

**SUPERIOR COURT
(Class Action Division)**

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

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

DATE : January 28, 2013

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

N° 500-06-000076-980

CONSEIL QUÉBÉCOIS SUR LE TABAC ET LA SANTÉ

and

JEAN-YVES BLAIS

Plaintiffs

v.

JTI-MACDONALD CORP. ("JTM")

and

IMPERIAL TOBACCO CANADA LTÉE ("ITL")

and

ROTHMANS, BENSON & HEDGES INC. ("RBH")

Defendants (collectively: the "**Companies**")

**RULING ON PLAINTIFFS' REQUEST
TO PRODUCE DOCUMENTS UNDERS ARTICLE 2870 C.C.Q.**

AND

N° 500-06-000070-983

CÉCILIA LÉTOURNEAU

Plaintiff

v.

JTI-MACDONALD CORP.

and

IMPERIAL TOBACCO CANADA LTÉE
and
ROTHMANS, BENSON & HEDGES INC.
Defendants

**RULING ON PLAINTIFFS' REQUEST
TO PRODUCE DOCUMENTS UNDERS ARTICLE 2870 C.C.Q.**

[1] The present judgment is essentially the continuation of a judgment the Court rendered on January 10, 2013 (the "**First Judgment**") on the question of filing into the record documents for which no witness is available, as foreseen in article 2870 of the *Civil Code*. In that judgment we analyzed several issues that are also relevant here, for example, the Legacy website ("**Legacy**"). We append the relevant sections of the First Judgment as Annex 1 to the present judgment and incorporate them by reference herein.

[2] The article itself reads as follows:

2870. La déclaration faite par une personne qui ne compareît pas comme témoin, sur des faits au sujet desquels elle aurait pu légalement déposer, peut être admise à titre de témoignage, pourvu que, sur demande et après qu'avis ait été donné à la partie adverse, le tribunal l'autorise.

Celui-ci doit cependant s'assurer qu'il est impossible d'obtenir la comparution du déclarant comme témoin, ou déraisonnable de l'exiger, et que les circonstances entourant la déclaration donnent à celle-ci des garanties suffisamment sérieuses pour pouvoir s'y fier.

Sont présumés présenter ces garanties, notamment, les documents établis dans le cours des activités d'une entreprise et les documents insérés dans un registre dont la tenue est exigée par la loi, de même que les déclarations spontanées et contemporaines de la survenance des faits.

2870. *A statement made by a person who does not appear as a witness, concerning facts to which he could legally testify, is admissible as testimony on application and after notice is given to the adverse party, provided the court authorizes it.*

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.

The reliability of documents drawn up in the ordinary course of business of an enterprise, of documents entered in a register kept as required by law and of spontaneous and contemporaneous statements concerning the occurrence of facts is, in particular, presumed to be sufficiently guaranteed.

[3] Initially, Plaintiffs proposed 53 documents (the "**Documents**") at this stage, but certain were dropped in the course of the hearing. Affidavit evidence in support of the motion confirms that all the Documents are found on the Legacy website, except for part

of Document 41. The great majority of the Documents relate to ITL and BAT, an important shareholder of ITL during the Class Period.

[4] As with the 19 documents treated in the First Judgment, the Companies object to the production under article 2870 of every one of the Documents proposed by the Plaintiffs at this time.

[5] In the First Judgment we held that the inclusion of a document in Legacy is a sufficient guaranty of reliability for the purposes of article 2870. Bolstering that in the present case is the fact that the great majority of the Documents also appear on the website of various American tobacco companies or of their trade association, the Tobacco Institute. On that basis, the Court finds that the reliability criterion has been met for all the Documents, save one at this point, and we shall not deal further with that question, except with respect to Document 41.

[6] In addition, in light of the review of the law done in the First Judgment, the Court will not analyze that anew. This said, it would appear useful to clarify certain evidentiary limits of a document produced under article 2870 (a "**2870 Document**"), particularly since the Plaintiffs' objective is often not to establish the truth of the contents but rather that the document exists, that the statements contained in it were, in fact, made by the author, and that the Companies were aware of that.

[7] As such, although it is generally not possible under article 2870 to produce a document containing hearsay and opinion, since it must concern facts to which the author could legally testify, we ruled in the First Judgment that the circumstances of these files will allow hearsay and opinion statements to be produced via this route, subject to certain restrictions as to their evidentiary value. We summarize those restrictions in the following principles:

- a. A 2870 Document that contains the author's personal opinion on a point will not establish the correctness or truth of that opinion but only that the author stated it as his own, resulting in the corollary that any party having access to the document was aware that the author held that opinion;
- b. A 2870 Document that reports a statement by a third person made in the presence of the author will not establish the truth of that hearsay statement but only that it was made by this person, resulting in the corollary that any party having access to the document was aware that this person made that statement;
- c. The probative value of a 2870 Document is not relevant to its admissibility, provided the document has some relevance to the case.

[8] In summary, while the production of a document under article 2870 can establish the truth of its contents, that does not apply to portions containing hearsay and opinion. The evidentiary value of such portions, as described in the first two of the above principles, is essentially identical to that for the entirety of a "May 2nd document", as defined in the First Judgment. By our May 2, 2012 judgment dealing with article 403

C.p.c., we allow the production of documents with the limitation that only their genuineness is established and not the truth of their contents.¹

[9] In this vein, the Court notes that the Companies object to many of the Documents on the ground that they contain the author's personal opinion. The first principle above replies to this objection and the Court will not deal with it further, unless there is something particular about a Document that moves it outside of the typical case.

[10] The same goes for the numerous objections on the ground of hearsay content. The second principle above covers that and no more need be said, unless, again, an atypical case arises.

[11] We proceed now with the analysis of each document proposed by the Plaintiffs. We deal with them in the order shown on the list prepared by Plaintiffs and identify them by their control number.

1. Document blq36b00

[12] This is a 191-page report on focus group research carried out by Analytical Research (Canada) Ltd. and submitted to ITL in 1969. No individual is indicated as its author.

[13] In addition to objections concerning hearsay and opinion, the Companies argue that there is no proof of the impossibility or unreasonableness of calling the author to testify. The Court dismisses this objection.

[14] In the First Judgment, we adopted the position taken by Ducharme² and held that the fact that the author of a document is not identified is not necessarily an obstacle to its production under article 2870. This type of document would generally not have one identified author, judging from the other surveys filed in this case, but that does not preclude a representative of the survey company from filing it into proof and being questioned on it.

[15] The rub now comes from the absence of proof of any attempt by the Plaintiffs to communicate with Analytical Research (Canada) Ltd. That said, the proof shows that this document is over 40 years old. No current employee of the company would have any useful knowledge of it and, even if by some luck one could find an employee who actually

¹ The Companies request clarification as to the evidentiary value of May 2nd documents in order to understand the level of proof that they must make in their defences. They contemplate filing a motion to that end, which could be viewed as a request for a legal opinion from the Court.

