SUPERIOR COURT
(Class Action Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

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

DATE : May 15, 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**")

AND

N° 500-06-000070-983

CÉCILIA LÉTOURNEAU
Plaintiff
v.

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

CASE MANAGEMENT RULING
ON THE COMPANIES' PROPOSED TRIAL SCHEDULE

JR1353

INTRODUCTION

[1] Article 4.1 of the Code of Civil Procedure imposes duties both on the parties to a case and on the Court. Concerning the parties, they must "refrain from ... behaving in an excessive or unreasonable manner, contrary to the requirements of good faith". As for the Court, it must see to the orderly progress of the proceedings and intervene to ensure proper management of the case.

[2] As well, in the context of a class action such as these, article 1045 C.C.P. provides additional powers to the Court, while indirectly imposing additional duties on it:

Art 1045. The court may, at any stage of the proceedings in a class action, prescribe measures designed to hasten their progress and to simplify the proof, if they do not prejudice a party or the members; ...

Art 1045. Le tribunal peut en tout temps au cours de la procédure relative à un recours collectif, prescrire des mesures susceptibles d'accélérer son déroulement et de simplifier la preuve si elles ne portent pas préjudice à une partie ou aux membres; ...

[3] These provisions set the context, the logic and the guidelines for the present case management ruling. Based on them, and on the duty to ensure that the resources of the justice system are used in a reasonable and proper manner, the Court must now intervene to avoid what it considers to be abuses on the part of the Companies, and especially ITL, in the planning and production of their evidence in defence.

THE PLAINTIFFS' CASE

[4] In assessing what is a reasonable forecast for the duration of the proof in defence, it is relevant to consider the circumstances of the Plaintiffs' proof. In that regard, the 134 hearing days taken by them, including motions, requires a closer look. Several factors should make the Companies' proof easier than that of the Plaintiffs. As well, several other factors complicated the Plaintiffs' case and extended the time they required compared to what normally would have been necessary.

[5] To start with, the fact that the proof in demand is now closed will facilitate the Companies' task compared to that of the Plaintiffs, who have the burden of proof. Knowing the case to which they must respond will assist the Companies in focusing their efforts and streamlining the evidence they need to adduce.

[6] As for complicating factors faced by the Plaintiffs, one important one was the fact that the great majority of Plaintiffs' witnesses were, by necessity, long-time employees of the Companies, people who were also listed as defence witnesses. Not only can it be presumed that such individuals were not totally sympathetic to the Plaintiffs' case, but it also prevented Plaintiffs' attorneys from speaking with them ahead of time in order to prepare their testimony. This multiplied the amount of time needed to conduct the examinations.

[7] The Companies, on the other hand, will face no such obstacles for many of their witnesses, although those coming from the Ministries of Health and Agriculture of Canada will not likely be as forthcoming as the Companies' former employees. But even there, the Companies' attorneys will not be precluded from speaking with those persons prior to their appearance in court. That is a big advantage over what the Plaintiffs faced.

[8] The Court recognizes that ITL complains that the Plaintiffs should be ordered to divulge more detail about the arguments they intend to make and to what in the exhibits they intend to refer and that the failure to do so forces it to adduce more evidence than perhaps necessary[1]. This rings hollow. The other Companies made no such motion and, in any event, given ITL's court experience in this and other related files across Canada, a plaintiff's evidence cannot hold any real surprises for it.

[9] With respect to documents, the Plaintiffs also faced challenges that were out of the ordinary. The Class Period in these files starts in 1950 and many of the persons involved in the industry over that period have either passed away, live abroad or are so old that they could not be called to testify. As a result, the only practical way to produce a large number of relevant documents was to proceed indirectly, i.e., through either article 403 of the *Code of Civil Procedure* or article 2870 of the *Civil Code*.

