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 ROBERT N. PROCTOR

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.

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[1] Plaintiffs have filed into evidence as rebuttal proof a report prepared by Dr. Robert N. Proctor (the "**Report**") whose stated purpose is "to evaluate and comment on three expert reports submitted by historians hired by Canadian tobacco manufacturers" in these cases. The historians in question are Messrs. Lacoursière, Flaherty and Perrins (collectively: the "**Three Experts**"). At the hearing, the Companies modified the position set out in their motion to state that they had seven grounds on which the Report should be rejected:

a. The Report is not rebuttal;

b. The Report is not acceptable as expert evidence, being essentially a biased diatribe;

c. Where the Report does give expert evidence, much of it is outside Dr. Proctor's expertise;

d. Whether the Report represents expert testimony or not, it is disguised fact testimony having the objective of dumping a large number of documents into the file;

e. The Report is an unacceptable effort to lard the factual file with unproven documents;

f. The Report focuses on the situation in the United States while for all intents and purposes ignoring Canada;

g. The only fair and practical thing to do so late in the game is to ensure that the Defendants do not have to spend their time preparing to defend against Dr. Proctor's testimony.

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

STRIKE the report of Robert N. Proctor dated August 19, 2011;

SUBSIDIARILY, STRIKE the portions of the report of Robert N. Proctor dated August 19, 2011 that are not proper rebuttal evidence or that exceed the expertise of Dr. Proctor;

SUBSIDIARILY, ISSUE appropriate orders protecting Defendants' rights, including allowing Defendants time to respond to the new evidence contained in the report of Robert N. Proctor dated August 19, 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 Proctor Report were inappropriate, which is denied, as long as other parts are appropriate, the report should be admitted into proof;

d. The accusation of bias is not a valid reason for excluding the report, and the Court should deal with that in its analysis of the Report's probative value.

[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

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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.

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.

A. NOT PROPER REBUTTAL EVIDENCE

[9] On the basis that the Plaintiffs have the burden of proof on the issue of awareness by the class members of the dangers of cigarettes and nicotine, the Companies object to the Report's efforts to introduce a new opinion on awareness at this stage. Asserting that the Plaintiffs had the obligation to state their case on awareness from the outset, counsel argues that the only way in which the Plaintiffs could have introduced the Report now would have been through a motion to file a new expert's report under Rule 17, a step the Plaintiffs chose not to take.

[10] The Plaintiffs, on the other hand, argue that the special rules set out in articles 1469 and 1473 shift the burden to the Companies. 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)

[11] 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 detailed commentaries on the reports of the Three Experts. In light of all this, the Court should not dismiss the Report on this ground.

[12] The Companies raise another objection, submitting that, whoever has the burden of proof on awareness, Dr. Proctor does not even attempt to rebut the position of the Three Experts that the Canadian public was inundated with information about cigarettes over the class period. Whatever the accuracy of this position, it does not preclude another expert from questioning their methodology.

[13] While it is true that he does not deny the findings of the Three Experts on the wide-spread availability of information about cigarettes, Dr. Proctor criticizes their analysis for neglecting to take into consideration countervailing information and publicity, e.g., the "misinformation" that he accuses the Companies of circulating among the public. He attempts to fill that void in the overall picture.

[14] That is proper and necessary rebuttal and the Court should not dismiss the Report on this ground.

[15] Finally, the Companies also object to the Report's attempts to qualify their intentions concerning the divulgation to the public of information about the dangers of smoking, given that the Three Experts do not deal with the issue of intent. They might be right, or they might not.

[16] At first sight, one could be surprised to see an historian opining on this aspect, but that leads to the question of whether that is, in fact, part of the proper role of historians. That issue, defining the proper role of historians, is a topic that only a professional historian can cover and the venue for that is a *voir-dire*. At that time, opposing counsel will have the opportunity of cross-examining the expert and of making proof through their own experts, if they choose.

[17] Thus, the Plaintiffs' argument that the motion is premature makes good sense, but it might not resolve the issue completely. The Court will hear Dr. Proctor on this point at trial, however, even if we are not convinced that he, as an historian, is within his role to opine on intention, it is not a forgone conclusion that we would reject the Report completely for that reason. This aspect can be isolated from the other parts of the Report and the Court might well choose to deal with this defect as a matter of probative value.