Be that as it may, clarification on the evidentiary value of May 2nd documents flows coincidentally from our analysis of the first two principles here, where we note that the evidentiary value of May 2nd documents is essentially identical to that of hearsay and opinion statements in a 2870 Document. Given that, we assume that no further explanation concerning May 2nd documents is necessary. In any event, we do not see how we can usefully say anything more on the subject at this stage. To the extent that either side disagrees with the Court's view of the matter, it will be free to put its position forward in final argument.

² Léo Ducharme, *Précis de la preuve*, 6^e édition (2005), Montréal, Wilson & Lafleur Itée, paragraphe 1365, à la page 555.

worked on the survey 43 years ago, the odds that he could say anything relevant are minuscule.

[16] Exercising our discretion, as we are required to do, we find that it would be unreasonable to require the presence of a witness with respect to this document.

[17] The Companies also argue that the length of the document is an impediment to its production under article 2870. The Court rejected this argument in the First Judgment and maintains that position here.

[18] Finally, they argued alternatively that, should the Court admit this document, the most that it could provide is a level of proof similar to that granted to a May 2nd document. This argument goes to probative value and is not relevant to the present decision once it is established that the document has some relevance, as is the case here.

[19] Consequently, the Court authorizes the production of this document into evidence under article 2870.

2. Document fme50a99

[20] This is a 59-page document, the first half of which is a presentation by Charles Ellis to a BAT research conference held in Southampton in 1962 and the second half reports the discussion held by the participants. Charles Ellis is deceased and the author of the second part is not indicated.

[21] Since the principal objections relate to hearsay and opinion, the Court authorizes the production of this document into evidence under article 2870.

3. Document iqn66b00

[22] This is a 14-page report on the BAT research conference held in Montreal in 1967. The author is Sidney Green, who is deceased.

[23] In addition to objections concerning hearsay and opinion, the Companies argue that the document is vague and contains either no factual statements or statements that are a mixture of opinion and fact. This argument goes to the probative value of the document and not its admissibility under article 2870. It is thus rejected and the Court authorizes the production of this document into evidence under article 2870.

4. Document yju40a99

[24] This is an eight-page report on the BAT research conference held in Hilton Head, South Carolina in 1968. The author is Sidney Green, who is deceased.

[25] It is essentially in the same category as Document 3 and the Court authorizes its production into evidence under article 2870.

5. Withdrawn (Document xap90f00)

6. Document gbr08h00

[26] This is a one-page 1990 memo from N. Cannar to S. Chalfen, both in England. The subject matter is BAT's and ITL's document retention policy, an issue that has garnered much interest in this trial.

[27] Mr. Cannar appears to be alive and well and living in the United Kingdom. This is the basis of the principal objection raised by the Companies, i.e., the Plaintiffs have made no effort to communicate with him to determine to what extent he would be willing or able to cooperate for the purpose of producing the document.

[28] Where contact information is available, the Plaintiffs should normally communicate with the individual, if only to determine if it is the person in question and his availability and ability to testify. As well, although the Court agrees with Plaintiffs that it might make little sense to require a rogatory commission in order to produce one document, it does make sense to think that Mr. Cannar might have useful recollection of the subject matter of this relatively recent document.

[29] For these reasons, the Court, in its discretion, is not satisfied that the necessity condition of article 2870 has been met and thus refuses authorization to produce this document into evidence under article 2870 at this stage.

7-12 Withdrawn (Documents zmy46a99, kes00f00, rpl66b00, yhz46a99, ase51f00, ynk00f00)

13. Document vox82a99

[30] This is a three-page report of a meeting with Dr. Hans Selye in 1970. The author, D.G Felton, and Dr Selye are both deceased.

[31] In addition to objections concerning hearsay, the Companies' argue that the subject matter of the meeting is of no relevance or use to the case. The Court rejects this view. The role of Dr. Selye has been discussed by at least two witnesses so far in this trial and this meeting relates to a research grant he received from the Companies. It thus appears to have some relevance. Its probative value can be argued in due course.

[32] The Court authorizes the production of this document under article 2870.

14. Document orz91a99

[33] This is a five-page report³ from 1983. The author is R.P. Ferris, who worked for BAT in Southampton, England. Plaintiffs could not locate him in the white pages or on Facebook or LinkedIn.

³ The length in pages of the documents analyzed in this judgment refers to the number of pages in the PDF version, which often contains unrelated or even blank pages. The relevant portion of this document, for example, is only two pages long.

[34] In addition to objections concerning opinion content, the Companies object on the grounds that the Plaintiffs have not made sufficient effort to communicate with Mr. Ferris and that there is no proof that ITL ever had this internal BAT document it in its possession.

[35] Concerning the first, the Court disagrees.

[36] It is one thing to omit to communicate with a person known to be alive, even if he or she lives in a distant country, but it is another where a review of reasonable resources, including the white pages of the telephone book, shows no result. That constitutes *prima facie* proof of necessity.

[37] In such circumstances, ITL could try to show that Mr. Ferris is available, if that is the case. This should be relatively easy, since it is today a 100% subsidiary of BAT and Mr. Ferris is a former BAT employee. Nevertheless, ITL made no effort in that regard. The Court is thus satisfied that the necessity condition has been met with respect to this document.

[38] Concerning the second, the Court has ruled on many occasions that the knowledge of the Companies' majority or significant shareholder in the US or UK is relevant, subject to the Plaintiffs' showing some bridge between that knowledge and the Companies' knowledge or activities. That bridge can come in various forms and it is not necessary to prove access to every document in the parent's files to construct it.

[39] The proof shows that the parent companies directed much, if not most, of the Companies' policies and positions on smoking and health during the Class Period of 1950 through 1998, although for part of the time ITL appears to have had more autonomy on this issue than did the others. As such, documents in the parent companies' possession that might affect or reflect their policies and positions are likely also to have had some effect on those of the Companies. This is so whether or not each one of those documents was ever shared with the latter.

[40] Such documents are, therefore, relevant and will not be precluded from production for the sole reason that there is no proof that the Companies ever had access to them. Accordingly, the Companies' objections on that ground will all be dismissed and the Court will not deal with it further, unless there is something particular about a Document that moves it outside of the typical case in this regard.

[41] The Court authorizes the production of this document into evidence under article 2870.

15. Document kca0899

[42] This is a four-page report of a visit to ITL by BAT representatives in 1985. The author is the same R.P. Ferris as for the previous document.

[43] It is essentially in the same category as Document 14 and the Court authorizes its production into evidence under article 2870.

16. Document yma66b00

[44] This is a 12-page report on a BAT research conference held in Kronberg, Germany in 1969 that ITL representatives attended. The author is Sidney Green, who is deceased.

[45] Since the principal objections relate to opinion content, the Court authorizes the production of this document into evidence under article 2870.

17. Document aro66a99

[46] This is a 13-page report on a BAT research conference held in Québec in 1970 that ITL representatives attended. The author is not indicated, although Mr. Green chaired the conference.

[47] The principal objections relate to the absence of a clear identification of the author and the Court rejects that objection. In light of the age of the document and the affidavit showing that many of the participants are deceased, the Court holds that the necessity condition of article 2870 has been met.

[48] Accordingly, the Court authorizes the production of this document into evidence under article 2870.

18. Withdrawn (Document bvh90a99)

19. Document gev36b00

[49] This is a three-page memo from 1972. The author is Sidney Green, who is deceased.

