SUMMARY

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The judgment of the Court disposes of three appeals and an incidental appeal arising out of a judgment of the Superior Court for the District of Montreal (the Honourable Mr. Justice Brian Riordan), rendered on May 27, 2015 and corrected on June 9, 2015, in connection with two class actions known respectively as the Blais action and the Létourneau action, both of which were initiated in 1998.

The Blais action was brought on behalf of individuals who developed lung cancer, cancer of the larynx, the oropharynx or the hypopharynx or emphysema after having smoked specified quantities of cigarettes manufactured by the appellants Imperial Tobacco Canada Ltd. ("ITL"), Rothmans, Benson & Hedges ("RBH") and JTI-Macdonald Corp. ("JTI"). The Létourneau action was brought on behalf of individuals who developed an addiction to tobacco after having smoked cigarettes manufactured by the appellants. The two actions bear on the period from 1950 to 1998 (the "Class Period").

The judgment under appeal condemned the appellants to pay moral damages of $6,858,864,000 to members of the Blais action, as well as punitive damages in the amount of $90,000, with interest and the additional indemnity provided by law. In the Létourneau action, the judgment did not award moral damages but condemned the appellants to pay $131,000,000 in punitive damages, with interest and the additional indemnity. The appellants' liability was based on private law of general application (*Civil Code of Lower Canada* or "*C.C.L.C.*" and *Civil Code of Quebec* or "*C.C.Q.*"), the *Tobacco-related Damages and Health Care Costs Recovery Act* ("*T.R.D.A.*"), the *Charter of Human Rights and Freedoms* (the "*Charter*") and the *Consumer protection Act* (the "*C.P.A.*").

The appeals consider issues relating to the conditions for liability of manufacturers and the appellant's failure to satisfy their duty to inform; the apportionment of liability; causation; the applicability of the *C.P.A.* and the *Charter*; prescription; the availability of punitive damages and quantum thereof awarded at trial; the appropriate method of recovery; evidence and interlocutory judgments; the transfer of the obligations of Macdonald Tobacco inc. (MTI), and the destruction of documents by ITL. By their incidental appeal, the respondents asked for an increase of punitive damages in the Blais action in the event that the amount of compensatory damages the appellants were required to pay was decreased in the principal appeal.

Conditions of the civil liability of the manufacturers, duty to inform, apportionment of liability

The trial judge did not err in deciding the case on the basis of the general law of extra-contractual liability (*C.C.L.C.* and *C.C.Q.*), ss. 1 and 49 of the *Charter*, and ss. 219, 228 and 272 of the *C.P.A*. While he did err in the application of some of these rules, these mistakes were ultimately without impact on the appellants' liability. That being said, the trial judge was wrong not to have taken account of s. 53 *C.P.A.* This error, however, was inconsequential as s. 53 would only have provided additional support for his conclusions.

Confirming the trial judge findings in this regard, the Court concludes that the appellants, acting in a concerted manner, breached their duty to inform during the entire Class Period. Their breach was twofold: they failed to provide information or adequate information to users on the safety defect inherent in their products; and they participated in a campaign of disinformation by attacking the credibility of warnings, advice or explanations issued by others dealing with the dangers associated with smoking cigarettes. In this respect, however, the Court concludes that the trial judge erred by implying that the appellants committed two different faults based on distinct regimes of civil liability. Disinformation, like the failure to inform, is not excluded from the manufacturer's general obligation to inform. Moreover, contrary to what the trial judge suggested, a breach of a manufacturer's duty to inform cannot simultaneously give rise to the application of the regime for manufacturer's liability pursuant to articles 1468, 1469 and 1473 *C.C.Q.* (or, formerly, of the rules for such liability established by the jurisprudence) and that of articles 1053 *C.C.L.C.* and 1457 *C.C.Q*. The general regime for civil liability in article 1457 *C.C.Q*. is particularized for manufacturers in articles 1468, 1469 and 1473 *C.C.Q*.; similarly, the rules for manufacturer's liability were extrapolated from article 1053 *C.C.L.C.* under the former law.

The appellants have failed acquit their burden to establish that, at the relevant times, the members of the classes knew of the safety defect in cigarettes or were in a position to know of or foresee the potential harm to which they were exposed by smoking. Therefore, they cannot rely on the ground of exoneration found in the first paragraph of article 1473 *C.C.Q*. or its analogue in the previously applicable law and the equivalent rule in s. 53 *C.P.A.* As the trial judge mentioned, knowledge of the causal relationship between smoking cigarettes and the diseases in issue in the Blais action could not have been acquired before January 1, 1980. The Court is of the view that this date should coincide with the date at which knowledge of the addictive effect of smoking cigarettes relevant to the Létourneau action was established, March 1, 1996. Before that date, smokers were deprived of an essential element that would permit them to understand the risk associated with their use. The extent of knowledge required for a manufacturer to be exonerated is that which allows for the conclusion of assumption of risk. The fact that a victim knew that the use of the product was dangerous is insufficient; such a person must have freely made an informed choice to assume the risk, which pre-supposes a high degree of

knowledge of the danger of harm and of the risk that harm will occur, as well as the willingness to assume them.

