COURT OF APPEALS

CANADA
PROVINCE OF QUEBEC
COURT CLERK OF
MONTREAL

N°: 500-09-024341-141
(500-17-052494-096)

DATE: September 28, 2015

CORAM: THE HONORABLE PAUL VÉZINA, J.C.A.
MANON SAVARD, J.C.A.
GENEVIÈVE MARCOTTE, J.C.A.

IMPERIAL TOBACCO CANADA LIMITED
JTI-MACDONALD CORP.
ROTHMANS, BENSON & HEDGES INC.
APPELLANTS – Plaintiffs

v.

ATTORNEY-GENERAL OF QUEBEC
RESPONDENT– Defendant

ORDER

---

[1] The appellants are filing an appeal against a judgment handed down on March 5 2014, by the Honorable Robert Mongeon of the Superior District Court of Montréal, which rejects their amended motion for a declaratory judgment to have the *Law for the recovery of costs of health care and damages and interest associated with tobacco* declared unconstitutional, on the grounds that it contravenes the Canadian Charter of Rights and Freedoms, and the Quebec Charter of Human Rights and Freedoms.

[2] For the reasons set forth by Judge Marcotte, to which Judges Vézina and Savard, subscribe, **THE COURT:**

[3] **DISMISSES** the appeal, with costs.

PAUL VÉZINA, J.C.A.

MANON SAVARD, J.C.A.

GENEVIÈVE MARCOTTE, J.C.A.

M^e^ Éric Préfontaine
M^e^ Julien Morissette
OSLER, HOSKIN & HARCOURT S.E.N.C.R.L./S.R.L.
For the appellant Imperial Tobacco Canada Limited

M^e^ François Grondin
M^e^ Patrick Plante
BORDEN LADNER GERVAIS, S.E.N.C.R.L., S.R.L.
For the appellant JTI-Macdonald Corp.

M^e^ Simon V. Potter, Ad. E.
M^e^ Pierre-Jérôme Bouchard
MCCARTHY TÉTRAULT, S.E.N.C.R.L., S.R.L.
For the appellant Rothmans, Benson & Hedges Inc.

M^e^ Benoit Belleau
M^e^ Francis Demers
M^e^ Marilène Boisvert
M^e^ Dana Pescarus
Bureau of Legal and Legislative Affairs (*Direction générale des affaires juridiques et législatives*)
BERNARD ROY (JUSTICE-QUÉBEC)
For the Respondent

Date of hearing: J u n e 18, 2015

REASONS OF JUDGE MARCOTTE

[4] The appellants are filing an appeal against a judgment handed down on March 5 2014, by the Honorable Robert Mongeon of the Superior District Court of Montréal, which rejects their amended motion for a declaratory judgment to have the *Law for the recovery of costs of health care and damages and interest associated with tobacco* (the "**Law**")[1] declared unconstitutional, on the grounds that it contravenes the Canadian Charter of Rights and Freedoms, and the Quebec Charter of Human Rights and Freedoms

CONTEXT

[5] The *Law*, which entered into force in June 2009, establishes specific rules to facilitate recovery by the government of Québec of the cost of health care associated with tobacco and attributable to the fault of one or several manufacturers of tobacco products. It modifies certain rules of the regime of civil liability with respect to evidence and prescription, and provides two means for taking action in court, on a collective or individual basis. It also extends the application of these new rules to individual and class actions filed against the manufacturers, and is inspired by the law adopted in British Colombia entitled *Tobacco Damages and Health Care Costs Recovery Act* (the "***British Columbia Law"***), whose Supreme Court has already recognized its constitutional validity in 2005, in *C.-B. v. Imperial Tobacco Canada Ltée*[2] ("**Imperial Tobacco"**).

[6] In 2012, basing itself on the *Law,* the government of Québec prosecuted the appellants for more than 60 billion dollars in reimbursement for the cost of health care provided for the population of Québec and associated with tobacco products.[3]

[7] Previously, in 1998, two class action suits had also been filed against the appellants. In June 2015, moreover, they were convicted by a judgment of the Superior Court to pay the members of the groups in question more than 16 billion dollars by way of moral and punitive damages, particularly through the application of the *Law.*[4] This judgment was also appealed. [5].

[8] The present appeal, however, is solely concerned with the constitutional validity of the *Law.*

JUDGMENT UPHELD

[9] In his judgment, the Judge of the lower court first sets forth in a detailed fashion the pertinent articles of the *Law* prior to stating the claims of the parties, with the appellants contending that the cumulative effect of the new rules

for the administration of evidence and prescription set forth therein violate their fundamental rights protected by Articles 6 and 23 of the *Quebec Charter of Human Rights and Freedoms* (the "***Quebec Charter"***)[6] and seek an unfair advantage for the government and other beneficiaries.

[10] He then refers to the *Imperial Tobacco* order. In his opinion, the judgment in question, which recognizes the constitutional validity of the *British Columbia Law*, "has thus removed any possible grounds for the inoperability of a similar law (if not identical on a number of points) in the light of Canadian constitutional law," and this, even if the order does not address "the specificity of the Quebec Charter *of Human Rights and Freedoms."*

[11] Also, although he states that his analysis will be confined to a single angle of the Quebec Charter,[7] he first goes over the principles established in the Imperial Tobacco order, which , in his opinion, settles the assorted problems at issue here, even if Articles 6 and 23 of the Quebec Charter are not specifically addressed. He insists on the analysis made by the Supreme Court of the issues of judicial independence and the primacy of the law, which are fully applicable, in his view.

[12] He notes that the Supreme Court dismissed the argument of the appellants that the *Law of British Columbia* takes away from the courts in whole or in part their "free will" because of the assumptions that it stipulates, and the restrictions that it imposes on the courts in terms of access to certain pertinent facts (by making access impossible to files of patients for the purpose of ascertaining the statistical basis, with a view to establishing the amount of health expenditures).

[13] He reviews the following sentiments of Judge Major when he dismisses the claims of the manufacturers with regard to the unfair and illogical character of specific rules set forth by the *British Columbia Law:*

> [49] The rules set forth by the Law that the appellants are contesting are not as unfair or illogical as the latter contend. They appear to reflect legitimate concerns for the public interest on the part of the legislature of British Columbia concerning the systemic advantages benefiting the manufacturers of tobacco products when complaints concerning the harmful effects of tobacco are submitted to the courts by individual common law actions for civil liability. However this is not the issue. It is not a matter of determining whether the rules set forth in the law are unfair or illogical, nor whether they differ from those governing common law civil liability actions, but rather whether they interfere with the jurisdictional function of the courts and hence, with the independence of the judiciary.[8]

[14] He also cites passages addressing the role of the courts in the interpretation and application of the law, both procedural as well as substantive, their participation in the evolution of the law and underscore that the legislator can define the law as he wishes, within the constraints of the Constitution. He recalls, in this regard, the fact that it is not up to the

Courts to call into question the choices of the legislator, or only to apply laws that he approves of, in the light of the teachings of the Supreme Court in its order *Wells v. Terre-Neuve.*[9]

[15] He also discusses the following passage of the reasoning of Judge Major concerning the modification of the rules of civil procedure and of evidence:

> [55] […] The fact that the Law shifts certain burdens of proof, or that it limits compellability with regard to information that the appellants deem pertinent, does not in any way pose an obstacle, either in appearance or in reality, to the jurisdictional function of the court, or to any of the essential conditions for judicial independence. Judicial independence can adapt to the introduction of innovative rules of civil procedure and evidence.[10]

[16] He concludes that the fact of modifying through one law the traditional rules bearing on the management of evidence does not mean that one is "automatically encroaching" upon the independence of the courts. He emphasizes, moreover, that in the case in point, Article 13 of the *Law*, which eliminates the need to identify beneficiaries, to prove the cause of the illness or the real cost of health care relating to a given beneficiary, is subject to Article 14. Now then, this latter Article allows parties being prosecuted to demand "statistically significant samples" to the satisfaction of the parties and the court. As he sees it, this provides an opening to contradictory evidence by experts on the reliability of the data on which the courts will retain all of their jurisdictional and discretionary Independence.[11]

[17] The Judge of the lower court also emphasizes that the Imperial Tobacco order addresses the notion of a fair trial in civil matters in the framework of his analysis of the notion of primacy of the law. He specifies in paragraph 104 of his judgment:

> [104] Thus we see that the juridical principle whereby the notion of a fair trial in civil matters should comprise part of the notion of the primacy of the law is far from being removed from the reflection and decision of Judge Major. In this, without necessarily invoking Article 23 of the Quebec Charter, he is not overlooking its guiding principles.