[50] Since the principal objections relate to lack of relevance and lack of proof that ITL ever received the document, the Court authorizes its production into evidence under article 2870.

20. Document box36b00

[51] This is a nine-page report apparently received by Sidney Green in 1976. The author is not indicated.

[52] Since the principal objections relate to opinion content, lack of relevance and lack of proof that ITL ever received the document, the Court authorizes its production into evidence under article 2870.

21. Withdrawn (Document fys97h99)

22. Document riq40a99

[53] This is a six-page memo "TO ALL NO. 1'S OF ASSOCIATED COMPANIES" from 1969. The author is G.C. Hargrove, who is deceased.

[54] In addition to the objection that there is no proof that ITL ever received it, the Companies attack its reliability on the ground that page 5 is missing.⁴ We note, however, that the proof at trial shows that the president of ITL was a "No. 1 of Associated Companies", so he should have received it⁵. Thus, the premise of the first objection appears to be wrong.

[55] As to the absence of page 5, this goes more to the probative value of the document than to its admissibility. It is clearly a BAT document directed at the highest executives in its corporate group. The Court is satisfied with its reliability.

[56] Accordingly, the Court authorizes its production into evidence under article 2870.

23. Document hfo34a99

[57] This is a 36-page report on a 1982 BAT marketing conference held in London, England. Although the list of participants is not furnished, the proof shows that ITL representatives regularly attended such BAT conferences during this period. The author is not indicated, although there is an introduction attributed to A.M. Heath, the Marketing Director of BAT. An address for him was found in London, but no telephone number could be identified.

[58] In addition to objections over opinion content and lack of relevance to ITL, the companies argue that the necessity condition has not been met, since Mr. Heath is still with us, and there appears to be at least one other author for the balance of the document. The Court rejects this argument.

[59] It is clear that the authorship of Mr. Heath extends to only one of the over 30 pages comprising this document and it is not possible to communicate with him by any means other than physically going to that address in London. Were that done, it is not impossible that he might recollect who authored the balance of this 30-year-old document, but the odds of that are quite low. Even in that unlikely event, it would be necessary to undertake another search for that person.

[60] Plaintiffs confirm that their purpose in filing the document is simply to show the attitude and knowledge of BAT's executives in the area of marketing strategies. Such objective is relevant to this case and, in any event, the document's focus goes beyond the UK to include international considerations, which ITL acknowledges would include Canada.

[61] Thus on the necessity issue, given the limited application of the document and its age, it would be unreasonable to require a witness to come to identify it.

[62] Accordingly, the Court authorizes its production into evidence under article 2870.

⁴ The Companies add that there is also a claim for Parliamentary Privilege concerning this document. In previous decisions on this issue, the Court has always allowed the production of the exhibit, while maintaining that its use must comply with the limitations imposed by that privilege. The same rules apply to this document, once produced.

⁵ For example, the testimony of Jean-Louis Mercier, a former president of ITL.

24. Document xro56b00

[63] This is a 10-page report on a visit by three BAT or Imperial Tobacco of England executives to the USA and Canada in 1958. The authors are indicated as being Messrs. Bentley, Felton and Reid.

[64] Mr. Felton is deceased and Mr. Reid cannot be located, although there is some indication that he might have spent some time in Sydney, Australia. Although Plaintiffs admit that Mr. Bentley appears to be living in Bristol, England, the Companies do not stress the failure to meet the necessity condition, presumably due to the fact that Mr. Bentley is 55 years older today than when he made the 1958 crossing. The Court agrees that it would be unreasonable to require his presence now.

[65] In addition to objections based on "double hearsay" and opinion content, the Companies raise the lack of relevance of this document that summarizes some 19 meetings held in April and May of 1958 on the question of the existence of a causal link between cigarette smoke and lung cancer. Only one meeting took place in Canada, with a professor from the University of Toronto, and seven of the remaining 18 were with tobacco industry people. The other 11 meetings appear to be with scientific researchers, many at prominent American universities.

[66] The probative value of this document might well be an easy target, but that is not an element that should concern us now, since the subject matter is of direct relevance to this case. Moreover, Mr. Felton is a party to several of the Documents and appears to be an important person in the BAT scientific hierarchy of the time. As such, the document shows BAT's knowledge of smoking and health issues, which is relevant to this case.

[67] Accordingly, the Court authorizes its production into evidence under article 2870.

25. Document sour87e00

[68] This is a one-page letter of 1969 from Alexander Holtzman, Assistant General Counsel to Philip Morris Inc. in New York, to Frank Decker, a New York lawyer. The subject matter is Dr. Hans Selye's possible appearance in parliamentary hearings in Canada and his request for research funding. Dr. Selye was based in Montreal.

[69] Mr. Holtzman is alive, although his age is unknown. The Court notes that he had attained the position of Assistant General Counsel to a major American corporation some 44 years ago, so he must easily be in his late 70's at the very least. The Plaintiffs have a telephone number for him in the State of New York but the evidence does not show that they attempted to communicate with him.

[70] Nevertheless, albeit with some hesitation, the Court finds that the necessity condition is met for this document. In spite of the omission to communicate with Mr. Holtzman when it appears possible to do so, it would be unreasonable to require him to come in order to produce a one-page letter written over 40 years ago. Not only is it highly unlikely that he could remember anything of relevance about the letter, but also its contents add little of importance to the case.

[71] The Companies' principal objection is that the document is useless to this case, since it is between two Americans. The Court rejects that argument.

[72] The document relates to the role of Dr. Selye and, as mentioned in our analysis of Document 13, that is relevant in this case. It thus has some value, in spite of the fact that it appears to be of limited interest.

[73] Accordingly, the Court authorizes its production into evidence under article 2870.

26. Withdrawn (Document cbr14f00)

27. Document wnl28e00

[74] This is a two-page letter of 1969 from Leo Laporte, Vice President of Research and Development of ITL, to Dr. Hans Selye. Both gentlemen have passed away. The subject matter is the approval and funding of Dr. Selye's research by the Canadian and American tobacco industries.

[75] Once it was established that Dr. Selye had passed away, there were no serious objections to filing the document and the Court authorizes its production into evidence under article 2870.

28. Document jee92b00

[76] This is a four-page memo of 1972 from Fred Panzer, an employee of the Tobacco Institute, to Horace Kornegay. The subject matter is "THE ROPER PROPOSAL".

[77] There is a telephone listing for a Fred Panzer in Washington, D.C., where he worked for the Tobacco Institute. The evidence does not show that the Plaintiffs attempted to communicate with him.

[78] Unlike for Document 25, the Court cannot in its discretion accept that omission with respect to this document. Where contact information is available, the Plaintiffs must normally communicate with the individual in order to provide evidence relevant to the necessity condition. Not only do they not do that here, but they also offer no explanation as to why this was not done.

[79] As well, the facts do not easily justify omitting this step. There is no indication that Mr. Panzer is of an age that would normally make travel difficult, in spite of the fact that he wrote the memo 40 years ago. Plus, there is the nature of the document itself, which is of more substance, say, than Document 25.

[80] For these reasons, the Court refuses authorization to produce this document into evidence under article 2870 at this stage.

