

Court File No. CV-19-615862-00CL
Court File No. CV-19-616077-00CL
Court File No. CV-19-616779-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF **JTI-MACDONALD CORP.**

AND IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF **IMPERIAL TOBACCO CANADA LIMITED**
AND **IMPERIAL TOBACCO COMPANY LIMITED**

AND IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF **ROTHMANS, BENSON & HEDGES INC.**

Applicants

**RESPONDING MOTION RECORD
(Returnable on June 26, 2019)**

June 21, 2019

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Lawyers for Conseil québécois sur le tabac et la
santé and Jean-Yves Blais and
Cécilia Létourneau

TO: JTIM Service List

AND TO: ITCAN Service List

AND TO: RBH Service List

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2	Affidavit of Dr. Alain Desjardins sworn June 20, 2019

TAB 1

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**NOTICE OF MOTION FOR STAY EXTENSION HEARING
(Quebec Class Action Plaintiffs)
(Returnable June 26, 2019)**

The Quebec Class Action Plaintiffs (the "QCAPs") will make a motion to Justice McEwen presiding over the Commercial List on June 26, 2019 at 10:00 a.m., or as soon thereafter as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An Order providing the following relief:

- (a) if necessary, abridging the time for service of this Notice of Motion and the Responding Motion Record and dispensing with service on any person other than those served;
 - (b) to the extent the Court grants an extension of the stay period, limiting the extension to September 27, 2019;
 - (c) implementing a court-to-court protocol, that would, *inter alia*, permit communication between Justice McEwen and Justice Riordan;
 - (d) ordering TM to remit to the Applicant JTIM, the amount it was paid from the said Applicant's funds held by TM, as well as any other relief or sanction that this Court sees fit to impose; and
2. Such further and other relief as this Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

3. On March 1, 2019, a unanimous bench of five judges of the Quebec Court of Appeal upheld the decision of Justice Riordan of the Quebec Superior Court rendered four years earlier, with minor modifications, holding the Applicants liable to the extent of approximately \$14 Billion for the intentional harm they inflicted on the Quebec Class Members.
4. Shortly thereafter, each of the Applicants sought insolvency protection in Ontario and asserted that the issuance of the Appeal Judgment was the event that triggered their decisions to seek such protection.

5. Numerous other tobacco-related claims have been made in proceedings instituted across Canada, notably by provincial governments and in the context of class actions (all but one of which have not been certified) and the Applicants have each stated that they envision the CCAA process as a means of resolving all such tobacco-related litigation on a global basis.

6. None of the Applicants has acknowledged its liability with respect to any of the tobacco-related litigation, including with respect to the Quebec Class Actions despite the Appeal Judgment.

7. Each of the Applicants engaged consultants after the Riordan Judgment was rendered, and these consultants were later appointed as Monitors in their respective Initial Orders.

8. The Honourable Warren K. Winkler is acting as the Court-Appointed Mediator.

9. The Initial Orders granted a stay of proceedings. Following the Comeback Hearing on April 4-5, 2019, the Court extended the stay period until June 28, 2019.

10. Each of the Applicants has filed a Notice of Motion requesting that this Court extend the stay period by a further six months until and including December 16, 2019 without any conditions being imposed upon them and without providing the other stakeholders with even the “kernel” of a plan of compromise or arrangement and without undertaking to do any more than “work towards developing a plan” within the nine months following the Initial Orders.

11. The QCAPs oppose such a lengthy extension and request that this Court limit the extension of the stay period to September 27, 2019.

12. In the particular circumstances of this CCAA process, a lengthy extension of the stay period is highly prejudicial to the Quebec Class Members.

13. The Quebec Class Members are suffering severe and irreparable harm as a result of the Applicants' delays in satisfying the Judgment Debt. These consequences should be weighed against the Applicants' inaction since the Initial Orders were issued and their total lack of diligence in disclosing even a kernel of a plan.

14. The "progress" reported by the Applicants is non-existent to date. Rather than seeking to engage with the QCAPs in good faith, the Applicants have proposed nothing and have limited their interaction with them to purely obstructionist tactics. This was exemplified by the behavior of ITCAN and RBH in impeding the implementation of the Insurance Settlements that did not involve them or their property, and of JTIM in brazenly circumventing the Order of this Court dated March 19, 2019.