[10] That, alone, is time consuming enough, but the process was extended to excessive lengths by the fact that the Companies, particularly ITL, objected to essentially every one of the hundreds of document sought to be produced under these provisions. Although some of the objections were maintained, about 95% of them were dismissed and the process added about two weeks to the hearing.

[11] Finally, it is relevant to note that the Plaintiffs announce that they do not intend to object to the filing of the great majority of the documents the Companies wish to produce under article 2870 C.C.Q. In line with that, ITL admits that the Plaintiffs did not contest over 98% of the more than ten thousand documents it noticed to them under article 403 C.C.P. As well, it is also to be expected that the Plaintiffs will be open to making certain admissions on factual issues, something that the Companies ferociously refused.

[12] Based on these factors, the Court was expecting that the Companies' proof in defence would last about the same amount of time as the Plaintiffs', in the neighbourhood of 140 days. The Court also recognized and accepted that, should circumstances reasonably require it, additional time could always be given.

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[1] In its judgment of May 8, 2013 on ITL's Motion for Directions, the Court refused to grant most of ITL's requests in that regard.

THE JANUARY LIST

[13] On January 11th of this year, the Companies provided a "Preliminary and Partial List of Defence Witnesses" (the "**January List**"). This first stab at a witness schedule was not meant to be final or binding, but it was supposed to be, after ten months of trial, as good an estimate as possible of the names of their defence witnesses and the duration of each of their testimonies.

[14] The January List indicated 258 days of testimony, half for examination in chief and half for cross-examination: 129 days for each side. Not having been consulted on the point, the Plaintiffs indicated that they required only 49 days of cross-examination. As a result, the preliminary estimate was that 178 days of testimony would be required to present the Defences. In addition, there would likely be several additional days of case management and document production.

[15] There were several areas of concern in the January List. One example that has carried over to the present is ITL's scheduling of 60 days to examine 50 class members: 15 of the 60,000 or so members in the Blais class and 35 of over a million in Letourneau[2]. The questioning would target primarily causation, collective recovery and their proper membership in the class.

[16] Given the size of the classes, it is difficult to see how their testimony can be of much relevance on the collective level. Assuming, however, that some useful questions could be asked, surely a half day with each witness would be more than sufficient, if it is, in fact, necessary to examine that many of them.

[17] This is just one example in the January List, and there were others, of possible economies of time that could reasonably shorten the duration below the 178-day level.

[18] What a surprise it was, therefore, when on April 9th the Companies filed an updated list of witnesses and a Defence calendar (respectively: the "**April List**" and the "**Calendar**") foreseeing about 300 days of hearing, extending over some two and one-half years until mid-October 2015.

THE EXCESSES IN THE APRIL LIST AND CALENDAR

[19] After taking cognizance of the Calendar and the April List, the Court is convinced that ITL, in particular, is attempting to prolong this trial unnecessarily by many months through a series of excessive and unreasonable measures.

[20] We start by noting that, in addition to the 60 days devoted to the class members, it has scheduled 43 days of testimony for its other 16 fact witnesses, giving a total of

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2 RBH and JTM stated that they do not plan to call class members as witnesses.

103 days, excluding experts and government witnesses[3]. The fact that one of ITL's key witnesses, Dr. Massey, passed away last month is certainly a complicating factor, but it cannot add months to the trial.

[21] In comparison, JTM requires 21 days for its 10 witnesses and RBH a mere seven days for four witnesses. It is important also to note that many, if not most, of the Companies' fact witnesses have already been examined in the Plaintiffs' proof. Accordingly, the Court assumes that the Companies will not be asking them to repeat what they have already said.

[22] The days of testimony mentioned above do not include the testimony of witnesses from the federal government. The Companies raised the number of those witnesses from 21 in the January List to a possible 37 in the April List, with an indication that there could possibly be others. They schedule more than 70 court days for that testimony.