29. Document yqd91a00

[81] This is a 17-page collection of 1976 organizational charts relating to the Research Department of Philip Morris Inc. in the United States. The author is not indicated.

[82] The Companies object principally because one of the persons listed on the first page thereof, W.A. Farone, will be testifying at trial here in March. In their submission, Plaintiffs should try to produce the document through him. The Court agrees.

[83] Production under article 2870 is the exception. Where an apparently appropriate witness will be coming to testify, Plaintiffs should try to file the document through him and thus allow some cross examination.

[84] Accordingly, the Court refuses authorization to produce this document into evidence under article 2870 at this stage.

30. Document glu74e00

[85] This is a 15-page collection of 1981 organizational charts relating to the Research Department of Philip Morris Inc. in the United States. The author is not indicated, but Mr. Farone is shown in the first pages as Director of Applied Research.

[86] For the reasons given for Document 29, the Court refuses authorization to produce this document into evidence under article 2870 at this stage.

31. Withdrawn (Document uzq53e00)

32. Document naf79d00 – Exhibit 583C-R

[87] This is a one-page 1981 organizational chart for the Research and Development Department of R.J. Reynolds in the United States. No author is indicated.

[88] It was filed as an exhibit under reserve through Raymond Howie, an employee of RJR MacDonald in Canada. He testified to recognizing quite a few of the names on it and to knowing some of the people mentioned. It went in under reserve pending, *inter alia*, the present motion.

[89] The Companies object mainly concerning necessity and reliability. The Court rejects both arguments, with reliability being covered by the fact that this is a Legacy document.

[90] On necessity, no information could be found to establish persons involved in the creation of the document, which is over 30 years old. However, Mr. Howie did show good knowledge of the facts it relates and did not contradict any part of it. He also confirmed its contents relating to high-level employees, such as Messrs. Morse, Piehl, Giles and Lyerly. This is key, because establishing the upper echelons of the company hierarchy is the main application of this type of document.

[91] It would be unreasonable to require any further testimony before producing this document and the Court authorizes its production into evidence under article 2870. In light of that, it orders the "R" to be removed from its exhibit number.

33. Document ltm36b00

[92] This is a four-page memo from 1959 from Alan Rodgman to Kenneth Hoover. Mr. Rodgman is described in the previous document, Exhibit 583C, as the head of

"Fundamental Research and Development" at R.J. Reynolds Tobacco Company in North Carolina ("**RJRUS**").

[93] In light of Mr. Rodgman's age, the Companies do not contest the production on the ground of necessity. Their main contestation is on relevance.

[94] This document predates the 1974 acquisition of MacDonald Tobacco (now JTM) by RJRUS by some 15 years. The Companies argue that the Plaintiffs are attempting to show that this early document had an influence on the smoking and health policies of RJRUS after the acquisition. Before being allowed to do that, they argue, the Plaintiffs have the burden of showing the essential link between such a document and company policy a decade and a half later, which they have not done.

[95] The Court rejects this argument. Parent-company knowledge is relevant in this file, even if it was acquired years earlier. There is no reason to assume that by 1974 RJRUS would have forgotten what it learned about smoking and health in the 1950's, to the contrary.

[96] JTM also raises an interesting twist on the opinion objection. It argues that a report from an in-house scientist is, in fact, an expert's report and cannot be entered into proof under article 2870.

[97] The Court disagrees with the characterization of this type of document as being the same as a report filed into a trial record to assist the judge in understanding technical information. That, however, is irrelevant to the present decision, since, even if it is opinion, the document is admissible on the basis of the first principle set out above.

[98] The Court authorizes the production of this document into evidence under article 2870.

34. Document kyv35d00

[99] This is a 71-page research report prepared by Alan Rodgman in 1964 summarizing an eight-year study of cigarette smoke condensate.

[100] It is essentially in the same category as Document 33 and the Court authorizes its production into evidence under article 2870.

35. Document bnf56b00

[101] This is a one-page memo from Alan Rodgman to Charles B. Wade Jr. in 1964 on the subject of nitrosamines in cigarette smoke.

[102] The Companies point out that this document could be a draft given that Mr. Rodgman did not actually sign this memo, whereas the two previous documents were signed by him. The Court sees no relevance to such an objection in relation to a short memo bearing no corrections or changes.

[103] This document is essentially in the same category as Document 33 and the Court authorizes its production into evidence under article 2870.

36. Document syiu88d00

[104] This is a four-page memo of 1966 from William Shinn, a US lawyer, to David Hardy, also a US lawyer. The subject matter is Mr. Shinn's visit with Dr. Hans Selye in Montreal, accompanied by Alexander Holtzman and Frank Decker. Mr. Shinn currently lives in Kansas City.

[105] In addition to an objection relating to necessity, the Companies argue that the document is useless, given that it is full of hypotheses and assumptions.

[106] On necessity, the Court finds that it would be unreasonable to require Mr. Shinn to appear in order to file a document he wrote nearly 50 years ago. The chances that he would remember anything more than what he says in it are too remote to merit consideration.

[107] The other objection goes to probative value and, since Dr. Selye's role is clearly relevant to this case, that argument falls.

[108] Accordingly, the Court authorizes the production of this document into evidence under article 2870.

37. Document bvs56b00

[109] This is a nine-page memo from 1977 entitled "SMOKING AND HEALTH ITEM 7: THE EFFECT ON MARKETING". The author is P.L. Short, an employee of BAT in London who was not listed in the white pages of England.

[110] In addition to an objection based on opinion content, the Companies argue that there is no evidence that Mr. Short is not alive, nor that ITL ever received this document. They add that the question could have been put to Mr. Kalhok when he testified.

[111] It is true that questions about Mr. Short's status and ITL's access to the document could have been put to Mr. Kalhok, but that omission does not necessarily spell the downfall of the request to file the document under article 2870. Given the age of the document, the Court is satisfied that the efforts made to find Mr. Short, while minimal, were sufficient to establish *prima facie* necessity. ITL made no effort to contradict the evidence concerning this former employee of its parent company.

[112] As for the proof of ITL's access to the document, we have already ruled against that argument.

[113] Accordingly, the Court authorizes the production of this document into evidence under article 2870.

38. Document wfs76b00

[114] This is a 16-page memo from 1962 entitled "THE EFFECT OF SMOKING - PROPOSAL FOR FURTHER RESEARCH PROJECTS WITH BATTELLE". The author is Charles Ellis, who is deceased.

[115] In addition to objections based on opinion content, the Companies argue that there is no indication that it was ever received by ITL, moreover, the last sentence calls for secrecy, thus making the document irrelevant.

[116] For reasons already explained, these objections have no merit. The Court authorizes the production of this document into evidence under article 2870.

39. Document qct20f00

[117] This is a seven-page report on a BAT research conference held in Montreal in 1967. The author is Charles Ellis, who is deceased.

[118] The document is clearly a draft and the Court held in the First Judgment that draft documents cannot be produced under article 2870.

[119] Accordingly, the Court refuses authorization to produce this document into evidence under article 2870.