15. Without a tight deadline, closely monitored by this Court, the Applicants will continue to delay making a settlement proposal that has any chance of success. It is essential that the Court and the creditors be able to ascertain within a reasonable period of time whether the Applicants and their parents are truly serious about achieving a global settlement or whether they are merely using the CCAA to gain leverage and delay.

16. The mediation process being led by the Court-Appointed Mediator, and in which the QCAPs have willingly and fully participated, does not supplant the CCAA process. The obligations of diligence, transparency and good faith that are fundamental elements of any CCAA process cannot be fulfilled by the Applicants merely pointing out that they are participating in a parallel mediation process. Furthermore, the imposition of a milestone date of September 27, 2019 will assist the mediation process and create a dynamic that will favour a hopefully positive result.

17. To date, the Quebec Class Members have received not the slightest indication that the parents of the Applicants are prepared to make significant contributions to a global settlement or that there has been any progress in resolving the dispute regarding intercompany payments or that the Applicants have any plan to present to their creditors.

18. To facilitate the current CCAA process, the QCAPs also request that a court-to-court protocol that would, *inter alia*, permit communications between Justice McEwen and Justice Riordan, be implemented forthwith.

19. JTIM has acknowledged that it was advised of, and permitted, its related-company, TM to circumvent the order of this Court dated March 19, 2019. It is requested that this Court order that TM remit to JTIM, the amount paid from said Applicant's funds held by TM, as well as any other relief or sanction that the Court may impose.

20. The provisions of the CCAA, including section 11.02, and the inherent and equitable jurisdiction of this Honourable Court.

21. Rules 1.04, 1.05, 2.03, 3.02, 16 and 37 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, and section 106 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

22. Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Responding Motion:

1. The Affidavit of Dr. Alain Desjardins sworn on June 20, 2019 and the document attached thereto;
2. Such further and other materials as counsel may advise and this Honorable Court may permit.

June 21, 2019

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**Lawyers for the Quebec Class Action
Plaintiffs**

TO: THE ATTACHED SERVICE LIST

TAB 2

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AFFIDAVIT OF DR. ALAIN DESJARDINS

(sworn June 20, 2019)

I, Alain Desjardins, of the City of Laval, in the Province of Quebec,

MAKE OATH AND SAY:

1. This Affidavit is sworn to support the Quebec Class Action Plaintiffs' Responding Motion to the Applicants' motions seeking to extend the Stay Period until December 16, 2019.
2. I was recognized as an expert clinician specialist in Pulmonary Medicine in the Quebec Class Actions and provided an expert report as well as testimony in respect thereof.

Qualifications

3. I studied Medicine at the University of Montreal and obtained my doctorate in medicine (MD) in 1983. After a 5-year residency program, I was certified as a specialist (Fellow) by the Royal College of Physicians and Surgeons of

Canada in internal medicine (1987) and adult pulmonary medicine (1988). During the next two years, I trained in Epidemiology and Biostatistics at McGill University in Montreal and pursued research in occupational asthma at the University of British Columbia in Vancouver.

4. I have been practising Pulmonary Medicine at Hôpital du Sacré-Coeur de Montréal since November 1990. In this context, I regularly treat patients affected by Chronic Obstructive Pulmonary Disease (COPD), including patients with emphysema, and lung cancer.
5. I also served as part-time consultant for 25 years at Hôpital St-Eustache (1990 to 2015) and for 27 years at Hôpital Curé-Antoine Labelle in Mont Laurier (1990 to 2017).
6. In 1993, I was named a fellow of the American College of Chest Physicians (FCCP). In February 2010, I obtained an official certification as a Tobacco Treatment Specialist from the Mayo Clinic. In 2012, I was acknowledged among the Best Doctors of North America.
7. I have assessed and treated tens of thousands of patients with lung diseases during my 29-year career as a clinical chest physician. I see patients with COPD, including emphysema, and lung cancer, on a daily basis. Based on several large epidemiological studies, and my vast personal clinical experience, I conclude that the cause of over 90% of COPD and lung cancer cases was tobacco smoking.
8. Many patients of mine are persons who have registered with Class Counsel in the Quebec Class Actions.