[18] For all these reasons, the Court rejects this first argument of the Companies.

B. NOT PROPER EXPERT EVIDENCE – A BIASED DIATRIBE

[19] The Companies object to the Report's use of "improper inflammatory rhetoric" and "ranting" in its analysis of their activities. Dr. Proctor certainly is enthusiastic in his criticism of the tobacco industry, and he often uses rather colourful language in the Report, including expressions such as: "conspiracy", "gimmicks ", "product deception", "comparable to the Flat Earth Society", "hobnobbed", "the American denial network", "the 'no proof' playbook",

"deconstructive bluster", "academy of laggards", "a sham contrived by attorneys working for the world's deadliest business enterprise", "killing non-smoking spouses, babies, colleagues in the workplace, bystanders and other 'innocents'", "a stacked scientific deck", "this general fraud", "one of the more grave and deadly deceptions in the entirety of human history", "a cigarette suffused fantasy world", "the ocean of sport heroes", etc.

[20] To some extent, he is merely contradicting or pointing out the weaknesses in the positions of the Three Experts. This is permissible, provided that the opinion is not excluded for some other reason. In cross examination, he might well be challenged to justify some of his statements. If they are shown to be excessive or inaccurate, this will certainly undermine his credibility and the probative value of the Report, but that is all. This aspect is not sufficient to justify excluding the Report outright.

[21] The Companies also made much of US courts' criticisms of Dr. Proctor's "missionary" methods and unacceptable behaviour in cases argued there, and some of the statements by our American colleagues go quite far in condemning him.

[22] The Court will have to wait and see if he has learned his lesson. It is on the basis of his comportment in these files that the Court will judge that. His past behaviour in other courts is not grounds for rejecting his Report here.

C. OUTSIDE HIS AREA OF EXPERTISE

[23] This ground deals in large part with the question of his statements on the Companies' intentions. There are also his statements on cigarette design and curing techniques. We have previously dealt with the need to examine his areas of expertise via the *voir-dire* and that is a sufficient answer to this ground.

[24] Let us add, as well, that one can easily conceive that, before commenting on the reports of the Three Experts, Dr. Proctor would feel the need to provide some general background information. He describes the first part of the Report as being "... some historical background on the tobacco plant and cigarette manufacturing, including the crucial historical role of cigarette design in product deception ... the history of the discovery of tobacco hazards and the history of popular understanding (and ignorance) of cigarette hazards in Canada."

[25] Granted, but the Companies point out that this background represents more than two thirds of the total Report: 75 out of 107 pages of text! He only begins to comment on the reports of the Three Experts at page 75, and this for 32 pages - less than half the space used for background information.

[26] Just the same, the Court found the first part of the Report useful, even essential, to understanding many of the points made in the second part. That is not to deny that portions of it were perhaps not necessary. Nevertheless, adopting the reasoning of our colleague Prévost J. in *Kavanaght* v. *Ville de Montréal*[2], we must refuse to try to separate out the relevant parts from the irrelevant. The interests of justice require that the full Report be admitted, subject to our eventually refusing to consider parts of it.

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2 500-06-000087-995, le 14 septembre 2011.

[27] The Court wishes to comment on the issue of the Report's discussion of surveys. Counsel for the Companies objected repeatedly to Dr. Proctor's competency to use survey results in his analysis, arguing that only an expert in conducting surveys may properly comment on their results. This miscasts the issue.

[28] Although, as we indicated in our judgment of same date concerning the report of Christian Bourque, it requires an expert in surveying to opine on certain aspects of survey methodology and objectives, this does not extend to the ability to understand or apply the results of a survey. Any reasonably intelligent person should be able to do that.

[29] This flows from the practices of the Companies themselves. They commissioned the surveys to be carried out by experts, but it was their executives and employees who applied the knowledge garnered from them. The argument has no merit.

D. DISGUISED FACT TESTIMONY AND DOCUMENT DUMP

[30] Counsel for the Companies likened the Report to a Trojan Horse full of new documents that the Plaintiffs wish to introduce surreptitiously and that would have the result of greatly expanding the proof required. He hammered the point that the Court should not wait until the results of a *voir-dire* at trial to exclude the Report, because to allow it to stay in the file now would require the Companies to call many, many witnesses and file huge numbers of documents to rebut its erroneous statements. This is a novel argument that counsel, to his credit, managed to put forth with a straight face but, alas, with no other authorities.