[18] He discusses passages in the judgment that dispense with the argument associated with the necessarily prospective and general character of laws, by signaling that the Supreme Court has already recognized that a law can be retrospective or retroactive, as well as serving to overturn well-established expectations in a manner that might appear unfair, without however being unconstitutional.[12]

[19] He also addresses the argument regarding the unjust character of legislative modifications that target one industry in particular and reduce its capacity to successfully uphold its position, by invoking the passage of the judgment in which Judge Major underscores the fact that the Supreme Court has already recognized the constitutionality of such modifications.[13]

[20] He concludes, moreover, that the Supreme Court has definitively settled the debate over the right to a fair trial in civil matters in paragraph 76 of the order which he cites:

> [76] Furthermore, the concept that the appellants have developed of the nature of a "fair" civil trial seems, to a considerable extent, to recapitulate the content of the traditional rules of civil procedure and evidence. As ought to be apparent from the analysis concerning judicial independence, there is no such thing as a constitutional right to a civil trial governed by such rules. Furthermore, the new rules are not necessarily unjust. Indeed, tobacco manufacturers prosecuted in the application of the Law will undergo a fair civil trial, in accordance with the meaning habitually ascribed to this concept: they have a right to a public hearing, before an independent and impartial tribunal, and they can challenge the claims of the plaintiff and produce elements of evidence in their defense. The tribunal will only rule on their liability upon the conclusion of the hearing, basing itself exclusively on its interpretation of the law that it applies to its conclusions of fact. The fact that the defendants should consider the law (hereinafter the "Law") is unjust, or that the rules of procedure that it sets forth are new, does not make their trial unfair.
>
> [Underlining added by the Judge of the lower court]

[21] In light of this passage, he determines that, even if the *Canadian Charter* and Canadian constitutional law do not expressly stipulate a guarantee of procedural fairness for civil trials as the Quebec Charter does, the concept of a fair civil trial is inherent to Canadian law. Also, in his opinion, to the extent that the Supreme Court has already recognized the validity of the *British Columbia Law*, it must necessarily conclude that the Law does not deprive the appellants of their right to a fair trial and that it is constitutionally valid.

[22] Having said this, he proceeds nonetheless to an analysis of the arguments raised by the appellants based on the Quebec Charter in order to determine whether they can lead to another result and conclude that the *Law* does not further contravene the Quebec Charter.

[23] In this regard he refers first to the jurisprudence that recognizes that the protection granted on the basis of Article 23 of the Quebec Charter has more to do with procedural rights than with "substantial" rights. According to him, the appellants have not managed to demonstrate that the *Law* contravened this article, that is moreover similar to Article 2e) of the *Canadian Bill of Rights*[14], which does not offer to the justices anything other than procedural guarantees.

[24] He also refuses to recognize that Article 23 of the Quebec Charter offers a protection that would go against a new law or a legislative change, and that could change the existing law or else that it would threaten to paralyze the legislative system.

[25] He cites the jurisprudence of the Court which confirms that Article 23 of the Quebec Charter makes constitutional, in both penal and civil terms, the right to natural justice consisting of 1) the right to a decision handed down by an independent tribunal and 2) the right to be heard, and that this Article guarantees certain procedural protections, rather than a protection against the application of provisions of substantive law.[15]

[26] He reiterates the sentiments of Chief Judge McLachlin (dissenting on the merits) in the order *Régie des rentes du Québec v. Canada Bread Company*[16] handed down in 2013, which confirms the validity of a law with retroactive scope, as long as the legislator has clearly expressed such scope:

> [53] It is well settled that a law can be retroactive if the legislator has clearly expressed this intention in the law. Accordingly, the legislator may, on enunciating the provisions applicable to a pending case, modify the outcome of a lawsuit. As the Court of Appeals of British Columbia put it in *Barbour v. University of British Columbia*, 2010 BCCA 63, 282 B.C.A.C. 270, authorization of appeal refused, [2010] 2 R.C.S. vi:
>
> [Translation of French translation] We believe that it is clear in Canada that the legislator can institute laws whose effect is to modify retroactively the law applicable to a lawsuit. Although the legislator may not interfere in the Court's role of settling lawsuits, he can amend the law that the Court must apply in the exercise of this function.
>
> (See also *British Columbia v. Imperial Tobacco Canada Ltd*, 2005 CSC 49, [2005] 2 R.C.S. 473, par. 69-72; Société canadienne de métaix [*sic*] Reynolds ltée
> v. Québec (Sous-ministre du Revenu), [2004] R.D.F.Q. 45 (C.A.), par. 16-17.)

[27] The Judge of the lower court also specifies that the appellants are basing themselves, among other things, on an isolated judgment of the Court of Québec in *Restaurant Brossard v. Québec (Sous-ministre du Revenu)*[17] which cannot be qualified as a precedent, since it dates from twenty years ago and has never been taken up since then by the higher courts. He also notes that the appellants base themselves on decisions by European courts handed down in a legislative context that is at times sharply different, and is not necessarily binding on Canadian courts.

[28] Thus, according to him, even if the expression "full and equal" in Article 23 of the *Quebec Charter* appears in the *European Convention on Human Rights*, [18] it must nevertheless be interpreted in the light of Canadian law. As the Court of Appeals has already interpreted Article 23 and has not extended its application to substantive law even though it had the occasion to do so[19], there are no grounds, in his opinion, to do so in the case in point.

[29] The Judge similarly dismisses the argument raised in connection with Article 6 of the Quebec Charter by elimination of the extinctive prescription in three years that is otherwise applicable. He notes that this article, accompanied by an important limitation by the expression

"except insofar as provided by the law," confers upon the legislator the right to legislate to modify the rights of all persons or categories of persons to the free disposal and peaceful enjoyment of their property.

[30] Drawing on the sentiments of Judge Major in *Authorson v. Canada (Attorney General),*[20] concerning the protection offered by Article 2) of the *Canadian Bill of Rights* which is comparable to that of Article 6 in regard to expropriation, he concludes that no one enjoys any guarantee to the permanence of a law. Similar to *De Belleval v. Québec (City)*, he reiterates that there are no "acquired judicial rights" with respect to constitutional law.[21]

[31] In his opinion, the barrier of prescription is not immovable or permanent to the point that one cannot displace or remove it by a subsequent law. The legislator may thus intervene at any time to modify an existing law, even retroactively, in such a way as to apply it to pending cases, as long as he is acting within his competency, of course.

THE MATTER IN DISPUTE

[32] The appellants have raised three grounds for appeal, all tied exclusively to Article 23 of the Quebec Charter, which can be regrouped under a single, identical question:

- Was the first Judge mistaken to conclude that the *Law on the recovery of health care costs and damages and interest associated with tobacco* does not contravene Article 23 of the Quebec Charter?

ANALYSIS

[33] The appellants have reviewed their approach since the *Imperial Tobacco* case, so that they are not raising the argument involving judicial independence any longer. They are attacking, instead, the validity of the *Law* by basing themselves on the specificity of the Quebec Charter which was not considered in the *Imperial Tobacco* judgment, and denouncing the effects of the *Law* on their right to be heard in the setting of a fair trial. They also indicate that the *Law* is not identical to the *British Columbia Law* which, for its part, does not apply to the pending cases.

[34] The appellants contend more specifically that the Judge of the lower court mistakenly concluded that the *Law* does not contravene Article 23 of the Quebec Charter, since its provisions significantly affect their right to be heard, and to have a fair trial, as guaranteed by this article.

[35] In fact, according to the appellants, by the adoption of these rules, the legislator is attempting to extend to the courts the weight of determining their fault by sealing in advance the outcome of the action through particular rules that considerably restrict their right

to be heard and to avail themselves of a full and complete defense. These have the effect of transforming the trial into a travesty, and contravene Article 23 of the Quebec Charter, without the legislator having made use of the escape clause stipulated in Article 52 of the Quebec *Charter*.

[36] The appellants contend there is a disruption of the concept of a just and fair trial due to the cumulative effect of the particular rules set forth by the *Law*. They refer to the cumulative effects of assumptions (Articles 16 and 17), of the possibility of proving causality by statistical evidence (Article 15), and of the expenditure of identifying individual members of the population for whom the government presents its request without having to establish the cause of their illness, or prove the expenditures made for each person (Article 13), as well as the elimination of prescription (Article 27).

[37] According to them, the fact of the Supreme Court concluding in the Imperial Tobacco case that the right to a fair civil trial is not included in the unwritten constitutional principles does not mean however that this right is not guaranteed by the Quebec Charter. Thus, the sentiments of Judge Major in paragraph 76 of the Imperial Tobacco order to the effect that the *British Columbia Law* does not impede the holding of a fair trial must be considered as an *obiter dictum* and, in any case, cannot be applied in light of Article 23 of the Quebec Charter, which confers a broader scope on the concept of a fair trial than the common law does.