Emphysema

9. Emphysema is a progressive and irreversible pulmonary disease, characterised pathologically by enlargement of airspaces distal to the terminal bronchioles caused by destruction of alveoli (small peripheral sacs where gas exchanges occur and accounting for the lungs' elastic recoil). This condition can easily be confirmed on contemporary high-resolution chest CT-scans. With time, emphysema becomes a debilitating disease which significantly affects the patient's breathing capacity.
10. Because patients suffering from pulmonary emphysema get diagnosed by spirometry, showing progressive and irreversible airway obstruction (decreased expiratory airflow), they are designated as having Chronic Obstructive Pulmonary Disease (COPD).
11. Chest physicians grade the severity of COPD according to international guidelines of the Global Initiative for Chronic Obstructive Lung Disease (GOLD, 2018 update), where four stages are recognized based on post-

bronchodilator forced expiratory volume in 1 second (FEV1), as % predicted, in those with FEV1/FVC ratio < 0,7:

Stage 1:	mild	FEV1 ≥80%
Stage 2:	moderate	50% ≤ FEV1 < 80%
Stage 3:	severe	30% ≤ FEV1 < 50%
Stage 4:	very severe	FEV1 < 30%

12. Of importance, as patients get older, their emphysema continues to progress, which is marked by an accelerated lung function decline.
13. Since the commencement of the trial of the Quebec Class Actions in March 2012, many members of the Class with claims relating to their COPD, including my own patients, have experienced further deterioration of their lung function, reaching GOLD stages 2 to 4. In the most severe cases, their breathing difficulty has been described by some as breathing through a narrow straw or having someone sitting on their chest.
14. Subjects with emphysema often need to be urgently transferred and admitted to hospitals because of acute exacerbations, characterised by acute respiratory distress. They have also been associated with increased mortality and decreased life expectancy.
15. COPD is very often described as a systemic disease, especially in severe stages, because it is associated with weight loss and muscular wasting, coronary artery disease, osteoporosis, anxiety and depression. These conditions lead to decreased endurance, fatigue, and loss of autonomy, which hamper quality of life and increase mortality rates. Furthermore, in current or former smokers, COPD with emphysema confers a supplemental risk of developing lung cancer, on top of the risk associated with their cumulative smoking.
16. Published data disclose that subjects with COPD in GOLD stages 1, 2 and 3-4 lose, on average, 3.8, 5.7 and 9.3 years of life, respectively, as compared to subjects with normal lung function.
17. During my nearly 30 years of clinical practice as a pneumologist, I estimate that about 5% of my patients with COPD and emphysema die every year.
18. In addition to increasing mortality, COPD with emphysema involves significant direct and indirect financial costs to those suffering, especially during the severe stages of the disease (GOLD 3-4). These include costs associated with job loss due to their inability to work, the cost of medication, the cost to purchase technical aids required to bathe or shower, the cost of mobility aids such as walkers and wheelchairs, the cost of inclinable hospital

beds required to help them breathe so that they can sleep more comfortably, and finally, the cost to hire caretakers to do household tasks such as cooking, cleaning and laundry, as well as to assist with their personal needs.

19. Patients with moderate to severe COPD and emphysema often suffer from social isolation and loss of autonomy. They often need to retire young, quit participating in sports and other recreational activities due to their shortness of breath, and eventually, as they become less mobile, end up being confined to their homes. This, in turn, can lead to chronic frustration, impatience, anxiety, and depression.

Lung cancer

20. Lung cancer is attributed to tobacco smoking in over 90% of cases.
21. When lung cancer is diagnosed, the news is often perceived as a death sentence, the individual feeling desperate, angry, frightened and depressed.
22. The life expectancy of a patient diagnosed with lung cancer, based on imaging, before the appearance of any symptom, is 66 months. This number is significantly reduced with the appearance of symptoms.
23. Lung cancer has an 85% fatality rate and causes, on average, 14 years of life loss.
24. As described in my testimony before Justice Riordan, and accepted in his judgment dated May 27, 2015 at paragraph 982 (the "**Riordan Judgment**"), a person living with lung cancer is affected both physically and psychologically, as well as spiritually, with victims experiencing, *inter alia*:
 - rapid fluctuations in the state of physical health;
 - fatigue, lack of energy and weakness;
 - loss of appetite;
 - pain;
 - loss of breath;
 - paralysis in one or more members; and
 - depression.
25. In addition to the cancer itself, the secondary effects from the required medical treatments cause significant hardship that can last for years.