40. Document 23129403 – Exhibit 1242A-R

[120] This is a 215-page BAT research report bearing the date of 26 June 1990 and entitled "A REVIEW OF THE BIOLOGICAL ACTIVITY OF SMOKE", with the indication "REPORT NO: RD" but no report number. The date is an important element for the analysis of this and the following document, which is dated 1 November 1990. The report's author is Graham Smith, who worked for BAT at Southampton, England.

[121] Document 40 is identical to Exhibit 1242A-R and contains a long distribution list that differs from the one annexed to Document 41.

[122] In addition to the objections on opinion content, the Companies argue that the necessity condition has not been met and that it is clearly a draft of Exhibit 1242, so it cannot be produced under article 2870.

[123] On necessity, the Plaintiffs were not able to locate Mr. Smith, a BAT employee, either through the yellow pages or via Facebook or LinkedIn. This constitutes *prima facie* proof of necessity. Since ITL did not attempt to show that Mr. Smith is available, using BAT's employee records, the Court is satisfied that the necessity condition has been met.

[124] On the draft status of the document, its earlier date, its long distribution list and the fact that no document number was attributed to it don't necessarily mean that it is a draft of the November document. It appears rather to be a complete earlier version of the report that was circulated for comment. That is not the same thing as a draft and ITL could not point to any difference between the report portions of Documents 40 and 41.

[125] This said, it is not a final document. As held in the First Judgment, only final documents may be produced under article 2870, since that provision requires that a "statement" must have been "made". The Court does not see how that occurs before the statement is final.

[126] As such, the Court refuses authorization to produce this document into evidence under article 2870, although this does not cancel its production under our May 2, 2012 judgment. Consistent with that, the Court orders the "R" to be removed from its exhibit number, to be replaced by "2M".

41. Document aum36b00 – Exhibit 1242

[127] This is a 209-page report with the same title as Document 40 but bearing the date of 1 November 1990 and an indication that it is "REPORT NO: RD.2177". The report's author is Graham Smith.

[128] It appears to be identical to Exhibit 1242, which was found in ITL's files, except for the inclusion of the first two pages: a distribution sheet with handwritten annotations signed by R.R. Baker (Exhibit I to the affidavit of Kimberly-Anne Kuntz) and a type of administrative checklist for Report RD.2177 indicating R.R. Baker as the "issuer" (Exhibit J to the affidavit). An attorney for ITL advised the Plaintiffs several years ago that Mr. Baker is deceased.

[129] These first two pages are apparently the only ones of all the Documents not found on Legacy. They were obtained from BAT's document depository in Guilford, England (along with another copy of Report RD.2177) by lawyers acting for the Attorney General of Canada in British Columbia. The circumstances surrounding BAT's allowing the public into Guilford are explained by Ms. Kuntz, an attorney in British Columbia, in an affidavit filed by the Plaintiffs:

3. The Guilford Depository was opened to the public as a result of litigation commenced by the State of Minnesota and Minnesota Blue Cross and Blue Shield against seven tobacco companies including BAT in 1994. When the Minnesota Litigation was settled in 1998, BAT agreed as part of the settlement to provide public access to the internal documents it produced during the discovery process. Initially, the documents were to be made available at the Guilford Depository for ten years. BAT opened its doors to the public in or about February 1999.

[130] In light of this evidence, "Guilford documents" seem every bit as reliable as Legacy documents, or even more so, since they are actually still in BAT's possession and control. Consequently, the Court finds that the two Guilford documents meet the reliability condition and, in light of Mr. Baker's demise, the necessity condition.

[131] The debate does not end there, however, since ITL objects to the filing of Report RD.2177 (Exhibit 1242) if it is joined with Exhibits I and J to Ms. Kuntz's affidavit. It argues that there is no justification for connecting those two pages to Report RD.2177, since Ms. Kuntz identifies them separately from it and from each other.

[132] On this question, it is relevant to consider Document 42, a November 8, 1990 cover memo from Mr. Baker, who is sending copies of Report RD.2177 to a Mr. Godby. Exhibit I is also attached to that memo, although with a different Bates number and without the signature and the annotations. There is no objection by the Companies to joining the cover memo and Exhibit I in Document 42.

[133] The Court is mystified as to why ITL objects to joining these two pages to the report and can see no reason not to do so. Exhibits I and J clearly relate to the report, showing administrative and distribution information. As well, the Court understands that this is the form in which the Plaintiffs received Document 41, in spite of the fact that Ms. Kuntz identifies the first two pages with separate exhibit numbers. The objection is dismissed.

[134] The Court authorizes the production of this document into evidence under article 2870.

42. Document vlx91a99 – Exhibit 1242B-R

[135] This is a 2-page document containing a November 8, 1990 cover memo from Mr. Baker to Attorney Godby advising that he is enclosing three copies of Report RD2177. Annexed thereto is Exhibit I to the Kuntz affidavit. Mr. Baker is deceased.

[136] The Companies object to its production now on the ground that there is no proof that Mr. Godby could not come to produce it and, in any event, it is irrelevant.

[137] The memo is a three-line note simply advising that he, Mr. Baker, is sending Mr. Godby three copies of the report and asking him to forward them to three people. Even if Mr. Godby, who was working as a lawyer in England at the time, were available, it would be unreasonable to require his presence to file such a document. That argument is rejected.

[138] As for relevance, since corporate knowledge is relevant in this file, the objection must be dismissed.

[139] The Court thus authorizes the production of this document into evidence under article 2870 as well as under our May 2, 2012 judgment. In light of that, it orders the "R" to be removed from its exhibit number.

43. Withdrawn (Document tnj00f00)

44. Document sqr59d00

[140] This is a nine-page 1976 RJRUS research planning memorandum on "THE NATURE OF THE TOBACCO BUSINESS AND THE CRUCIAL ROLE OF NICOTINE THEREIN". The author is Claude Teague who is still with us but whose age incites JTM not to contest the necessity condition.

[141] In addition to objections on relevance because it is an American document, the Companies argue that an earlier witness, Ms. Trudelle, mentioned this document in a memo and could have produced it during her testimony, but the Plaintiffs chose not to do so.

[142] Ms. Trudelle worked for RJR MacDonald in marketing and public affairs starting in 1982, some six years after the report was issued. Although she apparently did have

knowledge of it, she certainly had nothing to do with its creation. The Court rejects this argument.

[143] The Court authorizes the production of this document into evidence under article 2870.

45. Document jbr73d00

[144] This is a 33-page report from 1973 on "IMPLICATIONS AND ACTIVITIES ARISING FROM CORRELATION OF SMOKE PH WITH NICOTINE IMPACT, OTHER SMOKE QUALITIES, AND CIGARETTE SALES". The author is Claude Teague and necessity is not contested.

[145] In addition to objections on opinion content, relevance because it is an American document and the fact that it predates the acquisition of MacDonald Tobacco by RJRUS, the Companies plead that it should have been shown to Raymond Howie when he testified, since he might have been able to identify it. The Court rejects this argument.

[146] The proof indicates that this document never came into RJR MacDonald's possession, based on Mr. Howie's testimony concerning document management practices in the company. Given that, the conclusion is that Mr. Howie could not identify it. This suffices to refute this argument.

[147] The Court authorizes the production of this document into evidence under article 2870.