[38] In a subsidiary fashion, the appellants contend that the expression "full and equal" of Article 23 of the Quebec *Charter* should be interpreted in a broad and liberal fashion, so as to include the principle of "equality of arms" as defined by the European Court of Human Rights. As they see it, the first Judge mistakenly refused to consider this principle, as the sole decision from Quebec that is relevant to this issue: the *Restaurant Brossard* case cited previously.[2]

[39] Article 23 of the Quebec Charter, which at the start of Chapter 3, entitled "Judicial Rights," states the right to an impartial hearing by an independent tribunal in these terms:

23. Toute person a droit, en pleine égalité, à une audition publique et impartiale de sa cause par un independent tribunal et qui ne soit pas préjugé, qu'il s'agisse de la détermination de ses droits et obligations ou du bien-fondé de toute accusation portée contre elle.	**23.** Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.
Le tribunal peut toutefois ordonner le huis clos in l'intérêt de la morale ou de l'ordre public.	The tribunal may decide to sit in camera, however, in the interests of morality or public order.

[40] Although the greater part of the articles contained in Chapter 3 protect the rights of the accused, Article 23 expressly stipulates that it applies not only to civil but also to penal and criminal proceedings, by adding the proposition "that it is concerned with the determination of their rights and obligations." This is not the case for Article 11d) of the Canadian Charter which is only applicable to "all accused parties."[23]

[41] This being said, except for the observation that the wording of Article 23 of the Quebec Charter is inspired by international instruments, the legislative history of this provision does not allow us to draw precise conclusions with regard to the intention of the legislator on the subject.

[42] The Quebec Charter is a Quebec version of the fundamental rights and freedoms internationally recognized as constituting the rights of the individual. Its quasi-constitutional character is well established, as recently indicated by Judges Wagner and Côté of the Supreme Court in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier inc.*[24:]

> [30] Our Court has confirmed that, similar to the laws of other provinces with respect to individual rights, the Charter enjoys a particular status of a quasi-constitutional nature: Béliveau St-Jacques v. Fédération des employées et employés de services publics inc., [1996] 2 R.C.S. 345, p. 402, addressed in Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (Ville), 2000 CSC 27, [2000] 1 R.C.S. 665 ("Ville de Montréal"), par. 28; see also de Montigny v. Brossard (Succession), 2010 CSC 51, [2010] 3 R.C.S. 64, par. 45. Moreover, except as noted, its Arts. 1 to 38 take precedence over other laws of Quebec: Art. 52 of the Charter. Article 53 of the Charter specifies among other things that, "[i]f any uncertainty arises over the interpretation of a provision of the law, it is settled in the sense indicated by the Charter."

[43] The Quebec Charter thus restrains the power of the legislator of Quebec to legislate in a manner contrary to the rights that it sets forth, with an exception made for the express dispensation provided for in Article 52.[25] In its capacity as a quasi-constitutional law, it commands a broad and liberal interpretation in light of its aims and its context.[26] Its preamble specifies that it recognizes both equality before the law and equality in the law, as well as the right to human dignity. [27] To this are added the principles of interpretation that flow from the constitutional status of the Canadian Charter, which must be applied to the Quebec Charter, *mutatis mutandis*[28] and according to which one must give the words their popular sense, pursuant to the aims and context of the Canadian Charter, favoring its evolution along with that of society.[29]

[44] The Supreme Court has, for the first time, analyzed the scope of Article 23 of the Quebec Charter in the context of penal prosecution for various infractions of municipal regulations and the *Code of highway safety.*[30] Being called upon to determine whether Articles 608 and 608.1 of the *Law on cities and towns]*, which enabled part-time Judges in municipal courts to continue to practice law, contravening Article 11d) of the Canadian Charter *and* Article 23 of the Quebec Charter, the

majority of the Court, under the pen of Judge Gonthier, concluded that these articles did not go against judicial independence. The minority opinion, drafted by Judge Lamer, analyzing the issue instead from the standpoint of institutional impartiality, arrived at the same result. In both cases, the Supreme Court considered in parallel the guaranties offered on the basis of Articles 11d) of the Canadian Charter *and* 23 of the Quebec Charter, thus suggesting a common interpretation of the notions of independence and impartiality that are enshrined therein.

[45] A few years later, Judge Gonthier wrote, in the order *Ruffo v. Conseil de la magistrature,*[31] that the right to be judged by an impartial and independent tribunal comprises an integral part of the principles of fundamental justice indicated in Article 7 of the Canadian Charter. The Supreme Court then had to decide whether Articles 263 and 265 of the *Law on judiciary courts,* which allowed Judges of the Court of Québec to file a complaint against a Judge of their court, and assigned to the Chief Justice of the Court of Québec the role of President of the Council of the Magistracy, contravened Article 7 of the Canadian Charter and/or Article 23 of the Quebec Charter. Once again, Judge Gonthier opted for a comprehensive analysis of the question, judging that "the essence of the protections offered by the Canadian and Quebec *Charters* (Arts. 7 and 23, respectively) is the same."[32] The following year, he wrote the following in *2747-3174 Québec inc. v. Québec (Régie des permis d'alcool):*

> Article 23 of the Charter enshrines in the context of Quebec the right of any citizen to a public and impartial hearing of his case by an independent tribunal that is not prejudiced. Behind the variations of terminology lies hidden the recognition of classic principles relating to the impartiality and independence of justice.[33]

[46] In the *Charkaoui* order, the Supreme Court has just specified that Article 7 of the Canadian Charter does not require a particular type of proceeding, but a fair proceeding appropriate to the nature of the venue and the interests at issue, thus establishing a list of the constituent elements of such a proceeding:

> This basic principle exhibits numerous facets, including the right to a hearing. It requires that such hearing should take place *before an independent and impartial magistrate*, and that the *decision of the magistrate should be founded on the facts and on the law.* It entails the *right of each individual to know the evidence brought against him and the right of rebuttal.* The specific manner of complying with these requirements will vary according to the context. But to respect Art. 7, it is necessary to satisfy the essential aspects of each one of them. [34]
>
> [Emphasis in the original]

[47] While it must be allowed that the stakes in the *Charkaoui* order were very different from the stakes in the case before us, the fact remains that, in the Imperial Tobacco order, Judge Major defines a fair civil trial in a similar manner,[35] over and above the fact that the Supreme

Court has already recognized the common essence of the protections offered by Articles 7 and 23 of the Canadian and Quebec Charters with regard to independence and impartiality.[36]

[48] In the light of these orders, and considering that the *Law* of Quebec is practically identical to the *British Columbia Law*, the Judge of the lower court was correct to conclude that Judge Major's analysis of the principle of the independence of the judiciary in the Imperial Tobacco order fully applies here.

[49] The appellants contend that Article 23 of the Quebec Charter offers a guarantee of a fair trial whose terms go beyond the right to be judged by an impartial and independent tribunal, notably because of the words "full and equal."

[50] The jurisprudence of the Supreme Court however is not conclusive with regard to the scope of this article. That handed down by the Court of Appeals, for its part, consistently confirms that it is limited to a protection of a procedural nature, [37] as the Judge of the lower court also emphasizes in the judgment subject to challenge[38]. The latter reiterates in broad terms the jurisprudence emanating from this Court, which establishes that Article 23 of the Quebec Charter codifies the principles of natural justice commonly recognized in judiciary law and administrative law, notably, the full and equal right to a public hearing by an independent and impartial authority.[39]

[51] The appellants nevertheless fault the first Judge for relying unduly on the *Crane Canada* case,[40] since that was decided in an entirely different context. While it is true that this case concerned the validity of Article 396.1 of the *Code of civil procedure* which limits interviews prior to lawsuits of $25,000 and higher, and that the dispute hinged on the term "hearing," the passage cited by the Judge nonetheless perfectly sums up in my opinion the jurisprudential interpretation of Article 23 of the Quebec Charter*:*

> **16.** Article 13 of the Code of Civil Procedure establishes the principle of the public character of hearings. In both penal as well as civil terms, Article 23 of the Quebec Charter constitutionalizes the right to natural justice, whose constituents are: 1) the right to a decision handed down by an independent tribunal, and, 2) the right to be heard. This Article guarantees certain procedural protections, but it does not have the effect of creating a substantive law concerning a particular action. In principle, as Professors Brun and Tremblay write, Article 23 does not add anything to judicial or administrative law, except for the possibility of challenging specific legislative standards.[41]
>
> [Emphasis added]

[52] The appellants are thus mistaken, as I understand it, to claim that it is necessary to discard principles elaborated by the Court in this case. Nor are they right to maintain that the first Judge concludes the particular rules instituted by this *Law* cannot be contrary to Article 23 of the Quebec Charter because they are

of legislative origin. The fact of concluding that Article 23 only guarantees procedural rights simply signifies that the Quebec Charter does not prevent the modification of substantive rules of common law. His conclusion is in accordance with the principle of parliamentary sovereignty, which requires non-interference by the courts in legislative choices, except when the law is contrary to the Constitution[42].