26. The case of Jean-Yves Blais, the designated class member in the Quebec Class Actions, is a good example of the damages suffered by members in the lung cancer sub-group. I examined Mr. Blais personally. He started smoking at 10 years of age and smoked up to 50 cigarettes a day for most of his life. Pulmonary function testing confirmed moderate COPD. He underwent a right lower lobectomy for localised non-small cell lung cancer in 1997. He never succeeded in quitting smoking and ultimately died from lung cancer, a few months after the beginning of the trial in March 2012.
27. In my clinical practice, I have known and treated many patients forming part of the lung cancer sub-class in the Quebec Class Actions who have died and obviously not received any compensation from the Tobacco Companies.
28. Based on statistical data and my own experience, most members of the lung cancer sub-class have unfortunately died by now. The fortunate surviving lung cancer patients are, in many instances, frail and weak. Most survivors are elderly and many require financial assistance to help them meet their daily needs.
29. Based on my discussions with several patients during their routine appointments and without any questions on my part, they have spontaneously told me that they are anxious and frustrated that they have not received any monetary compensation after 21 years of proceedings and despite two consecutive victories before the Quebec Superior Court and the Quebec Court of Appeal. They are afraid that they will die before they receive the compensation awarded to them in those judgments.

Conclusions

30. There currently remain thousands of living individuals that form part of the emphysema sub-class. Given their expected disease progression, and in particular my experience with my own patients who fall within the Class, a significant proportion of the surviving emphysema patients diagnosed on or before March 12, 2012, will have now reached GOLD stages 3 and 4.
31. Furthermore, based on my clinical experience and the number of new cases of emphysema attributable to smoking in Quebec between 1995 and 2011 (23,086 per the Riordan Judgment), I estimate that since March 12, 2012 over 12,000 emphysema patients in Quebec have already died.
32. As for the lung cancer sub-class (comprising 82,271 members per the Riordan Judgment), the majority of the members have unfortunately died but there still remain many survivors. Based on my interactions with numerous patients, many of them are now in a dire condition.
33. Since the last diagnosis date for eligibility in the Quebec Class Actions was March 12, 2012, or more than seven years ago, the passage of time is

increasingly critical to the remaining living Class members, whose conditions are deteriorating significantly, and often rapidly.

34. This concern has become all the more acute since March 1, 2019 when the Quebec Court of Appeal rendered its judgment, since the remaining living members of the Quebec Class are becoming increasingly frail and infirm, based on my personal observation.
35. Furthermore, based on the statistics accepted in the Riordan Judgment as well as my own experience, several Quebec Class members have died since March 1, 2019 and several more are expected to die during the last six months of 2019.
36. Consequently, further delays in the payment of compensation by the Tobacco Companies to the Quebec Class members will result in an ever decreasingly small proportion of the Class still alive to receive any recovery from the Quebec Class Actions, which could provide them with the financial assistance that many of them require to help them live with their debilitating conditions.

AND I HAVE SIGNED



Alain Desjardins

Solemnly declared before me at Montreal,
Province of Quebec, this 20th day of June, 2019



Commissioner of Oaths for Quebec



IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED
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ONTARIO
**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**MOTION RECORD
(Re: Stay Extension Motion)
(Returnable June 26, 2019)**

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(Quebec Class Action Plaintiffs)

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Applicants

**FACTUM OF THE QUEBEC CLASS ACTION PLAINTIFFS
(RE: EXTENSION MOTIONS)**

June 21, 2019

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et la santé and Jean-Yves Blais and
Cécilia Létourneau

TO: JTIM Service List

AND TO: ITCAN Service List

AND TO: RBH Service List

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FACTUM OF THE QUEBEC CLASS ACTION PLAINTIFFS¹

PART I - OVERVIEW

1. The QCAPs are prepared, at this time, to continue to engage in a hopefully constructive CCAA process (including in the Court-ordered mediation) with a view to resolving the claims of the Quebec Class Members.
2. However, it is respectfully submitted that this Court should ensure that any extension of the stay of proceedings is made on terms that are fair to all parties involved and that the process moves forward diligently and in good faith. While the Court-ordered mediation is intended to assist all stakeholders in arriving at a resolution of their claims, mediation does

¹ To avoid duplication in the three concurrent CCAA proceedings, a single factum is filed by the QCAPs in connection with the ITCAN Notice of Motion, the RBH Notice of Motion and the JTIM Notice of Motion. Capitalized terms used herein are defined in the glossary attached as Annex 1.

not supplant the CCAA process and should not serve as a pretext for delay by the Applicants.