[31] The Court sees no obstacle to an expert referring to outside documents in explaining his opinion, subject to the right of cross examination and counter proof to challenge either the quality of the document or the expert's knowledge of it. In fact, this is the general rule. The Supreme Court of Canada confirms this:

> Lorsqu'on interroge un témoin expert sur d'autres opinions d'expert exprimés dans des études ou des livres, la procédure à suivre est de demander au témoin s'il connaît l'ouvrage. Dans la négative, ou si le témoin nie l'autorité de l'ouvrage, l'affaire en reste-là. Les avocats ne peuvent lire des extraits de l'ouvrage puisque ce serait les introduire en preuve. Dans l'affirmative, et si le témoin reconnaît l'autorité de l'ouvrage, alors il le confirme par son propre témoignage. Des extraits peuvent être lus au témoin, et dans la mesure où ils sont confirmés, ils deviennent une preuve dans l'affaire.[3]

[32] Consequently, although the testimony on the Report could be long should the Companies challenge every documentary reference in it, this argument does not justify excluding the Report.

[33] Moreover, it is clear that many of the "objectionable" points in the Report are matters that go to the heart of the actions and that the Companies will have to deal with in any event. It would thus appear that the many, many witnesses and huge numbers of

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3 R. c. Marquard, [1993] 4 S.C.R. 223, at page 251.

documents of which counsel warns are in the offing whether the Report is excluded or not.

E. ATTEMPT TO FILE UNPROVEN DOCUMENTS

[34] Although counsel identified this as a separate argument from the previous one, the Court does not see where the two differ. Accordingly, our reasoning and conclusion under the previous argument apply here.

F. EMPHASIS ON THE THE UNITED STATES AS OPPOSED TO CANADA

[35] Dr. Proctor often refers to events that occurred in the United States over the class action period: 1950-1998. This, according to the Companies, greatly changes the complexion of this case and forces them to defend the US case in addition to the Canadian one. Counsel estimates that if the Report remains in the file, he will have to call some 50 witnesses to counter its inaccuracies.

[36] The Court does not find this convincing.

[37] We have previously ruled that "industry knowledge" and information held by affiliates and subsidiaries is relevant to this file, so Dr. Proctor's reference to US and British sources is not problematic. It was always expected that the evidence would include consideration of research and development done in the US and UK and this is confirmed by the fact that the Companies' own experts make numerous references to events in those countries.

[38] Of course, the flow-through of knowledge does not include every action or decision taken in the UK or US, but the line is a difficult one to draw at this stage. From our current vantage point, it appears that the only workable method of sorting the wheat from the chaff is to do so on an item-by-item basis as the proof is being made. That is the approach we prefer and, accordingly, we shall not reject the Report on this ground.

G. TIME REQUIRED TO DEFEND AGAINST THE REPORT

[39] Based on the above reasoning, the Court cannot agree with counsel that it is unfair and impractical for the Companies to have to deal with certain of the issues raised in the Report between now and the date of Dr. Proctor's testimony.

[40] We are some five months from the likely date when he will testify, so time is not a concern. As for the volume of evidence required, that merely follows the general rule in these files where well over fifteen million pages of documents have been exchanged among the parties, considering both the principal actions and the actions in warranty.

[41] There is no justification for rejecting the Report on this ground.

THE REQUEST TO FILE A REPLY TO THE REPORT

[42] As other counsel, both for the Plaintiffs and for the Companies, correctly point out, experts can be cross examined on all the points in their reports and, in addition, opposing

experts would normally be allowed to comment on those opinions at trial. This greatly lessens the need for a reply report to the Report.

[43] Moreover, the Companies object to experts filing replies to other experts' replies and the Court agreed with them on this point when it excluded the opinion of Dr. DiFranza.

[44] In light of this, to allow a reply report to the Report would be both unnecessary and improper.

BASED ON THESE REASONS, THE COURT:

[45] **DISMISSES** the Companies' Motions for an Order Striking the Plaintiffs' Expert Report of Dr. Robert N. Proctor;

[46] **WITHOUT COSTS.**

BRIAN RIORDAN, J.S.C.

Hearing Date: October 18 and 19, 2011