SUPERIOR COURT
(Class Action Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

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

DATE : October 26, 2011

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. ("**JTI**")
and
IMPERIAL TOBACCO CANADA LTÉE ("**ITL**")
and
ROTHMANS, BENSON & HEDGES INC. ("**RBH**")
Defendants / Plaintiffs in Warranty (collectively: the "**Companies**")
v.
PROCUREUR GÉNÉRAL DU CANADA (the "**AGC**")
Defendant in Warranty

JUDGMENT ON DEFENDANTS' MOTION FOR AN ORDER STRIKING THE PLAINTIFFS' EXPERT REPORT OF CHRISTIAN BOURQUE OF LÉGER MARKETING

AND

JR1353

N° 500-06-000070-983

CÉCILIA LÉTOURNEAU
Plaintiff

v.

JTI-MACDONALD CORP.
and
IMPERIAL TOBACCO CANADA LTÉE
and
ROTHMANS, BENSON & HEDGES INC.
Defendants / Plaintiffs in Warranty

v.

PROCUREUR GÉNÉRAL DU CANADA
Defendant in Warranty

JUDGMENT ON DEFENDANTS' MOTION FOR AN ORDER STRIKING THE PLAINTIFFS' EXPERT REPORT OF CHRISTIAN BOURQUE OF LÉGER MARKETING

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[1] Plaintiffs have filed into evidence as rebuttal proof a report prepared by Mr. Christian Bourque of Léger Marketing (the "**Report**"). The Companies object to this report on five principal grounds:

a. Plaintiffs have the burden of proving lack of awareness as part of their case-in-chief;

b. Plaintiffs have known for years that it is their burden to prove lack of awareness;

c. The subject matter of the Report is not rebuttal of any Defence evidence filed;

d. The Report is not proper expert evidence;

e. The subject matter of the Report is irrelevant

[2] On this basis, the Companies seek the following conclusions:

STRIKE the report of Christian Bourque of Léger Marketing dated July 28, 2011;

SUBSIDIARILY, and at a minimum, **STRIKE** certain portions of the report of Christian Bourque of Léger Marketing, and, **ISSUE** appropriate orders allowing the Defendants time to respond to the evidence contained in the report of Christian Bourque of Léger Marketing dated July 28, 2011;

[3] The Plaintiffs counter the motion with the following arguments:

a. The motion is premature and cannot be decided until the Court has held a *voir-dire* and heard the expert on his qualifications;

b. The Report is proper rebuttal evidence;

c. Even if parts of the Report were inappropriate, which is denied, as long as other parts are appropriate, the report should be admitted into proof;

d. The main thrust of the Report is to review evidence that was made available to them only recently and well after they filed their declarations under article 274.1 C.C.P. ("**Rule 15**").

[4] Before dealing with the issues raised by the Companies, it is appropriate to remind the parties of the general procedural philosophy and practice adopted in these files and their application to the treatment of the "Rule 15's", aka, Declarations under Article 274.1 of the Code of Civil Procedure. This issue is of relevance not only to this motion but to the parallel motions brought by the Companies to exclude two other experts' reports[1].

[5] We doubt that anyone would fault us for saying that these files are of a very different nature from the typical civil court dossier. Volume of documents, duration of hearings, methods and timing of communication of documents, degree of case management, among others, all attest to the need for flexibility and ingenuity in the pre-trial management and we have tried to preach this sermon in a coherent and consistent way since assuming responsibility for these files nearly four years ago.

[6] In April 2010, at the Court's behest, the parties agreed to a "Timetable" to bring these cases to trial. In addition to setting out a number of *modi operandi* to be followed, the Timetable established target dates for the remaining pre-trial steps. As one would expect in a case of this magnitude, the parties all had trouble meeting their target dates. Nevertheless, due in our view to the fact that a schedule existed, the train managed to move inexorably forward towards the goal of starting the trial, even though the schedule was treated more "*à l'italienne*" than "*à la suisse*".

[7] In the Timetable, there is a precedent for what the Plaintiffs are attempting to do by filing the Report at this stage of the proceedings. At paragraph 14, it is foreseen that the Companies would be free to amend their experts' reports to take into account documents disclosed by the AGC and information from the examination of the AGC. This attitude is typical of the process followed in these files and the Plaintiffs submit that they are merely following the normal course.

[8] Moreover, the Court always made it known that, in the spirit of article 1045 C.C.P. and as long as a party was acting reasonably, we would not hold it rigidly to a target date or a particular procedural rule. We shall carry this attitude and process over to the questions we are dealing with now.

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1 In the same hearing, the Court heard all three motions to strike the reports of Christian Bourque, Robert Proctor and Joseph DiFranza.

A. THE BURDEN OF PROVING LACK OF AWARENESS

[9] The parties disagree over who has the burden of proving the lack of awareness of the danger of cigarettes and nicotine. The Companies say the general rules apply, putting the onus on the Plaintiffs, while the latter argue that the special rules set out in articles 1469 and 1473 shift the burden to the Companies.

[10] Since the Plaintiffs have the burden, argue the Companies, any expert report on that point should have been included in their initial series of reports. The only way they could file such a report after signing their Rule 15 is with the Court's permission. Since they did not respect that condition, the Report should be struck.