Subject to paragraph 1 of article 1473 *C.C.Q.*, the application of which gives rise to complete exoneration of the manufacturer, paragraph 2 of article 1478 *C.C.Q.* contemplates shared liability between, on the one hand, a manufacturer called upon to answer for the safety defect in a product arising as a result of the breach of its duty to inform, and, on the other, a user who commits a fault in the use of the product affected by the defect. The user, however, is not at fault if he or she fails to take precautions or misuses the product as the result of the manufacturer's failure to adequately satisfy its duty to inform. Courts must take care not to exonerate manufacturers because users have apparently made improper use of the product when, in point of fact, the product itself suffers from a security defect that results from a breach of the manufacturer's duty to inform.

In the case at bar, the trial judge attributed partial liability to members of the Blais class who began smoking less than four years before January 1, 1980 and who, in the judge's view, should have stopped smoking at that date because they were not yet addicted to tobacco. One might well ask if those members of the Blais class had sufficiently knowledge of the security defect in cigarettes for fault to be imputed to them. However, given that the respondents did not appeal the trial judge's conclusion on this point, it has no impact on the outcome of the appeal and the Court refrains from deciding the matter.

"Conduct causation" (in French, "la causalité comportementale") is irrelevant to the civil liability regime of articles 1468, 1469 and 1473 *C.C.Q*, and was no more so under the regime for manufacturer's liability pursuant to art. 1053 *C.C.L.C.* or that of s. 53 *C.P.A.* The respondents thus did not have to prove that if the class members had been aware of the dangers associated with the use of tobacco, they would have decided not to smoke or to stop smoking, any more than they would have had to show that they began to smoke or continued smoking as a result of the appellants' conduct. That said, even if the respondents did not have that burden, they established this causation on a balance of probabilities.

Causation

For Quebec courts, proof of a causal connection requires the damage be shown as the logical, direct and immediate consequence of the fault. This generally rests on the application of what is referred to as the theory of adequate causation. *T.R.D.A.* facilitates the means of proving causation in certain kinds of litigation relating to tobacco. In this case, the trial judge correctly interpreted the law when he concluded that s. 15 *T.R.D.A.* allowed the respondents to establish causation (medical or, supposing that it is required, conduct causation) by epidemiological or statistical proof. Section 15 *T.R.D.A.* does not only contemplate proof of general causation as opposed to specific causation. The legislature's intention in adopting this measure was to permit causation to be established on a collective basis in a given population in order, at a minimum, to allow for an inference of general and individual causation, subject to refutation by

evidence to the contrary. No sufficient contrary evidence was introduced by the appellants. Significant evidence indeed allowed the trial judge to conclude that there were serious, precise and concordant presumptions to establish both medical and conduct causation, although the Court is of the view that the latter element was superfluous in light of article 1468 *C.C.Q*. This evidence also allowed the judge to define tobacco addiction as he did.

The *C.P.A.*

The trial judge committed no reviewable error in concluding that the appellants were liable under ss. 219 and 228 *C.P.A.*, which prohibit a manufacturer from making false or misleading representations to a consumer or to suppress information of an important fact when making a representation, the sanction for which is a recourse under s. 272 *C.P.A.* The legislative scheme of the *C.P.A*. overlaps with the general law in this regard without, however, covering the claims of all class members inasmuch as certain prohibited practices under ss. 219 and 228 *C.P.A.* are limited to those that occurred after their coming into force on April 30, 1980. This issue, of which the trial judge was aware, has no bearing on the outcome of the appeals. The principle of full reparation required that class members be compensated, no more and no less than the harm suffered and, in this regard, the general law sufficed. Moreover, the trial judge did not err in awarding punitive damages pursuant to s. 272 *C.P.A*.