3. The QCAPs submit that the length of the extension of the stay requested by the Applicants is excessive and that, if granted, should be limited to September 27, 2019, rather than December 16, 2019, as Applicants propose. The QCAPs also submit that there is no reason why the Applicants cannot propose a *bona fide* Plan by September 27, 2019 if they truly intend to seek a resolution of the outstanding claims. It is noteworthy that even though they have asked for such a lengthy extension, the Applicants have indicated that the process is “*unlikely to be complete before year end and could take more time beyond that.*”²
4. The shorter extension period advocated by the QCAPs would enable the Court to more closely supervise the process and to assess if meaningful progress is being made. This would assist the Court in determining whether any further continuation of the stay of proceedings is thereafter justified and would assist all stakeholders in determining whether an acceptable “global settlement” is even possible. The shorter extension would also create a meaningful milestone that would assist the mediation process and promote its timely progress.
5. In order to facilitate the current CCAA process, the QCAPs also request that the court-to-court protocol, which the Monitors referenced in their joint letter of June 11, 2019, be implemented forthwith.
6. Considering that the Applicant JTIM has admitted that it was advised of, and permitted, its related-company, TM to contravene the March 19, 2019 Order, it is further requested that the Court order that any amount that the TM Receiver has applied from funds of JTIM that it was holding (apparently an amount in excess of \$1.33 million), be repaid to JTIM, as well as any other relief or sanction that the Court considers appropriate in the circumstances.

² Luongo Affidavit, para. 26.

7. Finally, the QCAPs wish to point out that they have prepared their Response to the Applicants' Motions without the benefit of having received (as at noon on June 21, 2019) the Monitors' Reports that were relied on in support of the Applicants' extension Motions. This places all creditors in the untenable disadvantage that they are forced to consistently respond, at the last moment, to the Applicants' and their Monitors' last-minute filings.

PART II - BACKGROUND AND FACTS

8. As each of the Applicants has asserted in its materials, the genesis of these proceedings was the Appeal Judgment issued on March 1, 2019. The Applicants are not typical debtors in "*crisis-mode due to [their] failure to meet creditor obligations*", nor do any of them require any "*breathing room to enable it to get its affairs in order without creditors knocking at the door.*"³ Prior to the commencement of these proceedings, the QCAPs were the only creditors knocking at the door. The other plaintiffs in tobacco-related litigation were all very far from obtaining any judgments against the Applicants (or even having trials commence on the merits).
9. The Applicants' stated desire to settle the tobacco-related litigation claims through this Court-supervised process is not based on any altruistic desire to take responsibility for their past conduct but is simply a strategic preference by them to use the CCAA to gain leverage vis-à-vis their creditors, including primarily the QCAPs, rather than simply satisfying the Judgment Debt due by them to the QCAPs.
10. A further 6-month extension of the stay of proceedings would be highly prejudicial to the Quebec Class Members and impose no urgency on the Applicants to submit a *bona fide* Plan in a timely manner.
11. As described more fully in the Desjardins Affidavit, further delay has significant repercussions for the Quebec Class Members:

29. Based on my discussions with several patients during their routine appointments and without any questions on my part, they have spontaneously told

³ *Industrial Properties Regina Limited v Copper Sands Land Corp.*, 2018 SKCA 36 at para. 20.

me that they are anxious and frustrated that they have not received any monetary compensation after 21 years of proceedings and despite two consecutive victories before the Quebec Superior Court and the Quebec Court of Appeal. They are afraid that they will die before they receive the compensation awarded to them in those judgments.

33. Since the last diagnosis date for eligibility in the Quebec Class Actions was March 12, 2012, or more than seven years ago, the passage of time is increasingly critical to the remaining living Class members, whose conditions are deteriorating significantly, and often rapidly.

34. This concern has become all the more acute since March 1, 2019 when the Quebec Court of Appeal rendered its judgment, since the remaining living members of the Quebec Class are becoming increasingly frail and infirm, based on my personal observation.

35. Furthermore, based on the statistics accepted in the Riordan Judgment as well as my own experience, several Quebec Class members have died since March 1, 2019 and several more are expected to die during the last six months of 2019.

36. Consequently, further delays in the payment of compensation by the Tobacco Companies to the Quebec Class members will result in an ever decreasingly small proportion of the Class still alive to receive any recovery from the Quebec Class Actions, which could provide them with the financial assistance that many of them require to help them live with their debilitating conditions.

