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 DR. JOSEPH DI FRANZA

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 DR. JOSEPH DI FRANZA

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[1] The Plaintiffs have filed into evidence a report prepared by Dr. Joseph DiFranza (the "**Report**") whose stated purpose is "to read the opinions of the individuals that the defendant has offered as expert witnesses and to comment on their scientific accuracy". The "individuals" in question are five scientists and/or medical doctors: Messrs. Goumaniouk, O'Connor, Davies and Dixon and Ms. Bourget (collectively: the "**Five Experts**").

[2] The Companies object to the Report on four principal grounds:

a. The Report is improper because it presents a different concept of addiction[1] and different methods of assessing addiction in class members, issues that Plaintiffs bear the burden of proving;

b. The Report is improper because it represents a rebuttal of the rebuttals contained in the reports of the Experts;

c. The Report does not rebut any evidence that could not have been reasonably anticipated;

d. The Report presents unsupported rhetoric.

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[1] In the context of these files, the term "addiction" will always refer to addiction to nicotine unless otherwise specified or apparent from the context.

[3] On this basis the Companies seek the following conclusions:

STRIKE the report of Joseph R. DiFranza, MD, served August 25, 2011 from the Court record;

SUBSIDIARILY and at a minimum, **STRIKE** certain portions of the report of Joseph R. DiFranza, MD, served on August 25, 2011, and **ISSUE** all appropriate orders allowing the Defendants time to address and respond to the new evidence contained therein, including the right for Defendants to file expert reports in reply.

[4] 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**");

e. The state of science on the issue of nicotine addiction has evolved since they filed the two reports of Dr. Negrete and it is in the interest of justice and truth to allow them to make proof of the current state of knowledge.

[5] 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[2].

[6] 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.

[7] 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

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

move inexorably forward towards the goal of starting the trial, even though the schedule was treated more "*à l'italienne*" than "*à la suisse*".

[8] 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.

[9] 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.

A. THE REPORT PRESENTS A DIFFERENT CONCEPT OF ADDICTION

[10] Prior to the Companies' filing the reports of the Five Experts, the Plaintiffs filed three expert reports covering the question of addiction to nicotine: one by Dr. Juan Negrete dated October 23, 2006, a second by Dr. Negrete dated October 27, 2009, and one by Dr. André Castonguay dated February 12, 2002. It would thus appear that the Plaintiffs agree that they have the burden of proof with respect to questions relating to addiction among class members.

[11] Dr. Negrete deals with the task of assessing the existence of addiction in both his reports. He mentions the DSM-IV test in his 2006 report, the tool of preference for the Experts. He concludes, however, that the Fagerstrom Test for addiction is preferable, being "*l'instrument de dépistage qui a été utilise et validé le plus universellement jusqu'à date*" (at page 18).

[12] In his 2009 report, he talks for the first time of the addiction test known as the "Hooked on Nicotine Checklist" ("**HONC**"). This tool was developed by Dr. DiFranza some fifteen years ago, although it is to be presumed that its notoriety has increased over time. Dr. Negrete does not refer to the HONC in his first report.

[13] Even in 2009, he does not say much about HONC. His comments on it are limited to a short statement on page 3 that "(des) études de suivi auprès des enfants qui ont commencé à fumer autour de l'âge de 12 ans (with reference to an article by Dr. DiFranza of 2007), ont mis en évidence une certaine perte d'autonomie – définie comme la présence de n'importe quelle des manifestations dans la "Hooked on Nicotine Checklist" – dès les premières expériences avec la cigarette."

[14] In the Companies' view, the Report represents an effort by the Plaintiffs to move the goalposts with respect to the test of addiction. The Plaintiffs begrudgingly admit that it could be seen that way, but argue that it is necessary to consider the Report because scientific knowledge has evolved since the original Negrete reports and the Court should have the most up-to-date science possible.

[15] One problem with this position is that, on this basis, the need to update the opinion never ends. Theoretically, it would be necessary to file a new report on the day of each expert's testimony, and thereafter on a continuing basis during the period of deliberation. This obviously would be unworkable. But there is more. The argument that the Report is based on "new science" is not supported by the facts.