The *Charter*

The appellants breached the class members' rights to life, personal security and inviolability of the person in an unlawful manner that also constituted a civil fault. The duration of the breaches extended from the date of the coming into force of the *Charter* until the end of the class period. This conclusion is nevertheless unnecessary for compensation of members of the Blais action given the appellants' liability under the general law. In fact, the principles of the general law sufficed to justify the compensatory damages ordered by the trial judge in this case. The appellants' condemnation in this regard cannot be disturbed on appeal. Similarly, the trial judge's conclusion that the violation of class members' rights was intentional is also free from reviewable error. He was therefore correct to have condemned the appellants to pay punitive damages in both class actions not just pursuant to the *C.P.A.* but also under s. 49, para. 2 of the *Charter*.

Prescription

The effect of section 27 of the *T.R.D.A.* is that prescription is not a bar to the claim for compensatory damages by the members of the Blais class. The claims of those members diagnosed with cancer or emphysema between the date of the judgment authorizing the class action on February 21, 2005 and July 3, 2010 (3 years prior to the judgment amending the composition of the class) are also not prescribed since they benefit from the suspension and interruption of prescription (art. 2908 and art. 2897 *C.C.Q.*). With respect to punitive damages, the 3-year prescription of the general law (art. 2925 *C.C.Q.*) applies. Thus, in the Blais file, the trial judge did not err in concluding that claims having arisen as of November 20, 1995 were not prescribed. The cause of action for punitive

damages could not have arisen prior to the time each of these class members were diagnosed. Although the trial judge did not differentiate the applicable prescriptive periods depending on whether the *Charter*, the *C.P.A*. or both statutes were applicable, his conclusion is free from reviewable error since the claims under the *Charter* were sufficient to justify the punitive damages award of $90,000.

In the Létourneau file, the trial judge did not err in concluding that none of the claims for punitive damages was prescribed. The appellants have failed to show a reviewable error in the trial judge's conclusion establishing March 1, 1996 as the knowledge date of the addictive effect of smoking cigarettes, which corresponds to the date on which the Létourneau members' right of action arose. Even if one were to assume that this date was incorrect, it was incumbent on the appellants to show when the class members had knowledge of the constituent elements necessary to support their cause of action under the *C.P.A*. and the *Charter*. They did not do so. Even if the trial judge did not analyze the matter based on the different factors giving rise to liability, his conclusion here cannot be disturbed.

The attribution and quantum of punitive damages

The appellants have failed to show any error that would justify the intervention of the Court with respect to the availability of punitive damages and the quantum awarded at trial. The assessment of such damages is discretionary and is thus deserving of deference on appeal. The trial judge took account of article 1621 *C.C.Q*. as well as the relevant provisions of the *Charter* and the *C.P.A*. relating to the attribution of punitive damages. His measure of the rational connection between the amount of the condemnations and the purposes of dissuasion, prevention and denunciation is unreviewable in appeal. In light of the Court's conclusion with respect to compensatory damages, the respondents' incidental appeal soliciting an increase in the award of punitive damages is moot.

Interest and the additional indemnity (Blais action)

The respondents concede that the trial judge erred in this respect, and they have proposed an appropriate corrective solution. The payment of capital amounts arising out of diagnoses made before January 1, 1998 will bear interest and the additional indemnity as of the date of the service of the motion seeking authorization to institute the class actions. As for diagnoses made as of that date, they will bear interest and the additional indemnity as of December 31 in the year of such diagnosis.

Appropriate method of recovery

The trial judge did not err in ordering collective recovery in accordance with article 1031 of the former *Code of Civil Procedure*.

Interlocutory judgments and questions relating to evidence

Although this ground of appeal is moot, the Court exercises its discretion to consider the unique issues raised. The trial judge did not err when he admitted an internal publication of ITL into evidence and drew conclusions from it following his dismissal of an objection based on parliamentary privilege. He also did not err in referring to exhibits that had been admitted in virtue of the principle of the May 2, 2012 judgment and by accepting the production of the *Colucci Letter*.

Transfer of MTI's (the predecessor of JTM) obligations

This ground of appeal is dismissed. The trial judge's conclusion that in 1978 R.J. Reynolds Tobacco Company and MTI knew that customers of MTI had been harmed by the company's products, and that there was a basis to anticipate lawsuits in Canada, is supported by abundant and uncontradicted evidence.

Destruction of documents by ITL

In his analysis of ITL's liability for punitive damages, the trial judge could properly take account that the company mandated its attorneys to store and supervise the destruction of certain research reports. The trial judge correctly held that such a conclusion was necessary to dissuade others from adopting ITL's reprehensible conduct and for its lack of candour before the courts. The trial judge could also properly take account of ITL's conduct in this regard to establish the quantum of punitive damages for which it was liable.

Disposition

The Court's formal order allows the appeals in part, reflecting adjustments made to the judgment in first instance, with legal costs to the respondents.

The cross-appeal is dismissed, without legal costs.