12. It is important to reiterate that no Plan can be approved without the support of the QCAPs. In addition to the fact that the QCAPs are creditors unlike any other in these proceedings, they represent tens of thousands of separate creditors and the Judgment Debt due to the Quebec Class Members is an award of damages by a court in civil proceedings in respect of bodily harm intentionally inflicted.
13. To date, the Applicants have never engaged in any discussions or negotiations with the QCAPs with a view to resolving their claims. On the contrary, the Applicants have, throughout this CCAA process, continued to exhibit the obstructionist *modus operandi* that has characterized their conduct for decades.
14. Within these CCAA proceedings, by way of illustration, the Applicants wasted time, energy and money needlessly fighting with the QCAPs in respect of matters that have no possible effect on them. This is best exemplified by the unacceptable conduct of ITCAN

and RBH relating to the approval by Justice Riordan of the Insurance Settlements, even though such Applicants have absolutely no interest in same and ultimately recognized that they had no possible interest in the settlement proceeds.

15. In the case of the Applicant JTIM, notwithstanding the clear Order issued by this Court to suspend the payment of all royalties to TM, it has allowed the TM Receiver to enforce security in order to circumvent the March 19, 2019 Order and to effect a prohibited royalty payment in a different way.
16. The QCAPs have fully participated in the Court-authorized mediation process managed by the Honourable Warren Winkler. The QCAPs are hopeful that the recent imposition by him of a deadline to file mediation briefs before August 1, 2019 is a step in the right direction towards moving this process forward in a diligent manner.
17. However, it is respectfully submitted that this Court should not be satisfied with the Applicants' hope to simply "*make meaningful progress*" over the next six months of the mediation process. Meaningful progress should have already been made over the past four months. Unfortunately, that is not the case.
18. The Applicants have not provided any indication as to the potential contents of a Plan; in particular, of its potential structure or economics, including the expected contributions to be made by their parent companies. Without any information as to what the Applicants intend to propose to their creditors, it is impossible for other stakeholders to know whether any such Plan has a reasonable chance of success. In order for any Plan to have such a chance of success, the Applicants' parents must make it crystal clear that they are fully committed to making meaningful financial contributions. As Justice Schragger stated in his judgment ordering the Applicants ITL and RBH to post security for their appeal of the Riordan Judgment:

... *Given my conclusions based on the facts in the record, it is not acceptable that Appellants merely say that they have no funds to satisfy the judgment or an order to furnish security and continue to distribute earnings because that is "business as usual". **A strategic decision is required by Appellants in caucus with their parent***

companies and related entities who have received the benefit of the profitable operations over the years and who continue to do so. Are they willing to do the necessary to help fund security to allow Appellants to continue their appeal? I do not question Appellants' right to appeal but neither can I stand idly by while Appellants pursue an appeal which will benefit them if they win but which will not operate to their detriment if they lose. ...⁴

[emphasis added]

19. The same strategic decision must be made today in the context of the Applicants' stated attempt to arrive at a comprehensive settlement. Will the parent companies, who have profited substantially, and will continue to profit substantially, from the Applicants' businesses, make the necessary financial commitment to enable a settlement to occur? The creditors require an answer to this critical question in order to assess whether there is any chance of a successful Plan.
20. The Applicants engaged their respective Monitors years ago and have had ample time to determine, along with their parent companies, how much money they are prepared to commit for the purposes of achieving their desired "global resolution." Nothing changed on March 1, 2019 with respect to the Applicants' knowledge of the scope and extent of claims against them in tobacco-related litigation across Canada.
21. By imposing a shorter extension (to September 27, 2019), this Court would succeed in creating an impetus and some pressure to force the Applicants (and their parents) to move forward to propose a Plan in a timely fashion. It would also impose on the Applicants an appropriate obligation to satisfy the Court on regular intervals that any further extension is warranted.

⁴ *Imperial Tobacco Canada Ltd. c. Conseil québécois sur le tabac et la santé*, 2015 QCCA 1737 at para. 52.