[16] For one thing, in spite of Dr. DiFranza's assurance at page 1 of the Report that "This review ... in some ways updates (Dr. Negrete's) account based on discoveries that have been made since his report was first filed", he does not identify which parts of the Report deal with these recent discoveries, and the text does not demystify the question.

[17] In the second paragraph of page 3, he uses terms such as "we now recognize the key features" and "it is now possible to diagnose ... much earlier than was possible previously", but does not inform as to the date at which that became possible, and the context gives no indication that these breakthroughs occurred only since 2009.

[18] As well, the HONC cannot be considered "new science" - either at the time the Report was filed in August 2011 or when Dr. Negrete filed his 2009 report. Dr. Negrete mentions the HONC, so it obviously formed part of the scientific literature in 2009. In spite of that, (a) Dr. Negrete did not change his opinion that the Fagerstrom Test is the preferable option and (b) the Plaintiffs did not choose to file a report by Dr. DiFranza for nearly two more years.

[19] The Companies submit that the Plaintiffs made a clear choice on the issue and they should have to swim - or sink - with it, particularly given that they responded to the Negrete opinion by several opinions of their own.

[20] In spite of the liberal attitude the Court prefers in these matters, this aspect weighs heavily against the Plaintiffs. That said, if this were the only obstacle to admitting the Report, the Court's decision might still have favoured inclusion. However, another lofty hurdle bars the way.

B. THE REPORT IS A REBUTTAL OF A REBUTTAL

[21] This argument is the *coup de grace* for the Report.

[22] Dr. DiFranza's mandate is clear. At page 5 he states that it is "to evaluate and comment on (the) scientific accuracy" of the opinions of the Five Experts. Although such a mandate is acceptable in a reply expert report, the road ends there. A party may not reply to a reply, which appears in large part to be the *raison d'être* of the Report.

[23] A major objective, if not the major objective, of the reports of the Five Experts is to reply to Dr. Negrete and Dr. Castonguay. They describe their mandates as follows:

- Dr. Alexander Goumeniouk: to consider whether the current state of the science in the realm of pharmacology is such as to justify the position taken by the plaintiff and Drs. Negrete and Castonguay that exposure to nicotine from cigarette smoking and any resulting activity in the brain is responsible for the smoking habit ...;

- Dr. John Davies: to comment on the notion of addiction as it relates to smoking ... also ... to comment on the report of Professor Juan Negrete, and on Professor Negrete's responses to supplementary question by Mr. Johnson (sic); he adds that "comments on the most significant points raised in these two documents are to be found throughout the text.";
- Dr. Kieron O'Connor: to provide commentary on Dr. Negrete's reply to Me Bruce Johnston, this being the sole purpose of one of the two reports prepared by Dr. O'Connor bearing the date of December 29, 2010.
- Dr. Michael Dixon: to review an expert report submitted in this case by Dr. André Castonguay and to compare his comments with my own research experience and knowledge of the published scientific literature on issues such as: ...;
- Dr. Dominique Bourget: to address various issues arising from the above class actions with respect to smoking, concepts of addiction and dependence, and the ability of people to make and act upon informed, voluntary and competent decisions; she refers to Dr. Negrete's reports at numerous places in hers.

[24] In fact, of the fifty pages in the Report, some 45 are taken up with commenting on and criticizing the reports of the Five Experts. Of the balance, most of it is taken up with a "preface" for the purpose of "(laying) a foundation for my critiques so that the court will have a clear picture of what the current state of our knowledge about nicotine addiction entails". There he mentions the HONC but does little else except to describe the nature of nicotine addiction in a general way.

[25] It is true that in his criticisms of the Five Experts' reports Dr. DiFranza defends the use of the HONC as a preferable tool to those chosen by the Five Experts, without ever completely describing it, but in doing so he is replying to their comments on Dr. Negrete and the choice of the Fagerstrom Test.

[26] It is also true that he does not limit himself solely to discussing the Five Experts' reports even in that section of the Report. His aim is wide and his comments are varied. The Companies also object to much of this portion of the Report and the Court discusses that argument below.