Accordingly, the courts shall not intervene with respect to the procedural rights guaranteed by Article 23 of the Quebec Charter, except when the legislative provisions at issue are shown to be contrary to the principles of natural justice.

[53] What is the sense of the expression "full and equal" contained in Article 23?

[54] The appellants maintain that because of the aims of the Quebec Charter *and* the rules of the internal coherence of laws, the expression "full and equal" must be interpreted in such a way as to include the principle of equality of arms, an interpretation strengthened, in their opinion, by the external jurisprudence cited, particularly that of the European Court of Human Rights (the "**European Court"**) which treats the matter under the heading of "equality of arms."

[55] It must be recalled in this regard that even if the Quebec Charter was adopted in order to align Quebec law with international law with respect to human rights, nothing in the history of parliamentary work indicates any intention on the part of the legislator to give to Article 23 of the Quebec Charter the sense that the appellants ascribe to it. In the light of the parliamentary debates, neither the principle of equality of arms, nor the meaning of the words "full and equal" were the subject of discussion when the Quebec Charter was adopted.

[56] It is true that the legislative history of the Quebec Charter shows that it was adopted, among other reasons, to bring Québec into harmony with the international obligations set forth in the in the *Universal declaration of human rights* of 1948, and the *International covenant on civil and political rights* of 1966,[43] and that some of its expressions or some of its concepts reiterate those of the *Convention for the protection of human rights and fundamental freedoms.* However, even if these international instruments can be shown to be useful when the time comes to interpret the provisions of the Quebec Charter, considering, moreover, the similarity between Article 23 of the Quebec Charter *and* Article 10 of the *Universal declaration of human rights,*[44] the recourse to international instruments and to foreign law do not make it possible to uphold the interpretation de Article 23 of the Quebec Charter as the appellants propose, and which furthermore is at variance with that handed down by the jurisprudence of Quebec.

[57] On the one hand, the interpretation of the notion of "equality of arms" put forward by the appellants does not appear to be a faithful reflection of the state of the jurisprudence of international courts.

[58] Indeed, the appellants are claiming that equality of arms prevents any kind of legislative interference in the cases pending. Now then, this assertion must be qualified. First, the European Court recognizes unequivocally the principle whereby in civil matters, the legislative branch can regulate rights flowing from the laws in force by new provisions with retroactive scope. [45] Furthermore, what the State is prohibited from doing is to "reach a judgment" by legislative means in a case to which it is a party, contravening the fair character of the proceeding, except in the case of overriding reasons of the public interest.[46] Moreover, in cases between private parties, the European Court has judged that legislative interventions not justified by reasons of the public interest, and that have the effect of definitively settling retroactively the essence of pending litigation, and thus rendering pointless any continuation of the proceeding, were contrary to Article 6(1) of the *Convention for the protection of human rights and fundamental freedoms.*[47]

[59] On the other hand, here, contrary to what the appellants contend, the *Law* does not definitively and retroactively settle the essence of pending litigation placing them in opposition to the government. Furthermore, the *Law* does not definitively settle the dispute between parties. Furthermore, in light of Judge Major's sentiments in the Imperial Tobacco order,[48] here there appear to be sufficient overriding reasons in the public interest to demonstrate that legislative interference is justified.

[60] The appellants also claim that the jurisprudence of the European Court confirms that the act of modifying the rules of prescription constitutes an assault on procedural fairness. Once again, a qualification must be introduced, since the European Court has explicitly recognized the power of the legislator to establish different rules of prescription for different kinds of appeals.[49] What emerges from jurisprudence, is that the parties should receive fair treatment in terms of the deadlines for the proceeding, and a tribunal may not interpret or apply a law in such a way as to allow the State to shirk its obligation to respect the rules of prescription. It is for this reason that a deadline for prescription twenty times shorter than that allowed for the adverse party was judged unfair,[50] even for the suspension of a procedural deadline against only one of the two parties.[51]

[61] Finally, the appellants contend that a law that creates a crushing burden of proof, or that has the aim of giving an advantage to one of the parties is contrary to equality of arms. They do not, however, cite any jurisprudence that directly supports their contention in this regard.

[62] In the jurisprudence of the European Court, the notion of equality of arms is defined as one of the broadest elements of the principle of a fair trial that imposes the obligation to offer to each party a reasonable possibility of presenting their case – including their evidence – in conditions that do not place one of the parties in a situation of distinct disadvantage with respect to its adversary.[52] This jurisprudence does not, however, suggest that the legislator is prevented from modifying the general rules

of evidence, procedure and prescription in order to address a specific action such as the case before us.

[63] Returning in any case to the jurisprudence of Quebec, it should be noted that two judgments of the Superior Court, in my opinion, mistakenly mix together the words "full and equal" from Article 23 of the Quebec Charter with those of Article 10 of this same Charter which prohibit discrimination for a series of reasons.[53] These cases are based on an order of this Court in which Judge Tourigny wrote, parenthetically*:*

"I am far from certain that the words "full and equal" that this Article contains refer to a type of equality other than that indicated in Article 10 of the Quebec Charter and that makes reference to the reasons for the discrimination."[54]

[64] The authors Brun and Tremblay emphasize for their part that nothing in the text of Article 23 of the Quebec Charter connects the procedural fairness that it guarantees with the reasons for discrimination in Article 10.[55] They specify:

> **XII-7.111** – Article 23 of the Quebec Charter also addresses the right to equality, but without reference to Article 10. It states that all persons have the "full and equal " right to a public and impartial hearing of their case. With respect to judicial or quasi-judicial procedure, this provision seems, then, to protect against differences of treatment, without regard for the reasons for differentiation or the notion of discrimination in Article 10.
>
> **XII-7.112** – The possibility that Article 23 protects against differences of procedural treatment does not, however, mean that any differentiation of this nature would be judged as contrary to the right to equality of Article 23. Here, as for all rights, absolutism is bound to come up against the demands of reality; it is plausible that a criterion of "reasonability" should apply to procedural equality.[56]
>
> [Emphasis added; references omitted]

[65] Supposing that they are correct, Article 23 thus essentially aims to protect equality of procedural treatment, whether it is the right of two parties to a fair judicial or quasi-judicial proceeding, that is to say, a public hearing, an independent and impartial judge, a decision based on the facts and the law, and the possibility of knowing the evidence or accusations formulated against them and to respond to them.

[66] It remains possible at any time, moreover, for the legislator to amend the civil liability rules of common law.[57]

[67] The appellants find it shocking that the burden of proof for the government and other beneficiaries has been retroactively modified by the *Law,* even for cases that are pending. They find it equally unacceptable that the *Law* permits plaintiffs to prove causality based only on statistical information or epidemiological, sociological or other studies.

[68] In my opinion, they are not completely wrong. In fact, the *Law is* particularly severe towards them, and it has considerably lightened the burden of proof of the government and other beneficiaries of the *Law.* The legislator has chosen to target the tobacco products industry and to implement measures that one could characterize as "harsh" towards it as far as civil liability is concerned. Despite this observation, it remains established that it is not the role of this Court to call into question the choices made by the legislator or the appropriateness of a law. It is of this, moreover, that Judge Major reminds us in *Imperial Tobacco:*

> 51 The courts participate to a certain extent in the evolution of the law that it behooves them to implement. For example, thanks to the interpretation that they give the laws, the control that they exercise over administrative decisions and the evaluation they conduct of the constitutionality of the laws, they can broadly cause the law to go forward. They can also cause all previous decisions to evolve progressively— that is to say, the common law — in order to adapt the regulations of law so that they are in accordance "with social changes": R. v. Salituro, [1991] 3 R.C.S. 654 , p. 666. See also Hill v. Église de scientologie de Toronto, [1995] 2 R.C.S. 1130 , par. 91 and 92. But the role of the courts in the evolution of the law remains relatively limited. "[I]n a constitutional democracy such as ours, it is the legislator and not the courts that assume the primary responsibility with respect to reform of the law": Salituro, p. 670.
>
> 52 It follows that the role of the courts is not, as the appellants seem to be claiming, to apply only those laws that they approve of. Nor is it a matter for them to issue decisions simply in the light of what they (rather than the law) consider just or pertinent. Their role no longer consists of calling into question the reform of business law by the legislator, even if it introduces a new cause of action, or rules of procedure to govern it. Within the limits of the Constitution, the legislatures can define the law as seems proper to them. "Only voters can debate the wisdom and values of legislative decisions": Wells v. Terre-Neuve, [1999] 3 R.C.S. 199 , par. 59.
>
> [Emphasis added]

[69] In such circumstances, I cannot conclude that the modification of the traditional rules of civil liability, both in terms of evidence as well as prescription, has the effect of contravening Article 23 of the Quebec Charter nor that it prevents the appellants from presenting a full and complete defense in the sense of this article, even if I must admit that the *Law,* as adopted, facilitates the evidence that the government or other beneficiaries must present against the appellants, and deprives them of certain means of defense that were available to them up until now.