PART III - THE LAW AND ANALYSIS

A. Criteria for an extension of a stay

A-1. The Applicants do not satisfy the criteria for an extension

22. An initial stay under Section 11.02(1) CCAA may be imposed for a maximum period of 30 days. On a subsequent application under Section 11.02(2) CCAA, the applicant must satisfy the court that the three-prong test set out in Section 11.02(3) CCAA to justify a continuation of the stay has been met. In particular, the court considers:
- (a) whether circumstances exist that make the order appropriate;
 - (b) whether the applicant has acted, and is acting, in good faith; and
 - (c) whether the applicant has acted, and is acting, with due diligence.⁵
23. While the QCAPs are not currently taking the position that no stay should be granted on June 26, 2019, the fact that these criteria are not met, should militate in favor of the Court granting a shorter extension, during which time it is the QCAPs expectation that the Applicants would put forward a *bona fide* Plan.
24. With respect to the criterion of appropriateness, ameliorating the “*existential threat*”⁶ to the Applicants’ caused by tobacco-related litigation is not a valid purpose for the CCAA.⁷ A process whose goal is to continue businesses promoting a dangerous and useless product, at the expense of the victims of the Applicants’ intentionally harmful conduct, does not satisfy that test.
25. Moreover, to date, there has been no indication that a viable Plan is even possible.
26. Nearly four months into this CCAA process, no tangible progress has been made by any of the Applicants. In the words of JTIM’s CRO, JTIM purports to still be having “*continued*

⁵ Dr. Janis P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act*, (Carswell, 2013) at p. 76; *Skeena Cellulose Inc. (Re)*, 2001 BCSC 1423 at paras. 13-14.

⁶ ITCAN Notice of Motion at para. 1.

⁷ *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at paras. 26-29.

*discussion...in an attempt to **commence** resolution discussion...*”⁸ ITCAN is looking for an extension of the stay, *inter alia*, to “**start finalizing the terms on which information will be shared with other stakeholders.**” and “*engage in substantive discussions with the Tobacco Litigation stakeholders.*”⁹ RBH is only hoping to make “**meaningful progress**” during the six-month additional stay period being requested.¹⁰ [emphasis added]

27. In *North American Tungsten Corporation Ltd. (Re)*¹¹, the British Columbia Superior Court stated:

*[26] When granting an extension, it is a **prerequisite for the petitioner to provide evidence of what it intends to do** in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the CCAA. **The debtor company must show that it has at least “a kernel of a plan”**: *Azure Dynamics Corporation (Re)*, 2012 BCSC 781 (CanLII).*

[emphasis added]

28. The Applicants’ assertion that they will continue to participate in the mediation process before former Chief Justice Winkler is not the kernel of a Plan.
29. In determining the appropriateness of the continuation of the stay, the Court also considers the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension.¹²
30. As referenced above, since the Initial Orders, Quebec Class Members have died and are continuing to die and the remaining living members are anxiously awaiting payment of their awards. With each passing day, these individuals are in a materially worse situation.

⁸ Aziz Affidavit at p. 4.

⁹ Thauvette Affidavit at p. 9.

¹⁰ RBH Notice of Motion at para. 5.

¹¹ 2015 BCSC 1376.

¹² *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 at para. 22; *Hunters Trailer & Marine Ltd., Re* 2000 ABQB 952 at paras 15-19.

31. As it relates to the good faith criterion¹³, since the commencement of these CCAA proceedings, the Applicants have not changed course from the conduct that was so severely criticized by the Quebec courts.
32. Finally, the Applicants have not acted with any diligence. Notwithstanding that the potential liability resulting from the outstanding litigation has been known to them for more than two decades, none of the Applicants has even hinted at the potential contents of a proposed Plan to satisfy its creditors.

A-2. The proposed extension of the stay of proceedings

33. It is submitted that, if granted, the extension of the stay should be limited to a period of three months ending September 27, 2019. This is a reasonable amount of time by which the Applicants must come back to this Court to explain their progress, if any, and for the Court to then determine whether the CCAA process should be terminated or not.
34. The previous stay extension granted by this Court was for approximately two months and there is no justification at this time for the granting of a subsequent extension that is three times as long.

B. A Court-to-Court protocol is indicated

35. As raised by the Court, the QCAPs support the implementation of a court-to-court protocol. In particular, the QCAPs believe that communication between Justice McEwen and Justice Riordan will benefit this process; in particular, since Justice Riordan must give his approval before the QCAPs could even consent to any Plan or settlement (assuming an acceptable one is made in a timely manner).