46. Withdrawn (Document rte53d00)

47. Document lby66b00

[148] This is a three-page 1953 statement to the public by the Tobacco Industry Research Committee, the American tobacco industry's trade association, and its eight corporate sponsors. The names of the presidents of the American tobacco companies are listed under that of the committee.

[149] The Companies' only objection is on relevance because it is an American document. We have previously ruled this objection to be invalid.

[150] The Court authorizes the production of this document into evidence under article 2870.

48. Document pcw34f00

[151] This is a 21-page 1954 report entitled "A SCIENTIFIC PERSPECTIVE ON THE CIGARETTE CONTROVERSY" produced by the Tobacco Industry Research Committee.

[152] In addition to objections because of opinion content, the Companies raise irrelevance and lack of proof because this is not a publication of any of the Companies and there is no proof that any of them ever had access to it. As discussed above, the Court rejects these arguments.

[153] The Court authorizes the production of this document into evidence under article 2870.

49. Document xjq70g99

[154] This is a two-page 1972 letter referencing "COMPENSATION BY SMOKERS FOR CHANGES IN CIGARETTE SMOKE COMPOSITION". The author is Robert Wade, who is deceased. He was an employee of ITL and it would appear that this document should have been in that company's records. There is no explanation as to why it was not divulged to the Plaintiffs in the document exchange done in these files.

[155] The Companies object to the filing under article 2870 because its contents refer to research done by a third party company. This is not a valid argument, since such information is relevant to this case.

[156] The Court authorizes the production of this document into evidence under article 2870.

50. Document wou74e00

[157] This is a three-page document containing a two-page memo from Dr. R. Fagan to H. Wakeham and a one-page 1969 memo from H. Wakeham to C. Goldsmith. The reference is "SMOKING IN PREGNANCY: A PROSPECTIVE STUDY DONE IN BRITAIN". The two authors, Messrs. Wakeham and Fagan, are both deceased

[158] In addition to objections on the basis of hearsay, the Companies argue that the document is irrelevant because it deals only with an article published in the UK and it could have been shown to another witness, i.e., Norman Cohen.

[159] The objection based on UK content has already been dealt with and the one mentioning Mr. Cohen is ill-founded. Although this gentleman did testify before us, he worked exclusively in Montreal and there is no indication that he had any connection whatsoever either with Dr. Fagan or his article.

[160] The Court authorizes the production of this document into evidence under article 2870.

51. Document sqz74e00

[161] This is a three-page 1969 memo from H. Wakeham to C. Goldsmith in 1969. While Mr. Wakeham is deceased, Mr. Goldsmith is apparently living in New York City.

[162] The Companies' objections to this article are basically the same as for the previous one and are, therefore, dismissed. Although not strenuously argued, requiring Mr. Goldsmith to come from New York in order to file this 44-year-old memo on which he could say precious little, even assuming he remembered it, is unreasonable.

[163] The Court authorizes the production of this document into evidence under article 2870.

52. Withdrawn (Document zvv36b00)

53. Withdrawn (Document lbl46a99)



BRIAN RIORDAN, J.S.C.

Hearing Date: January 15 and 16, 2013

ANNEX 1 – The First Judgment

LA REQUÊTE

[1] Les demandeurs désirent se servir des dispositions de l'article 2870 du *Code civil* pour déposer au dossier 19 documents émanant pour la plupart de la « *LEGACY TOBACCO DOCUMENTS LIBRARY* » (« **Legacy** ») ou des archives des Compagnies. Ce sont des documents mentionnés par leur expert, l'historien Robert Proctor, soit dans son rapport⁶ soit dans son témoignage devant nous, témoignage qui a incité une avalanche d'objections de la part de tous les procureurs des Compagnies.

[2] Quant aux documents provenant de Legacy (les « **documents Legacy** »), l'affidavit déposé par les demandeurs à l'appui de leur requête déclare qu'ils se retrouvent tous sur des sites Web de compagnies de tabac américaines ou d'organismes formés par elles⁷.

[3] Quant aux documents provenant de leurs archives (les « **documents 2 mai** »), les Compagnies les ont fournis aux demandeurs elles-mêmes à la suite de l'engagement de communiquer tout document pertinent en leur possession. Elles admettent donc les posséder et le Tribunal, rejetant les objections des Compagnies, les a cotés en preuve à la suite de notre jugement du 2 mai 2012 (le « **jugement du 2 mai** »⁸), mais uniquement quant à leur authenticité.

[4] Dans cette optique, eu égard les documents 2 mai la requête des demandeurs est faite de bene esse dans le seul but d'éviter toute objection procédurale possible, s'il en existe, à ce que le Dr Proctor s'y réfère dans son rapport ou dans son témoignage.

[5] Les Compagnies s'opposent au dépôt en preuve de chacun de ces 19 documents, plaidant qu'aucun ne satisfait aux conditions strictes gouvernant l'application de l'exception à la règle contre le oui-dire que crée l'article 2870.

LEGACY

[6] La *LEGACY TOBACCO DOCUMENTS LIBRARY* est décrite dans l'affidavit comme « *a publicly available digital (i.e., web-based) archive maintained by the University of California, San Francisco Library and Center for Knowledge Management* ». Tel que mentionné dans l'affidavit, les procureurs de RBH fournissent une description de l'histoire de Legacy, de même que leur position quant à certains aspects de la fiabilité des documents s'y retrouvant, dans une requête déposée antérieurement dans ces dossiers. Ils y écrivent:

⁶ Pièce 1238.

⁷ Il s'agit des sites Web de RJ Reynolds, The Council for Tobacco Research, Lorillard, Philip Morris et The Tobacco Institute.

⁸ Ce jugement permet la production par le biais de l'article 403 C.p.c. des documents que les Compagnies ont fournis mais dont elles nient l'authenticité.

A. The Legacy Library Is Merely a Digital Archive and Cannot Give an Imprimatur of Authenticity for any Document.

12. In 1998, the five major U.S. tobacco companies and their two industry associations entered into a Master Settlement Agreement ("MSA") with the Attorneys General of 46 states, who had filed health-care cost recovery lawsuits against the companies. As part of the MSA, the U.S. tobacco companies agreed to make the documents produced by the companies for discovery purposes in these lawsuits available on their own document websites. See http://legacy.library.ucsf.edu/about/about_history.jsp.
13. The MSA also funded the American Legacy Foundation, which in turn funds the Legacy Library. *Id.*
14. The Legacy Library is a publicly available digital (i.e., web-based) archive maintained by the University of California, San Francisco Library and Center for Knowledge Management. The Legacy Library currently contains over 14 million documents. See http://legacy.library.ucsf.edu/about/about_the_library.jsp;jsessionid=01C68B892FF9E83AED7509716A9E1B06.tobacco03.
15. These documents can broadly be classified into two groups: documents produced in smoking and health litigation, and documents provided by various research institutions, anti-smoking activists, and plaintiffs' lawyers. See http://legacy.library.ucsf.edu/about/about_collections.jsp; see also http://legacy.library.ucsf.edu/about/about_research_collections.jsp.
16. Pursuant to an order in a civil suit brought by the U.S. Department of Justice, U.S. tobacco companies are now required to make any documents produced in U.S. smoking and health litigation available to the public until 2021. See http://legacy.library.ucsf.edu/about/about_history.jsp.
17. The database also contains collections from numerous other sources. See http://legacy.library.ucsf.edu/about/about_collections.jsp; see also http://legacy.library.ucsf.edu/about/about_research_collections.jsp.⁹
18. Producing documents pursuant to discovery obligations did not render the documents authenticated, and nothing in the MSA or U.S. Department of Justice order varied that normal rule.¹⁰ The fact that documents were posted to the companies' websites, and thereafter to the Legacy Library, provides no guarantee or even indicia of authenticity. Indeed, no one has ever even sought to admit most Legacy Library documents as evidence, nor does the Legacy Library website indicate for each document whether it has ever been admitted into evidence at trial (or if so, how many times, when and for what purpose).
19. The vast majority of Legacy Library documents have never had their authenticity accepted by any court, anywhere in the world. And even when courts have accepted into evidence a document found on the Legacy Library website, such decisions have never been