[23] It is not that the role of the federal government is irrelevant to these cases. Although the Companies' action in warranty has now been dismissed, the Court recognizes that the activities of Health and Agriculture Canada ("**Canada**") in the areas, *inter alia*, of advertising restrictions, notices to the public, light and mild cigarettes and new tobacco strains have pertinence to at least the question of punitive damages. The problem lies in the amount and type of evidence that the Companies appear intent on adducing.

[24] It is important to point out that there is little or no factual controversy surrounding Canada's actions in these areas. They were transparent, public and widely reported. Some evidence will have to be made on Canada's role but it defies reason to assert that it should require 70 days of hearing.

[25] It is surprising, for example, that ITL intends to call what appears to be every living high-level manager and scientist who worked at the Delhi Research Station from 1976 to the present to describe the research carried out there. The technical aspects of that research are only of background interest and there is no need to go into the scientific detail, for example, of the work on new tobacco strains. That, however, is what ITL apparently wants to do.

[26] The Court would have thought that ten days for each ministry would be more than ample. This estimate is supported by the Plaintiffs' assurance that they will cooperate with respect to document production, an exercise ITL points to in order to justify the length of certain witnesses.

[27] The management of the Companies' expert witnesses also bears mention.

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[3] But including "Leaf Purchasing", which is scheduled later, and adding Dr. Bilimoria, for an estimated two days.

[28] The Companies have filed a total of 18 experts' reports, with three more still to come. The April List indicates 79 days of hearing on this: some seven months of trial. This is in spite of the fact that, since the "Read-In Rule" applies, an expert's report that is accepted as an exhibit has its content taken as testimony. It is thus not necessary to have him repeat everything stated in the report and questioning can be limited to key points, to commenting on the proof already in the record and, eventually, to cross examination. It is therefore surprising to see some experts scheduled for six, seven or even eight days of examination.

[29] The nature of the experts' reports also appears excessive. Notwithstanding our admonitions to avoid duplication, the Companies not only duplicated reports on several subjects, but even "triplicated" them - or worse. For example:

a. On the question of addiction, the Companies filed four reports (Drs. Goumeniouk, O'Connor, Bourget and Davies)

b. On the question of public awareness, the Companies filed three expert reports (Drs. Lacoursière, Flaherty and Duch), plus a fourth (Dr. Perrins) on the awareness of the government and scientific and medical communities;

c. On epidemiology, the Companies filed three reports (Drs. Marais, Price and Mundt);

d. On "disease, individual assessment", JTM filed two reports (Drs. Barsky and Rice);

[30] During the four years of case management in these files, the Court respectfully requested that the Companies avoid this type of overlap and overkill. Our pleadings appear to have fallen on deaf ears. Today, the Court cannot but conclude that this manner of proceeding is excessive and unreasonable to the point of being abusive.

[31] In addition to the these major excesses, there are a number of other scheduling examples where the Companies' attitude does not respect the requirements of reasonableness and proportionality: unnecessary motions, unnecessary witnesses, failure to schedule hearing days, unreasonably long breaks at Christmas and in the summer and unnecessarily long duration for witnesses who have already testified in the first part of the trial.

[32] The Companies admitted that they drafted the April List and Calendar without consulting Plaintiffs' counsel. This is not proper planning in a trial such as this one, which will take over three years of court time. No thought was given to exploring the possibility of admissions or any other shortcuts in the proof. This is unacceptable.

THE COURT'S INTERVENTION

[33] On April 11, 2013, the Court advised the Companies that it was considering imposing a time limit on their defences, mentioning a possible range of 175 days, i.e., approximately 25% longer than what the Plaintiffs took. At that hearing, the Companies indicated that the April List and Calendar were, in essence, worst-case estimates and that, depending on how other elements of the proof went, they might not need all this time. That goes without saying, but that is no guaranty.

[34] One thing that must be said, however, is that a party has the obligation and duty to use the court's time in an efficient and conscientious manner. The courts are not the servants of individual litigants but, rather, of the system of justice. The Court is convinced that the Companies would not be respecting that duty, nor would the Court, were the April List and Calendar to be ratified. These schedules are excessive to the point of abuse of the system.