[70] Even so, the *Law* does not compromise the independence and impartiality of the tribunal that will possibly hear the appeal, nor does it prevent the decision of this tribunal from being founded on the facts and on the law as established by the legislator. Nor does it restrict the right of the appellants to know the evidence brought against them (which

will not include the medical files of all beneficiaries concerned, as mentioned previously) and to respond to it. It is enough to analyze in a more detailed fashion the scope of the challenged articles to become convinced of this.

[71] As far as the reversal of the burden of proof is concerned, it should be recalled that in civil cases, the use of assumptions is not contrary to the procedural fairness guaranteed by Article 23 of the Quebec Charter.[58] It is one of the means of evidence indicated by the *Civil code of Québec*[59], which sets forth several dozen legal assumptions[60] and leaves the serious, exact and corroborating assumptions of fact up to the discretion of the courts.[61]

[72] The *Law's* mechanism for arriving at an assumption in fact makes it possible to establish a rational causal link where it would otherwise be practically impossible to do so due to the ordinary rules of civil law, which require a link of causality for each beneficiary.[62] At all events, here, the reversal of the burden of proof is not total.

[73] Indeed, as a result of Article 16 of the *Law,* [63] the government first has the burden of demonstrating the fault of the manufacturers in addition to establishing that exposure to tobacco can cause or contribute to causing a disease or a general deterioration in a person's state of health. It must also demonstrate temporal corroboration between the fault ascribed to the manufacturers and the sale of their products.

[74] It is only once this evidence is established that the assumptions of Article 17 of the *Law* come into play.[64] This article provides that the tribunal shall presume 1) that the exposure of the beneficiaries to the category of tobacco products in question is due to the negligence of the manufacturers, and 2) that the exposure has caused the disease, the general deterioration in the state of health, or the risk of disease.

[75] Article 18[65] stipulates for its part that, when the assumptions are applied, the tribunal sets the cost of care provided counting from the date of the first negligence of the manufacturers. Article 19[66] sets forth in this regard the means for reversing the assumption, particularly when a defendant manages to prove that its negligence has not caused or contributed to causing the beneficiaries' exposure to the products targeted by the action or the disease or the general deterioration in the state of health. It makes it possible, furthermore, for the court to reduce as a result the amount of the cost of health care for which it will be held liable, or to adjust its portion of liability.

[76] In light of the foregoing, it becomes difficult to contend properly that the reversal of proof that the *Law* stipulates contravenes the right to a fair trial, insofar as it allows for assumptions that can be overturned, without mentioning that the Supreme Court has already recognized the legitimacy of the irrebutable assumption, particularly in its *Time* order.[67]

[77] As far as the administration of evidence is concerned, Article 13 of the *Law*[68] dispenses the government from identifying the individual members of the population on whose behalf it is filing its claim, along with having to establish the cause of the illness of each individual, and to prove the expenses incurred for each person. Its second paragraph also waives compulsory interviews with individuals on their state of health, or compelling them to produce medical records. However, in light of Article 14, manufacturers can ask the court to order the production of statistically significant samples from records of beneficiaries or of care provided, and to set the terms for the disclosure of the samples, providing the measures necessary to ensure protection of the identity of the beneficiaries in question.

[78] These articles are primarily intended to protect the privacy of beneficiaries receiving health care, rather than to deprive manufacturers of crucial elements of evidence. They do not restrict their right to peruse the evidence presented against them and to respond to it, since this information (which concerns individual members of the population) is not likely to be introduced into evidence by the government, whose action is non-subrogatory in character. Article 14 of the Law,[69] in any event, permits them to request statistically representative sampling.

[79] Article 15[70] also provides that the link of causality and the cost of health care claimed can be established through the use of statistical information, drawn from epidemiological, sociological or other studies. Through Article 25[71], these rules are applicable to any action for damages and interest for harm caused by tobacco as a result of a fault committed in Québec, by one or several manufacturers.[72]

[80] Judge Major recognized that the similar provisions in the *British Columbia Law* served to thwart the systemic advantages favoring manufacturers as a result of the traditional rules of civil liability. These views, although issued in a context of common law, can easily be transposed here.[73]

[81] In a similar fashion, Article 15 of the *Law* seeks to remedy the systemic inequality inherent to common law with respect to civil liability, since the recent judgment handed down in the context of the two class actions filed against manufacturers of tobacco products clearly illustrates that providing evidence of causality with the help of epidemiological or statistical information is not necessarily easy.[74]

[82] As far as prescription is concerned, contrary to what the appellants claim, Article 27 of the Law[75] does not have the effect of eliminating it altogether, even though these provisions do enable the government and other beneficiaries to invoke the fault of the manufacturers, whatever the date of their negligence may be.

[83] Article 27 of the *Law* contemplates three situations: (1) prescription cannot be a reason for dismissing any action brought within a window of three years, that is, from June 19, 2009 to June 19, 2012; (2) actions taken prior to the entry into force of the

Law and dismissed on grounds of prescription can be renewed up until June 19, 2012; and (3) these modifications to the rules of prescription apply to both actions for recovery of costs of health care associated with tobacco filed by the government, and to actions claiming damages and interest for reparation of harm associated with tobacco, whether it is an individual or class action.

[84] While it is true that prescription is a tool for legal certainty, which makes it possible to mitigate the consequences of the erosive effect of time on memory and the other elements of evidence, and to ensure the diligence of creditors, it is not an immutable institution. Jurisprudence consistently recognizes the power of the legislator to adopt retroactive laws of all sorts, even when this interferes with rights of litigation, to the extent that the retroactivity is explicit.[76]

[85] Here, in Article 31[77] of the *Law,* the legislator expressly stipulates the retroactive effect thereof in such a way as to confirm the retroactive scope of the modifications to the rules of prescriptions set forth in Article 27.

[86] In sum, parliamentary supremacy allows the legislator to modify the law as he wishes, as long as these modifications respect constitutional limits. Here, the appellants have not demonstrated in what way the elimination of prescription, or the other changes made in the rules of evidence and civil procedure, would contravene their right to a fair trial, even if, in fact, it does deprive them of some of their means for defense.

[87] For these reasons, I propose to dismiss the appeal, with expenses.

GENEVIÈVE MARCOTTE, J.C.A.

---

1 RLRQ, v. R-2.2.0.0.1.
2 [2005] 2 R.C.S. 473.
3 *Québec (Procureur général) v. Imperial Tobacco Canada Ltd. et al.* (dossier 500-17-072363-123).
4 *Létourneau v. JTI-MacDonald Corp.,* 2015 QCCS 2382.
5 *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé et al.*, 500-09-025385-154; *JTI-MacDonald Corp. v. Conseil québécois sur le tabac et la santé et al.*, 500-09-025386-152; *Rothmans, Benson & Hedges inc. v. Conseil québécois sur le tabac et la santé et al.*, 500-09-025387-150.
6 RLRQ, v. C-12.
7 Judgment of lower court, paragr. 43.
8 *Ibid.*, paragr. 95, citant *C.-B. v. Imperial Tobacco Canada Ltée,* préc. note 2.
9 [1999] 3 R.C.S. 199, as cited in *C.-B. v. Imperial Tobacco Canada Ltée, supra,* note 2, paragr. 52.
10 *Ibid.*, paragr. 55.

[11] Judgment of lower court, paragr. 97.

[12] *C.-B. v. Imperial Tobacco Canada Ltée*, *supra*, note 2, paragr. 70-71.

[13] *Ibid.,* paragr. 73-75.

[14] S.C. 1960, Chapter 77. Article 2[e]) is written as follows:

2. Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la Déclaration canadienne des droits, doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme	2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
[…]	[…]
e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations.	(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

[15] *Béliveau v. Comité de discipline du Barreau du Québec*, [1992] R.J.Q. 1822 (C.A.); *SCFP Local 2466 c. Ville de Jonquière*, [1996] R.J.Q. 621, p. 622; *Association des policiers provinciaux du Québec v. Sûreté du Québec*, 2007 QCCA 1087; *Centrale de l'enseignement du Québec v. Procureur général du Québec*, 1998 CanLII 12481 (C.A.) (authorization of appeal to the Supreme Court overturned: [1999] 3 R.C.S. 8).