[11] Article 1473 reads as follows:

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

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

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

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

[12] This language supports Plaintiffs' argument as to what they have to prove in chief, as opposed to what the Companies have to prove in defence. In any event, the Report does not deal primarily with awareness, but includes other aspects that are relevant to these files, as discussed in further detail below. In light of all this, the Court should not dismiss the Report on the basis of this first argument.

B. PLAINTIFFS HAVE KNOWN FOR YEARS THAT THEY HAVE THIS BURDEN

[13] With respect, the Court has great difficulty understanding the point that ITL is trying to make here. What it does seize, however, is that the principal authority on which ITL relies, with reference to the complete text, i.e., including paragraph 375, goes directly against ITL's position.

[14] In his work entitled *Evidence*[2], Professor Anthony F. Sheppard writes:

> **375** The judge has a discretion to admit rebuttal evidence offered by a plaintiff if: (1) the evidence becomes relevant to the plaintiff's case as a result of defence evidence of new facts which the plaintiff could not reasonably be expected to have anticipated; (2) the evidence is offered to dispute a matter, the proof of which rested on the defendant; (3) the evidence is offered to contradict unforeseen facts brought out on cross-examination of a defence witness, or (4) the evidence is offered to contradict the report of a defence expert which the plaintiff received before trial.
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> **376** On the other hand, the judge should disallow rebuttal evidence if: (1) the evidence primarily confirms the case the plaintiff is required to make out in the first instance; (2) the evidence contradicts the evidence of the defence on a collateral issue; (3) the evidence contradicts irrelevant evidence of the defence, or (4) it would be unjust to admit it.

[15] Plaintiffs correctly point out that much of the Report is an analysis of surveys carried out by ITL on a monthly basis over a number of years, what are known as Continuing Marketing Assessments ("**CMA**"). The CMA's were divulged to the Plaintiffs only last December 13th, well after they filed their Rule 15 and the opinions comprising the first round of their experts' reports.

[16] As such, point #1 in the citation from Professor Sheppard's book, the case of new evidence, is certainly at play here and the Companies' second argument must also be rejected.

C. THE REPORT DOES NOT REBUT ANY DEFENCE EVIDENCE

[17] The Companies argue that, although the Plaintiffs state at paragraph 16 of their Plan of Argument that the Report purports to respond to the expert evidence of Messrs. Flaherty and Lacoursière, in fact, it does no such thing.

[18] That is perhaps true, but the Report certainly finds its justification on other points, as discussed elsewhere. Thus, even if the Court were to agree with this position, that would not be sufficient to justify striking the Report.

D. THE REPORT IS NOT PROPER EXPERT EVIDENCE

[19] The Companies accuse Mr. Bourque of speculation as to the intention behind the various surveys they, and especially ITL, commissioned, and it is true that he offers his opinion as to the likely objectives of these surveys.

[20] Assuming that Mr. Bourque is an expert in surveys, a fact that will only be established after the *voir-dire* on his qualifications that will take place at trial, the Court finds that such an expert would be a proper witness to opine on this point. The Companies

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2 A.F. Sheppard, *Evidence*, Revised Ed. (Toronto: Carswell, 1996) at para. 376.

will be able to counter this opinion both through factual proof and through their reply expert's report, which the Court will authorize for this Report.

[21] Consequently, the Report will not be struck on the basis of this argument.

E. THE SUBJECT MATTER IS IRRELEVANT

[22] The Companies argue that the subject matter of the Report is what the Companies knew, while the real issue is what the members of the class action groups knew. In arguing this, they do not seem to read the Report in the same way that the Plaintiffs - or the Court - do.

[23] The key impact of the Report is not so much in assessing what the Companies knew of the dangers of smoking and nicotine but, rather, what the Companies knew about what the public knew. This is an entirely different matter. It goes directly to the main issues of the case and assists the Plaintiffs in efforts to contradict certain statements of the Companies' experts. As well, proof of the Companies' awareness of the public's lack of awareness might well be relevant to the claim for punitive damages.

[24] Accordingly, this argument does not convince.

THE REQUEST TO FILE A RESPONSE TO THE REPORT

[25] As mentioned above, since the type of analysis done in the Report is "new" to the file, in that no previous expert opined on the matter, the Court will accede to the Companies' request to file a reply expert's report. At the hearing, ITL indicated that it would require two months to prepare such a report and the Plaintiffs did not object.

[26] Accordingly, the Court will authorize the Companies to file one (1) joint reply opinion to the Report, and this by December 30, 2011. The reply report must be limited to commenting on the Report and thus to the subject matter covered by Mr. Bourque in it.

BASED ON THESE REASONS, THE COURT:

[27] **GRANTS in part** the Companies' Motions for an Order Striking Plaintiffs' Expert Report of Christian Bourque of Léger Marketing;

[28] **AUTHORIZES** the Companies to file one (1) joint reply opinion by no later than December 30, 2011, such reply report to be limited to commenting on the expert report of Christian Bourque of Léger Marketing;

[29] **WITHOUT COSTS.**

BRIAN RIORDAN, J.S.C.

Hearing Date: October 18, 2011