⁹ In addition to documents produced in U.S. smoking and health litigation, Legacy includes other collections, such as documents attributed to Brown & Williamson which were copied and leaked by an anonymous employee, documents concerning California's tobacco control measures, documents produced in the Canadian ad-ban cases in 1989 and 1997 (many of which were purely "extrinsic evidence"), and various research collections. *Id.*

¹⁰ The full text of the MSA and the DOJ order are available on the Legacy website. See http://legacy.library.ucsf.edu/about/about_history.jsp.

strictly on the testimony of a Legacy Library representative. The fact that the documents happen to be on the Legacy Library or some other third-party database is wholly immaterial. A document is not authentic merely because it is found on the Legacy Library website. Nor does a document escape the need to be authenticated simply because it resides in the Legacy Library. Plaintiffs know this and have accordingly sought the admission of a substantial number of documents that reside in the Legacy Library by way of traditional methods of authentication. Bedrock principles of evidence law cannot be cast aside because of Plaintiffs' apparent desire for expedience.

[7] Les demandeurs maintiennent que les circonstances entourant la création de Legacy et le dépôt des documents qui y sont archivés présentent une garantie suffisante de la fiabilité des documents Legacy aux besoins du deuxième alinéa de l'article 2870, surtout lorsqu'on considère qu'ils se retrouvent également sur des sites Web des cigarettiers américains ou d'organismes reliés. De plus, ils prétendent que presque tous ces documents ont été créés dans le cours ordinaire des Compagnies et devraient donc bénéficier de la présomption de fiabilité établie au troisième alinéa de l'article.

[8] Les Compagnies ne sont point convaincues, soulignant que des notes manuscrites paraissent sur certains documents, que la numérotation des pages n'est pas toujours exacte et que certains extraits sont illisibles.

[9] Pour sa part, le Tribunal est satisfait que les documents retrouvés sur Legacy rencontrent *prima facie* la condition de la fiabilité, puisqu'ils proviennent des archives des cigarettiers américains en conformité avec un processus créé par des tribunaux américains.

[10] Certes, s'agissant de documents vieux dans certains cas de plus d'un demi-siècle, il va y avoir des imperfections. C'est regrettable, mais cela ne constitue pas en soi une fin de non recevoir. Le mieux étant l'ennemi du bien, il ne faut pas laisser la poursuite de la perfection devenir une barricade à toute action.

[11] De plus, force est de constater que les tribunaux travaillent souvent avec des documents présentant certaines lacunes et se doivent donc d'en ajuster la force probante en conséquence. D'autre part, advenant le cas où un document comporterait d'autres éléments mettant en doute sa fiabilité, le Tribunal demeurera ouvert à des arguments à cet égard.

[12] Ainsi, non seulement le Tribunal n'écartera pas un document du simple fait qu'il émane de Legacy, mais de plus, il présumera que les garanties de fiabilité imposées par le deuxième alinéa de l'article 2870 sont rencontrées, bien que conscient qu'il peut y avoir des exceptions.

Les documents provenant des dossiers des Compagnies

[13] Afin de compléter notre analyse sur la fiabilité d'un document basé sur sa provenance, le Tribunal adoptera la même position en ce qui concerne les documents du 2 mai, provenant tous des dossiers des Compagnies. Le Tribunal a reconnu leur authenticité nonobstant les objections des Compagnies. Ainsi, il semble logique de

reconnaitre leur fiabilité au sens de l'article 2870, tout en admettant la possibilité d'exceptions, auquel cas les Compagnies devront les plaider.

LA PORTÉE DE L'ARTICLE 2870 C.C.Q.

[14] Avant d'analyser chaque document, étudions la portée des principes établis à l'article 2870, dont le texte se lit ainsi :

(Omitted)

[15] Se basant sur l'examen du premier alinéa de cet article fait par les auteurs Tessier et Dupuis¹¹, le Tribunal appliquera les principes suivants en statuant sur l'admissibilité en preuve de la déclaration d'une personne qui ne compareît pas (le « **déclarant** »):

- a. La déclaration doit être recevable, c'est-à-dire, porter sur des faits sur lesquels son auteur aurait pu légalement déposer, et plus précisément;
- b. La déclaration doit porter sur des faits dont l'auteur avait une connaissance personnelle;
- c. La déclaration ne peut être fondée sur du ouï-dire lorsque la véracité est en question;
- d. La déclaration doit être pertinente aux faits en litige;
- e. La déclaration ne peut constituer une opinion d'expert ou tenir lieu du témoignage de l'expert;
- f. Dans sa décision sur l'autorisation de la demande en vertu de cet article, le Tribunal exerce sa discrétion.¹²

[16] Quant au deuxième alinéa, le Tribunal résume ainsi sa compréhension des deux conditions qui y sont énoncées, soit la difficulté de présenter un témoin et la fiabilité de la déclaration :

- a. Les exigences en vertu des notions de nécessité et de fiabilité doivent s'appliquer avec souplesse afin de favoriser la recherche de la vérité;¹³
- b. Le décès du déclarant n'est pas le seul cas d'impossibilité prévue et l'incapacité de retrouver la personne après des recherches raisonnables dans les circonstances suffit;
- c. Le geste visé par la notion d'impossibilité dans ce contexte n'est pas celui d'obtenir l'élément de preuve en question, mais plutôt celui d'obtenir la comparution du témoin (« impossible d'obtenir la comparution du déclarant comme témoin »). De la même manière, lorsque l'article mentionne le cas où il serait « déraisonnable de

¹¹ TESSIER, Pierre et DUPUIS, Monique, *Les qualités et les moyens de preuve*, dans Preuve et procédure, Collection de droit 2011-2012, École du Barreau, vol. 2, Cowansville, Edition Yvon Blais, 2011, para. 169, à la page 195, tel que cité dans Rouleau et al. c. Placements Etteloc Inc., AZ-50079136 (QCCS).

¹² Voir: *Iredale v. Stroll*, EYB 2008-136123 (C.S.), paragraphes 17-19.