[16] [2013] 3 R.C.S. 125.

[17] [1993] J.Q. 2906 (C.Q.).

[18] 4 novembre 1950, 213 RTNU 221, STE 5, Article 6(1). It should be noted, however, that the text of this article does not contain the expression "full and equal," as it appears in the text of this provision:

6(1). Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle. Le jugement doit être rendu publiquement, mais l'accès de la salle d'audience peut être interdit à la presse et au public pendant la totalité ou une partie du procès dans l'intérêt de la moralité, de l'ordre public ou de la sécurité nationale dans une société démocratique, lorsque les intérêts des mineurs ou la protection de la vie privée des parties au procès l'exigent, ou dans la mesure jugée strictement nécessaire par le tribunal, lorsque dans des circonstances spéciales la publicité serait de nature à porter atteinte aux intérêts de la justice.	6(1). In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[19] Judgment of lower court, paragr. 135.

[20] [2003] 2 R.C.S. 40.

[21] *De Belleval v. Québec (Ville de)*, 2012 QCCS 2668, paragr. 166-169.

[22] *Restaurant Brossard v. Québec (Sous-ministre du Revenu)*, *supra*, note 17.

[23] Article 11d) of the *Canadian Charter* is written as follows:

11. Tout inculpé a le droit:	11. Any person charged with an offence has the right
[…]	[…]
d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;	(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[24] *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier inc.*, 2015 CSC 39. See also *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (Ville),* [2000] 1 R.C.S. 665.

[25] Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel,* 6e éd., Cowansville, Éditions Yvon Blais, 2014, p. 982, notes XII 2.54-5.

Article 52 of the Quebec Charter reads as follows:

52. Aucune disposition d'une loi, même postérieure à la Charte, ne peut déroger aux articles 1 à 38, sauf dans la mesure prévue par ces articles, à moins que cette loi n'énonce expressément que cette disposition s'applique malgré la Charte.	52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

[26] See *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier inc.*, *supra*, note 24; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (Ville), supra*, note 24. See also *Béliveau St-Jacques v. Fédération des employées et des employés de services publics,* [1996] 2 R.C.S. 354, paragr. 42; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (Ville),* [2000] 1 R.C.S. 665, paragr. 27.

[27] "Considérant que tous les êtres humains sont égaux en valeur et en dignité et ont droit à une égale protection de la loi," "Whereas all human beings are equal in worth and dignity, and are entitled to equal protection of the law," sub-paragraph 2 of the preamble of the *Charter of Human Rights and Freedoms,* RLRQ, v. C-12.

[28] Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel,* 6e éd., Cowansville, Éditions Yvon Blais, 2014, p. 1007, note XII 3.37; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier inc.*, *supra*, note 24, paragr. 31; *Béliveau St-Jacques v. Fédération des employées et des employés de services publics,* [1996] 2 R.C.S. 354, paragr. 43. See, by analogy: *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 R.C.S. 145, p. 158; *Robichaud v. Canada (Conseil du Trésor)*, [1987] 2 R.C.S. 84.

[29] Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel,* 6e éd., Cowansville, Éditions Yvon Blais, 2014, pp. 999 to 1002, notes XII 3.12-19. See also: Pierre-André Coté, *Interprétation des lois,* 4e éd., Montréal, Éditions Thémis, 2009, p. 305, note 1013.

[30] *R. v. Lippé,* [1991] 2 R.C.S. 114.

[31] *Ruffo v. Conseil de la magistrature*, [1995] 4 R.C.S. 267.

[32] *Ibid.*, paragr. 46.

[33] *2747-3174 Québec inc v. Québec (Régie des permis d'alcool),* [1996] 3 R.C.S. 919, paragr. 17. In this case, the Supreme Court had to determiner whether the revocation of an alcohol permit as a result of the

Las on Alcohol Permits respected Article 23 of the Quebec Charter. The Supreme Court took the opportunity to clarify the scope of application of Article 23, particularly with regard to administrative agencies exercising a quasi-judicial function.

[34] *Charkaoui v. Canada (Citoyenneté et Immigration),* [2007] 1 R.C.S. 350, paragr. 20 and 29. This case had to do with the constitutional validity of the articles of the *Law on immigration and the protection of refugees* establishing a procedure enabling the Minister of Citizenship and Immigration and the Minister of Public Safety and Civil Protection to issue a certificate attesting that a foreigner or permanent resident is prohibited from the territory of Canada, particularly for reasons of security and leading to the detention of the person designated in the certificate. The certificate and detention were subject to the oversight of a Judge of the Federal Court called upon to rule on whether or not it was reasonable, without allowing a possibility of appeal or judicial review of the decision, and depriving the person designated by the certificate of access to all or part of the information on the strength of which the certificate was issued and the detention ordered.

[35] *C.-B. v. Imperial Tobacco Canada Ltée,* [2005] 2 R.C.S. 473, 2005 CSC 49, paragr. 76: "GThey have the right to a public hearing, beforfe an independent and impartial tribunal, and they can challenge the claims of the plaintiff and produce evidence in their defense."

[36] *Ruffo v. Conseil de la magistrature,* supra, note 31, paragr. 46.

[37] *Association des Policiers Provinciaux du Québec v. Surêté du Québec*, [2007] J.Q. no 8352, 2007 QCCA 1087, paragr. 109; *Centrale de l'enseignement du Québec v. Procureur Général du Québec*, [1998] J.Q. no 2914 (C.A.), paragr. 48 (authorization of appeal overturned by the Supreme Court, [1999] 3 R.C.S. p. VIII); *Syndicat de la fonction publique, Local 2466 v. Ville de Jonquière*, [1996]
R.D.J. 621 (C.A.), paragr. 9; *Béliveau v. Comité de discipline du Barreau du Québec*, [1992] R.J.Q. 1822 (C.A.), paragr. 11 (authorization of appeal overturned by the Supreme Court, [1993] 1 R.C.S. p. V). See also: *2760-5450 Québec Inc v. Québec*, [1996] J.Q. no 5753 (C.S.), paragr. 18-19.

[38] Judgment of lower court, paragr. 113.

[39] Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel,* 6e éd., Cowansville, Éditions Yvon Blais, 2014, pp. 999 to 1002, notes XII 3.12-19. See also: Pierre-André Coté, *Interprétation des lois,* 4e éd., Montréal, Éditions Thémis, 2009, p. 1201, note XII 6.142.

[40] *Crane Canada inc. v. Sécurité Nationale, compagnie d'assurances,* [2004] J.Q. no 13746 (C.A.).

[41] *Ibid.,* paragr. 16, citant *2747-3174 Québec inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 R.C.S. 919; *Océan Port Hotel Ltd. v. British Columbia (Général Manager Liquor Control and Licensing Branch)*, [2001] 2 R.C.S. 781; *Béliveau v. Comité de discipline du Barreau*, [1992] R.J.Q.
1822 (C.A.); *Syndicat canadien de la fonction publique v. Ville de Jonquière*, [1996] R.D.J. 621 (C.A.).

[42] *Wells v. Terre-Neuve*, [1999] 3 R.C.S. 199, paragr. 52-59.

[43] Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel,* 6e éd., Cowansville, Éditions Yvon Blais, 2014, p. 947, note XII 1.18.

[44] *Ibid.*, XII 1.21. See *Bruker v. Marcovitz,* [2007] 3 R.C.S. 607, 2007 CSC 54. In this order, the Supreme Court had to determine whether the prolonged refusal of a husband to grant a *get,* a Jewish divorce, to his wife, despite a commitment to do so, was justifiable on the grounds of freedom of religion. The Supreme Court drew, in particular, on the jurisprudence of certain foreign courts that had addressed similar issues.

[45] See *Cabourdin v. France,* Requête n° 60796/00, 11 avril 2006, paragr. 28 *et seq*.

[46] *National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society v. Royaume-Uni*, Requête n° 117/1996/736/933-935, 23 octobre 1997, paragr. 72; *Forrer-Niedenthal v. Allemagne*, Requête n° 47316/99, 20 février 2003, paragr. 64; *Ogis-Institut Stanislas, Ogec St. Pie X et Blanche de Castille et autres v. France*, Requêtes nos 42219/98, 54563/00, 27 mai 2004, paragr. 61-72; *EEG-Slachthuis Verbist v. Belgique*, Requête n° 60559/00, 10 novembre 2005.

[47] *Cabourdin v. France,* préc. note 46, paragr. 29-39; *Vezon v. France,* Requête n° 66018/01, 18 septembre 2006, paragr. 28-38; *Arras et autres v. Italie,* Requête n° 17972/07, 14 février 2012, paragr. 42-51.