[35] As a result, we shall order the Companies to prepare a new trial calendar and witness list by May 31, 2013 that respect a total of 175 days of hearing, including both testimony and any interlocutory motions. There is precedent for such an order in the Chief Justice's decision imposing a time limit on the parties in the "Castor Holding"[4] file.

[36] The Court recognizes that the 175-day duration is really a target, albeit, we feel, a most feasible one. It is not set in stone. Adjustments will certainly be possible, depending on the circumstances. In the end, the Court will ensure that the Companies have a reasonable opportunity to present a full and proper defence.

THE TESTIMONY OF THE CLASS MEMBERS

[37] There is an additional scheduling issue that should be dealt with now: ITL's scheduling of the class members as the final witnesses for the defence.

[38] Past history in these files leads the Court to expect that there will be a number of objections as to the relevance of parts of the class members' evidence. Where such objections are maintained, past history also indicates that the decision will be appealed, a *de plano* right. In that event, given the proposed timing of this testimony, it would likely be necessary to suspend the trial until the appeals are decided. This would be intolerable. After 15 years, and by then 17, judgment must be rendered in these files.

[39] To avoid this pitfall, the Court will order that ITL conduct its examinations of class members starting in August of this year, immediately after the testimony of JTM's expert, Robert Perrins. In this manner, any appeals relating to their testimony will have

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[4] *Widdrington v. Wightman*, 2007 QCCS 6881.

the time to work their way through the Court of Appeal at a reasonable pace, without affecting the progress of the trial.

[40] This causes no real prejudice to any of the Companies. RBH complains that proceeding in this manner would create an undesirable gap in the presentation of the evidence in which it is interested. This might be true, but it is of no major consequence. Given that there are three co-defendants in these files with three different sets of facts to be adduced, several such gaps are inevitable. Moreover, as the schedule stands today, only one fact witness will have been heard prior to that date - for a total of three days.

DAY-TO-DAY SCHEDULING

[41] As mentioned earlier, the Court disagrees with the failure to schedule hearings on a number of juridical days. In a moment of inexplicable beneficence it begrudgingly acceded to RBH's urgings not to require hearings during the weeks of June 25, 2013 and January 6, 2014, subject to the undertaking "to make up for the June days at a later point". There remain, however, other dates for which there is no apparent reason not to schedule witnesses, i.e.:

a. June 10, 11, 12 and 13, 2013
b. June 17, 2013
c. December 4, 5 and 19, 2013
d. The weeks of January 13 and 20, 2014
e. April 7, 2014, unless that is Easter Monday
f. June 5, 2014
g. The weeks of August 18 and 25, 2014
h. October 16, 2014
i. If Defence not closed - December 17 & 18, 2014
j. If Defence not closed - March 31 + April 1 & 2, 2015

[42] The Court requests that the Companies either schedule witnesses for those dates in the new trial calendar or explain at hearing why these gaps in the testimony should be allowed. As well, we note that there will be no hearings on May 30, 2013 or October 17, 2013 because of the Divisional and Annual Meetings of the Superior Court.

BASED ON THESES REASONS, THE COURT:

[43] **LIMITS** the duration of the proof in defence to 175 days, including both testimony and any interlocutory motions;

[44] **ORDERS** the Companies to prepare a new trial calendar and witness list that respect a total of 175 days of hearing, including both testimony and any interlocutory motions;

[45] **ORDERS** that ITL conduct its examinations of class members starting in August 2013, immediately after the testimony of JTM's expert, Robert Perrins.

[46] **REQUESTS** the Companies to respond to the gaps in the day-to-day testimony, as explained in paragraph 42 of the present Ruling.

BRIAN RIORDAN, J.S.C.

Hearing Date: April 30, 2013