[27] As we noted above, it is not permissible for a party to produce an expert to reply to another expert's reply to its original expert's opinion. That appears to be the main focus of the Report. It is inadmissible.

C. THE REPORT IS NOT A PROPER REBUTTAL

[28] The Companies argue that it "is clear and obvious that the Plaintiffs could have anticipated, and did anticipate, the evidence presented by the Defence experts". Consequently, the Report should be rejected, since its content should have been included in the Plaintiffs' first series of opinions.

[29] That is perhaps so, but it would not, in itself, have convinced us to reject the Report.

D. THE REPORT PRESENTS UNSUPPORTED RHETORIC

[30] The Companies argue that much of the Report is inadmissible because Dr. DiFranza is opining on matters outside of his area of expertise, often encroaching on questions that are up to the Court to decide. In their Plan of Argument, the Companies submit:

> 38. Nevertheless, Dr. DiFranza offers opinion on subjects other than addiction and is plainly not in "rebuttal" of the reports of Defendants' addiction experts. He is also not qualified to offer such opinions.
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> 39. For example, Dr. DiFranza opines on cigarette machine testing, product design, and the knowledge and intentions of cigarette manufacturers with regard thereto. In addition to making unsupported statements such as, "It is more likely that the cigarette manufacturers were motivated by profit rather than benevolence," DiFranza Report at p. 45, Dr. DiFranza is not qualified to offer any testimony as to these issues.
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> 40. Dr. DiFranza also opines on pharmacological and psychological aspects of nicotine addiction, but he is neither a pharmacologist nor a psychologist. He is not a psychiatrist, yet he dismisses the DSM. He is not a pharmacologist, and yet he makes broad statements about how "nicotine performs a makeover on the brain." DiFranza Report at p. 4. Dr. DiFranza simply lacks the education and training to address the fundamental pharmacological and psychological components of nicotine addiction, rendering him unqualified to offer any expert testimony on such topics.
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> 41. In sum, Dr. DiFranza's report is not proper rebuttal, and it also contains unsupported and unsubstantiated views which are beyond any expertise he could have.

[31] The Court agrees. The Report is replete with statements that have nothing to do with nicotine addiction, his specialty, and that in too many cases represent his view of the merits of the case. Several of the many examples of this are the following:

- "... This misrepresents the complaint which asserts that cigarette manufacturers should be held responsible for their actions and inactions. The complaint does not seek absolution for the actions of smokers." (page 6, point 1)[3];
- "I assume that this is a strategic and intentional misrepresentation of the complaint since this same argument is repeated by the other defense experts." (page 6, point 12);
- "This is an example of how the doctor (Goumeniouk) applies an improper interpretation to a single study and feels he has disproven something that has been established through decades of research involving thousands of scientists." (page 22, point 13);
- Individuals like Dr. O'Connor and Dr. Bourget who make their living providing CBT do not want to admit that nicotine addiction is a brain disease because it undermines the scientific premise that people can be talked out of their addiction." (page 27, point 22)

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3 The Court noted at least ten objectionable opinions in pages 6 through 19, the section dealing with Dr. Bourget's opinion.

[32] This point, although bothersome for a judge, would not have convinced us to reject the Report. Were the Report to be admitted, we would likely have dealt with this in the context of the Report's probative value.

CONCLUSION

[33] For the reasons set out above, we shall grant the Companies' motion to strike the Report. That said, it does not bar the Plaintiffs from reacting to the reports of the Five Experts. As the Companies' counsel correctly pointed out at the hearing, those experts can be cross examined on many of the points that the Report criticizes and, in addition, Drs. Negrete and Castonguay would normally be allowed to comment on the opinions criticizing them in their examinations-in-chief.

[34] Finally, in the light of our rejection of the Report, it is not necessary to authorize a reply to it.

BASED ON THESE REASONS, THE COURT:

[35] **GRANTS** the Companies' Motion for an Order Striking the Plaintiffs' Expert Report of Dr. Joseph DiFranza;

[36] **STRIKES** from the Court record the report of Joseph R. DiFranza, MD, served on August 25, 2011;

[37] **WITHOUT COSTS.**

BRIAN RIORDAN, J.S.C.

Hearing Date: October 19, 2011