION NOTWITHSTANDING APPEAL

Considering the exceptional nature of this case, the Court approved the plaintiffs request for a partial provisional execution of the damages awarded. The judge pointed out that the case had begun 17 years ago and that an appeal could take up to 6 years.

Meanwhile, since smoking affects the physical well-being of consumers, it was deemed to be in the interest of justice that they be compensated as soon as possible. Therefore the judge ordered provisional execution in the next 60 days, regardless of an appeal, of an amount equal to its initial deposit for moral damages in addition to both condemnations of punitive damages representing more than $1 billion. The judge will decide at some later date how to distribute these funds.

CONCLUSION

The defendants have already issued statements announcing their intention to appeal the decision and ask the Court of Appeal to set aside the provisional execution order.

It should be noted that at least seven similar class actions are ongoing in Canada as well as 10 healthcare cost recovery lawsuits. The amount claimed in many of these cases exceeds even the amount awarded by the Québec Superior Court. This is the first class action case in which class

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members obtain an award in a tobacco case in Canada. Certification for a similar class action in Ontario was dismissed in 2004 in the Caputo case[17].

It remains to be seen how all these cases will play out and how they will eventually relate to each other.

SUMMARY TABLES OF DAMAGES AWARDED[18]

COMPANY	MORAL DAMAGES BLAIS	PUNITIVE DAMAGES BLAIS	PUNITIVE DAMAGES LÉTOURNEAU
ITL	$670,000,000	$30,000	$72,500,000
RBH	$200,000,000	$30,000	$46,000,000
JTM	$130,000,000	$30,000	$12,500,000

MORAL DAMAGES	LIABILITY
Blais Member who started smoking before January 1, 1976	Companies – 100%
Blais Member who started smoking from January 1, 1976	Companies – 80% / Member 20%
Létourneau Member who started smoking before March 1, 1992	Companies – 100%
Létourneau Member who started smoking as of March 1, 1992	Companies – 80% / Member 20%

PUNITIVE DAMAGES	LIABILITY
Blais claim accruing before November 20, 1995	Prescribed
Létourneau claim accruing before September 30, 1995	Companies – 100%
Blais claim accruing as of November 20, 1995	Companies – 100%
Létourneau claim as of September 30, 1995	Companies – 100%

[1] *Létourneau* v. *JTI-MacDonald Corp.* (C.S., 2015-05-27), 2015 QCCS 2382.
[2] Commonly referred to as non-pecuniary damages.
[3] The trial stage began on March 12, 2012 and ended on December 11, 2014.
[4] Date on which the motions for authorization were served.
[5] Art. 1457, *Civil Code of Québec*.
[6] Art 1468 and following of the CCQ.
[7] Art 1 and 49 of the *Charter of human rights and freedoms*.
[8] Art 219 and 228 of the *Consumer Protection Act*.
[9] Art. 1473 CCQ.
[10] Lung and throat cancer or emphysema.
[11] The Court ruled that it takes approximately 4 years to become dependent to smoking. Therefore Blais Class Members who started to smoking after January 1, 1976 and Letourneau Class members who started smoking after March 1, 1992 and that continued smoking after theses dates must share liability.
[12] Art. 15 Tobacco-Related Damages and *Health Care Costs Recovery Act* ch.R-2.2.0.0.1 (Qc) of 2009; In an action brought on a collective basis, proof of causation between alleged facts (...) 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 (...).
[13] Art. 1031 CCQ.
[14] Once interest and the additional indemnity of the Civil Code are added, this sum increases to $15,500,000,000.
[15]

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The judge decided that the circumstances justified that 90% of the total punitive damages go to Blais members and 10% to Létourneau members. Considering the amount allocated for moral damages in the Blais file, the Court made a symbolic award and ordered each company to pay $30,000 in punitive damages which represents one dollar for each Canadian death this industry causes every year.

[16] Art 1036 CCP.

[17] *Caputo* v. *Imperial Tobacco Ltd.*, 2004 24753 (ON SC).

[18] Tables 910 and 1113 of the decision.

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