[48] *C.-B. v. Imperial Tobacco Canada Ltd.,* préc. note 2, paragr. 49.

[49] *Dacia S.R.L. v. Moldova,* Requête n° 3052/04, 18 mars 2008, paragr. 76: "The Court does not call into question the power of the legislator to establish different limitation periods for different types of lawsuits." See also: *Varnima Corporation International S.A. v. Grèce,* Requête n° 48906/06, 28 mai 2009, paragr. 26.

[50] *Varnima Corporation International S.A. v. Grèce,* Requête n° 48906/06, 28 mai 2009, paragr. 26-35.

[51] *Platakou v. Grèce,* Requête n° 38460/97, 11 janvier 2001, paragr. 47-48; *Wynen et Centre hospitalier interrégional Edith-Cavell v. Belgique,* Requête n° 32576/96, 5 novembre 2002, paragr. 32.

[52] *Szabowicz v. Suède,* Requête n° 343-58, 30 juin 1959; *Dombo Beheer B.V. v. Pays-Bas,* Requête n° 14448/88, 27 octobre 1993, paragr. 33; *Gryaznov v. Russia,* Requête n° 19673/03, 12 juin 2012, paragr. 53-54; *Krčmář e v. the Czech Republic*, Requête n° 35376/97, 3 March 2000, paragr. 39; *Juričić v. Croatie*, Requête n° 58222/09, 26 juillet 2011, paragr. 72; *Batsanina v. Russia,* Requête n° 3932/02, 26 mai 2009, paragr. 22; *Steck Risch et autres v. Liechtenstein,* Requête n° 63151/00, 19 mai 2005, paragr. 54-55; *Walston (No. 1) v. Norvège,* Requête n° 37372/97, 3 juin 2003,
paragr. 56.

[53] *Gladstone v. Dankoff*, [2003] R.J.Q. 1534 (C.S.); *Lessard v. Québec (Sous-ministre du Revenu)*, 2007 R.J.Q. 999 (C.S.).

[54] *Droit de la famille – 1741,* [1993] J.Q. no 217 (C.A.) (authorization of appeal to the Supreme Court refused: [1993] 2 S.C.R. vi).

[55] Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel,* 6e éd., Cowansville, Éditions Yvon Blais, 2014, p.1201, note XII 6.143.

[56] *Ibid.*, p. 1256, notes XII 7.111-2.

[57] *Québec (Curateur public) v. Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 R.C.S. 211, paragr. 32.

[58] See *Droit de la famille* – 1741, [1993] R.J.Q. 647 (C.A.).

[59] See Articles 2811, 2846 and 2847 *C.c.Q.*

[60] See, by way of example, Articles 69, 80, 85, 127, 156, 194, 337, 387, 398, 423, 447, 460, 469, 487, 525, 561, 603, 628, 633, 647, 650, 651, 745, 746, 756, 849, 884, 887, 918, 921, 923, 925, 928, 934, 955, 1003, 1028, 1045, 1253, 1282, 1285, 1329, 1335, 1336, 1339, 1343, 1421, 1422, 1525, 1606, 1632, 1633, 1689, 1696, 1744, 1756, 1853, 1871, 1890, 1925, 1945, 1948, 1962, 1966, 1993, 2064, 2080, 2133, 2153, 2215, 2268, 2297, 2315, 2375, 2428, 2448, 2467, 2512, 2550, 2562, 2624, 2805, 2813, 2830, 2848, 2870, 2943, 2968, 3027 and 3113
C.c.Q.

[61] See Article 2849 *C.c.Q.*

[62] *Létourneau v. JTI-MacDonald Corp., supra*, note 4, paragr. 691-694.

[63] Article 16 of the Law is written as follows:

16. Pour que la responsabilité d'un défendeur partie à une action prise sur une base collective soit engagée, le gouvernement doit faire la preuve, relativement à une catégorie de produits du tabac visée par l'action:	16. For a defendant who is a party to an action brought on a collective basis to be held liable, the Government must prove, with respect to a type of tobacco product involved in the action, that
1° que le défendeur a manqué au devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposaient à lui envers les personnes du Québec qui ont été exposées à la catégorie de produits du tabac ou pourraient y être exposées;	(1) the defendant failed in the duty to abide by the rules of conduct, to which the defendant is bound in the circumstances and according to usage or law, in respect of persons in Québec who have been or might become exposed to the type of tobacco product;
2° que l'exposition à la catégorie de produits du tabac peut causer ou contribuer à causer la maladie ou la détérioration générale de l'état de santé d'une personne;	(2) exposure to the type of tobacco product may cause or contribute to a disease or the general deterioration of a person's health; and

3° que la catégorie de produits du tabac fabriqués par le défendeur a été offerte en vente au Québec pendant tout ou partie de la période où il a manqué à son devoir.

(3) the type of tobacco product manufactured by the defendant was offered for sale in Québec during all or part of the period of the failure.

64 Article 17 of the Law is written as follows:

17. Si le gouvernement satisfait aux exigences de preuve prévues à l'article 16, le tribunal présume:
1° que les personnes qui ont été exposées à la catégorie de produits du tabac fabriqués par le défendeur n'y auraient pas été exposées n'eût été son manquement;

2° que l'exposition à la catégorie de produits du tabac fabriqués par le défendeur a causé ou a contribué à causer la maladie ou la détérioration générale de l'état de santé, ou le risque d'une maladie ou d'une telle détérioration, pour une partie des personnes qui ont été exposées à cette catégorie de produits.

17. If the Government establishes the elements of proof required under section 16, the court presumes
(1) that the persons who were exposed to the type of tobacco product manufactured by the defendant would not have been exposed had the defendant not failed in its duty; and

(2) that the exposure to the type of tobacco product manufactured by the defendant caused or contributed to the disease or general deterioration of health, or the risk of disease or general deterioration of health, of a number of persons who were exposed to that type of product.

65 Article 18 of the Law is written as follows:

18. Lorsque les présomptions visées à l'article 17 s'appliquent, le tribunal fixe le coût afférent à tous les soins de santé résultant de l'exposition à la catégorie de produits du tabac visée par l'action qui ont été prodigués postérieurement à la date du premier manquement du défendeur.

Chaque défendeur auquel s'appliquent ces présomptions est responsable de ce coût en proportion de sa part de marché de la catégorie de produits visée. Cette part, déterminée par le tribunal, est égale au rapport existant entre l'un et l'autre des éléments suivants:

1° la quantité de produits du tabac appartenant à la catégorie visée par l'action fabriqués par le défendeur qui ont été vendus au Québec entre la date de son premier manquement et la date de l'action ;

2° a quantité totale de produits du tabac appartenant à la catégorie visée par l'action fabriqués par l'ensemble des fabricants de ces produits qui ont été vendus au Québec entre la date du premier manquement du défendeur et la date de l'action.

18. When the presumptions set out in section 17 apply, the court sets the cost of all the health care required following exposure to the category of tobacco products involved in the action and provided after the date of the defendant's first failure.

Each defendant to whom the presumptions apply is liable for the costs in proportion to its market share in the type of product involved. That share, determined by the court, is equal to the relation between

(1) the quantity of tobacco products of the type involved in the action that were manufactured by the defendant and that were sold in Québec between the date of the defendant's first failure and the date of the action; and

(2) the total quantity of tobacco products of the type involved in the action that were manufactured by all the manufacturers of those products and that were sold in Québec between the date of the defendant's first failure and the date of the action.

[66] Article 19 of the Law is written as follows:

19. Le tribunal peut réduire le montant du coût des soins de santé auquel un défendeur est tenu ou rajuster entre les défendeurs leur part de responsabilité relativement au coût des soins de santé si l'un des défendeurs prouve soit que son manquement n'a ni causé ni contribué à causer l'exposition des personnes du Québec qui ont été exposées à la catégorie de produits visée par l'action, soit que son manquement n'a ni causé ni contribué à causer la maladie ou la détérioration générale de l'état de santé, ou le risque d'une maladie ou d'une telle détérioration, pour une partie de ces personnes.	19. The court may reduce the amount of the health care costs for which a defendant is liable or adjust among the defendants their share of responsibility for the health care costs if one of the defendants proves either that its failure did not cause or contribute to the exposure of the persons in Québec who were exposed to the type of product involved in the action, or that its failure did not cause or contribute to the disease suffered by, or the general deterioration of health of, a number of those persons, or cause or contribute to the risk of such a disease or such deterioration.