¹³ Royer, Jean-Claude et Lavallée, Sophie, *La preuve civile*, 4^e édition (2005), Cowansville, Les éditions Yvon Blais inc., paragraphe 726, à la page 580.

l'exiger », cela réfère au fait qu'il serait déraisonnable d'exiger la comparution du déclarant;

d. La notion de la proportionnalité joue un rôle important quant à l'appréciation des limites du raisonnable à exiger la présence d'un témoin au procès. Ainsi, les tribunaux n'hésitent pas à dispenser de la comparution un témoin, même si ce dernier est relativement disponible, dans le cas où son témoignage n'ajouterait rien au document qu'il déposerait;

e. La détermination qu'un document est suffisamment fiable dans ce contexte n'est pas garant de sa force probante. En effet, les circonstances l'entourant, y compris le fait qu'il puisse contenir du oui-dire, peuvent également en affecter sa force probante.

[17] Ensuite, notre analyse du troisième alinéa nous amène aux constatations suivantes :

a. Une déclaration peut être considérée comme un document;

b. Même si un document établi dans le cours ordinaire des activités d'une entreprise est présumé rencontrer les garanties de fiabilité énoncées, ceci n'est pas limitatif. Autrement dit, il est possible que les documents d'une entreprise qui ne sont pas établis dans le cours ordinaire puissent quand même être considérés fiables aux fins de cet article;

c. Il n'est pas nécessaire que la personne faisant la déclaration soit une partie au litige et les documents de tiers, tels des factures, des registres, etc., sont souvent admis en preuve en vertu de l'article 2870;

d. Un déclarant peut aussi bien être une personne morale qu'une personne physique selon le type de document en question;

e. Le fait que le déclarant ne puisse être contre-interrogé par la partie adverse n'est pas un obstacle à l'admission de la déclaration.

La preuve du contenu du document ou de sa simple existence

[18] Les Compagnies exigent que les demandeurs expliquent le but de chaque déclaration. Les demandeurs répondent que leur intention en déposant la majorité de ces 19 documents, loin d'établir la véracité de leur contenu, est de démontrer la fausseté et la mauvaise foi des propos des représentants des Compagnies.

[19] Cependant, ces dernières insistent que cela ne peut se faire par le biais de l'article 2870. Puisque cette disposition crée une exception à la règle contre le oui-dire, avancent-elles, son rôle se limite donc à établir la véracité du contenu d'une déclaration et non son authenticité, fonction qui est réservée exclusivement à l'article 403 du *Code de procédure civile*.

[20] Bien qu'un document admis en preuve en vertu de l'article 2870 puisse de ce fait voir son contenu validé, du moins *prima facie*, le Tribunal ne voit rien dans le texte qui limiterait l'effet de l'article à cet élément.

[21] Même si nous reconnaissons que cet article crée une exception à la règle contre le oui-dire, son rôle n'est pas nécessairement limité à cette mission. Il faut appliquer le libellé de la disposition et ça stipule que la déclaration « peut être admise à titre de témoignage ». Or, le témoignage sert souvent à tester la crédibilité et la bonne foi d'un témoin et des personnes qu'il représente. Il sert également à la production de documents, laquelle en établit normalement leur authenticité.¹⁴

[22] Il va de soi qu'un document authentique peut contenir des fausses représentations, tout comme peut un témoignage admissible. Dans cette optique, rien n'empêche la production d'un document dans le but de démontrer la fausseté de son contenu ou la mauvaise foi de son auteur. C'est une des pierres angulaires de notre système adversarial.

[23] Dans les présents dossiers, nous époussetons des faits vieux de 40, 50, voire 60 ans. Limiter la possibilité de déposer des documents en l'absence d'un témoin aux dispositions de l'article 403 C.p.c. créerait un obstacle indu au droit de tester la partie adverse. Prenez l'exemple d'une dénégation de bonne foi de l'authenticité d'un document datant d'il y a 50 ans, mais qui paraît valide. Dans bien des cas, il n'existerait aucune autre porte pour le faire admettre en preuve que celle de l'article 2870. Ne pas permettre une telle utilisation serait inacceptable dans un régime de droit qui favorise la recherche de la vérité.

[24] Rien n'empêche donc cette option, sujette bien sûr aux conditions essentielles de son application.

[25] Pour toutes ces raisons, le Tribunal rejette la position des Compagnies à ce sujet et reconnaît que le dépôt en vertu de l'article 2870 peut avoir pour effet d'établir la simple authenticité d'un document et de permettre à une partie de s'en servir non pas nécessairement pour prouver la véracité de son contenu, mais également pour tout autre emploi légal, entre autres, pour en prouver la fausseté.

Les documents sans auteur

[26] Quelques réflexions s'imposent sur la situation où l'auteur précis n'est pas identifié, comme c'est le cas de plusieurs de ces 19 documents. Est-ce que l'absence de cette information empêche l'application de l'exception prévue à l'article 2870?

[27] Il semble que l'auteur Ducharme ne serait pas de cet avis, et cela, pour cause d'impossibilité. De plus, sur la question connexe de la probabilité qu'un témoin ne puisse

¹⁴ Dans ce sens, la présente situation se distingue de celui dont traite le juge Deschesne dans *Brochu v. Loto-Québec*, EYB 2009-161732 (C.S.), où il note aux paragraphes 55 et 56 que « le dépôt des documents uniquement pour établir leur existence et non pour faire une preuve de leur contenu est inadmissible en preuve pour motif de non-pertinence ... il est manifeste que cette preuve n'aurait aucune utilité parce qu'elle n'est pas susceptible d'établir l'existence du droit réclamé ».

apporter un éclaircissement utile quant au contenu du document, il favorise l'application de l'exception pour cause de déraisonnabilité.¹⁵

[28] Dans le contexte d'annotations faites par plusieurs personnes dans des dossiers hospitaliers, Ducharme écrit: « À notre avis, cette condition devrait être considérée comme remplie pour cause d'impossibilité d'assigner ces personnes comme témoins lorsque leur identité ne peut être établie, et comme déraisonnable de les faire comparaître lorsque, bien que leur identité soit connue, la nature des faits qu'elles ont consignés dans les documents rend improbable qu'elles aient pu en conserver un souvenir précis. Mais encore faut-il que ce fait soit établi lors de la demande d'autorisation de produire le document à titre de témoignage »¹⁶.

[29] Concernant l'impossibilité ou la déraisonnabilité d'appeler le déclarant comme témoin en adoptant le point de vue de Ducharme, le Tribunal ne voit pas nécessairement un obstacle du fait que le nom de l'auteur ne soit pas indiqué¹⁷.

¹⁵ Léo Ducharme, *Précis de la preuve*, 6^e édition (2005), Montréal, Wilson & Lafleur Ltée, paragraphe 1365, à la page 555.

¹⁶ *Ibidem*.

¹⁷ Ceci dit, le Tribunal est en total accord avec la décision de notre collègue Chantal Masse dans *Lefebvre v. Compagnie d'assurance Wawanesa*, EYB 2012-208378 (C.S.), où elle a refusé la production d'un rapport d'un enquêteur en incendie absent qui répète les dires d'un témoin oculaire d'un incident qui refuse de s'identifier. Nous ne voyons toutefois aucune ressemblance entre cette décision et celles requises ici.