[67] *Richard v. Time inc.,* [2012] 1 R.C.S. 265. paragr.124. This is the assumption stated in Article 272 of the *Law on consumer protection* which permits the courts to conclude that the prohibited practice considered by this article is reputed to have had a misleading effect on consumers, once the consumer has tried the elements of this practice. In order to be able to benefit from the assumption, the consumer must prove the following four elements: (1) violation by the merchant or manufacturer of one of the obligations imposed by Title II of the law; (2) the apprehension by the consumer of the representation constituting a forbidden practice; (3) the formation, modification or execution of a consumer contract subsequent to this apprehension, and (4) a sufficient proximity between the content of the representation and the good or service indicated by the contract.

[68] Article 13 of the Law is written as follows:

13. S'il prend action sur une base collective, le gouvernement n'a pas à identifier individuellement des bénéficiaires déterminés de soins de santé, non plus qu'à faire la preuve ni de la cause de la maladie ou de la détérioration générale de l'état de santé affectant un bénéficiaire déterminé de ces soins, ni de la part du coût des soins de santé afférente à un tel bénéficiaire.	13. If the Government brings an action on a collective basis, it is not required to identify particular health care recipients individually or prove the cause of the disease suffered by, or the general deterioration of health of, a particular health care recipient or the portion of the health care costs incurred for such a recipient.
En outre, nul ne peut, dans une telle action, être contraint:	Moreover, no one may be compelled in such an action
1° de répondre à des questions sur l'état de santé de bénéficiaires déterminés de soins de santé ou sur les soins de santé qui leur ont été prodigués;	(1) to answer questions on the health of, or the health care provided to, particular health care recipients; or
2° de produire les dossiers et documents médicaux concernant des bénéficiaires déterminés de soins de santé ou les documents se rapportant aux soins de santé qui leur ont été prodigués, sauf dans la mesure prévue par une loi, une règle de droit ou un règlement du tribunal exigeant la production de documents sur lesquels se fonde un témoin expert. 2009, v. 34, a. 13.	(2) to produce the medical records and documents of, or the documents related to health care provided to, particular health care recipients, except as provided by a law or a rule of law, practice or procedure that requires the production of documents relied on by an expert witness.

[69] Article 14 of the Law is written as follows:

14. Nonobstant le deuxième alinéa de l'article 13, le tribunal peut, à la demande d'un défendeur, ordonner la production d'échantillons statistiquement significatifs des dossiers ou documents concernant des bénéficiaires déterminés de soins de santé ou se rapportant aux soins de santé qui leur ont été prodigués.	14. Despite the second paragraph of section 13, the court may, at the request of a defendant, order the production of statistically meaningful samples of records and documents concerning, or relating to health care provided to, particular health care recipients.
Le tribunal fixe, le cas échéant, les conditions de l'échantillonnage et de la communication des renseignements contenus dans les échantillons, en précisant notamment la nature des renseignements qui pourront ainsi être divulgués.	In that case, the court determines conditions for the sampling and for the communication of information contained in the samples, specifying, among other things, what kind of information may be disclosed.
L'identité des bénéficiaires déterminés de soins de santé visés par l'ordonnance du tribunal ne peut être divulguée, non plus que les renseignements permettant de les identifier. En outre, aucun dossier ou document concernant des bénéficiaires déterminés de soins de santé ou se rapportant aux soins de santé qui leur ont été prodigués ne peut être produit en exécution de cette ordonnance sans que les renseignements identifiant ou permettant d'identifier ces bénéficiaires en aient été extraits ou masqués au préalable.	The identity of, or identifying information with respect to, the particular health care recipients concerned by the court order may not be disclosed. Moreover, no record or document concerning, or relating to health care provided to, particular health care recipients may be produced under the order unless any information they contain that reveals or may be used to trace the identity of the recipients has been deleted or blanked out.

[70] Article 15 of the Law is written as follows:

15. Dans une action prise sur une base collective, la preuve du lien de causalité existant entre des faits qui y sont allégués, notamment entre la faute ou le manquement d'un défendeur et le coût des soins de santé dont le recouvrement est demandé, ou entre l'exposition à un produit du tabac et la maladie ou la détérioration générale de l'état de santé des bénéficiaires de ces soins, peut être établie sur le seul fondement de renseignements statistiques ou tirés d'études épidémiologiques, d'études sociologiques ou de toutes autres études pertinentes, y compris les renseignements obtenus par un échantillonnage.	15. In an action brought on a collective basis, proof of causation between alleged facts, in particular between the defendant's wrong or failure and the health care costs whose recovery is being sought, or between exposure to a tobacco product and the disease suffered by, or the general deterioration of health of, the recipients of that health care, may be established on the sole basis of statistical information or information derived from epidemiological, sociological or any other relevant studies, including information derived from a sampling.
Il en est de même de la preuve du coût des soins de santé dont le recouvrement est demandé dans une telle action.	The same applies to proof of the health care costs whose recovery is being sought in such an action.

[71] Article 25 of the Law is written as follows:

25. Nonobstant toute disposition contraire, les règles du chapitre II relatives à l'action prise sur une base individuelle s'appliquent, compte tenu des adaptations nécessaires, à toute action prise par une personne, ses héritiers ou autres ayants cause pour le recouvrement de dommages-intérêts en réparation de tout préjudice lié au tabac, y compris le coût de soins de santé s'il en est, causé ou occasionné par la faute, commise au Québec, d'un ou de plusieurs fabricants de produits du tabac.	25. Despite any incompatible provision, the rules of Chapter II relating to actions brought on an individual basis apply, with the necessary modifications, to an action brought by a person or the person's heirs or other successors for recovery of damages for any tobacco-related injury, including any health care costs, caused or contributed to by a tobacco-related wrong committed in Québec by one or more tobacco product manufacturers.
Ces règles s'appliquent, de même, à tout recours collectif pour le recouvrement de dommages-intérêts en réparation d'un tel préjudice.	Those rules also apply to any class action based on the recovery of damages for the injury.

[72] Article 24 of the Law is written as follows:

24. Les dispositions de l'article 15, relatives à la preuve du lien de causalité existant entre des faits allégués et à la preuve du coût des soins de santé, sont applicables à l'action prise sur une base individuelle.	24. The provisions of section 15 that relate to the establishment of causation between alleged facts and to proof of health care costs are applicable to actions brought on an individual basis.

[73] See *C.B. v. Imperial Tobacco*, paragraph 49:

The rules set forth by the Law that the appelants are contesting are not as unfair or illogical as the latter contend. They appear to reflect legitimate concerns for the public interest on the part of the legislature of British Columbia concerning the systemic advantages benefiting the manufacturers of tobacco products when complaints concerning the harmful effects of tobacco are submitted to the courts by individual common law actions for civil liability […]

[74] *Létourneau v. JTI-MacDonald Corp.*, *supra*, note 4, paragr. 668-767.

[75] Article 27 of the Law is written as follows:

27. Aucune action, y compris un recours collectif, prise pour le recouvrement du coût de soins de santé liés au tabac ou de dommages-intérêts pour la réparation d'un préjudice lié au tabac ne peut, si elle est en cours le 19 juin 2009 ou intentée dans les trois ans qui suivent cette date, être rejetée pour le motif que le droit de recouvrement est prescrit.	27. An action, including a class action, to recover tobacco-related health care costs or damages for tobacco-related injury may not be dismissed on the ground that the right of recovery is prescribed, if it is in progress on 19 June 2009 or brought within three years following that date.
Les actions qui, antérieurement au 19 juin 2009, ont été rejetées pour ce motif peuvent être reprises, pourvu seulement qu'elles le soient dans les trois ans qui suivent cette date.	Actions dismissed on that ground before 19 June 2009 may be revived within three years following that date.

[76] Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel,* 6e éd., Cowansville, Éditions Yvon Blais, 2014, p. 669, notes VIII 57-9. See also: *Air Canada v. Colombie-Britannique,* [1989] 1 R.C.S. 1161, aux pp. 1192-1193; *Authorson v. Canada (Procureur général),* [2003] 2 R.C.S.

40, 2003 CSC 39; *C.-B. v. Imperial Tobacco Canada Ltée,* [2005] R.C.S. 473, 2005 CSC 49; *R. c. Dineley,* [2012] 3 R.C.S. 272, 2012 CSC 58.

[77] Article 31 of the Law is written as follows:

31. Les dispositions de la présente loi ont l'effet rétroactif nécessaire pour assurer leur pleine application, notamment pour permettre au gouvernement d'exercer son droit de recouvrement du coût des soins de santé liés au tabac quel que soit le moment où a été commise la faute donnant ouverture à l'exercice de ce droit.

31. This Act has the retroactive effect necessary to ensure its full application, in particular to enable the Government to exercise its right to recover tobacco-related health care costs regardless of when the tobacco-related wrong was committed.