C. JTIM should be sanctioned for contravening the March 19, 2019 Order

36. In an affidavit in support of its Notice of Motion, the Applicant JTIM recognizes that the March 19, 2019 Order, which suspended its payment of royalties to TM, as well as principal

¹³ *Alberta Treasury Branches v. Tallgrass Energy Corp.*, 2013 ABQB 432 at para. 13.

and interest payments, is in force and that, consequently, it is stayed from making any royalty payments to its subsidiary, TM.¹⁴

37. However, despite the March 19, 2019 Order, and despite the stay of proceedings ordered by this Court, the Applicant JTIM has nevertheless permitted its subsidiary, TM, through its privately appointed receiver, to exercise a purported right to effect a payment from funds of JTIM held by TM. TM has purported to apply such amount on account of alleged unpaid royalties that pre-date the filing of the CCAA proceedings by JTIM.¹⁵
38. This payment to TM was only disclosed to the Court after it was made. It is distressing that the Applicant JTIM and its Monitor did not take any action to prevent this breach of the March 19, 2019 Order or, at a bare minimum, seek directions from the Court before the payment was made.
39. It is submitted that the Court should order that the amount received be forthwith paid by TM to JTIM and impose such other sanction as it sees fit.

PART IV - RELIEF REQUESTED

40. For these reasons, the QCAPs request the orders sought by them in their Notice of Motion for the hearing dated June 26, 2019 in court files CV-19-615862-00CL, CV-19-616077-00CL and CV-19-616779-00CL, namely that:
 - (i) to the extent that the Court grants an extension of the stay period, the extension be limited to September 27, 2019;
 - (ii) a court-to-court protocol that would, *inter alia*, permit communication between Justice McEwen and Justice Riordan, be implemented forthwith; and

¹⁴ Aziz Affidavit at para. 16.

¹⁵ *Ibid* at para. 21.

- (iii) TM be ordered to forthwith remit to the Applicant JTIM, the amount paid from the said Applicant's funds held by TM as well as any other relief or sanction that this Court sees fit to impose.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

June 21, 2019

(s) Fishman Flanz Meland Paquin

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ANNEX I

GLOSSARY OF DEFINED TERMS

“**Appeal Judgment**” means the decision of the Quebec Court of Appeal (*Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358) rendered on March 1, 2019, upholding, with very minor exceptions, the Riordan Judgment.

“**Applicants**” means ITCAN, JTIM and RBH.

“**Aziz Affidavit**” means the Affidavit of William E. Aziz sworn June 26, 2019

“**CCAA**” means the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

“**CRO**” means chief restructuring officer.

“**Desjardins Affidavit**” means the Affidavit of Dr. Alain Desjardins sworn on June 20, 2019.

“**Insurance Settlements**” means, collectively, the settlement agreements entered into by the QCAPs with Kansa General International Insurance Company Ltd. on July 4, 2017 and Northumberland General Insurance Company on February 16, 2017, respectively.

“**ITCAN**” means, collectively, Imperial Tobacco Company Limited and Imperial Tobacco Canada Limited.

“**ITCAN Notice of Motion**” means ITCAN’s notice of motion dated June 17, 2019.

“**JTIM**” means JTI-MacDonald Corp.

“**JTIM Notice of Motion**” means JTIM’s notice of motion dated June 14, 2019.

“**Judgment Debt**” means the amounts due to the Quebec Class Members pursuant to the Riordan Judgment and Appeal Judgment.

“**Luongo Affidavit**” Affidavit of Peter Luongo, sworn June 14, 2019

“**March 19, 2019 Order**” means the March 19, 2019 Order in Court file number CV-19-615862-00CL

“**Plan**” means a plan of compromise or arrangement

“**QCAPs**” means the class representatives Jean-Yves Blais, Conseil Québécois sur le tabac et la santé and Cécilia Létourneau.

“**Quebec Class Actions**” means both actions instituted in the Quebec Superior Court by the Class Action Plaintiffs in September and November 1998, bearing numbers 500-06-000076-980 and 500-06-000070-983.

“Quebec Class Members” means approximately 1 million class action members of the Quebec Class Actions.

“RBH” means Rothmans, Benson & Hedges Inc.

“RBH’s Notion of Motion” means RBH’s notice of motion dated June 14, 2019.

“Riordan Judgment” means the decision of the Honourable Justice Brian Riordan of the Quebec Superior Court (*Létourneau c. JTI-MacDonald Corp.*, 2015 QCCS 2382) rendered on May 27, 2015 which condemned the Tobacco Companies to pay damages that, with interest and the additional indemnity provided by law, exceed \$13.5 billion in the aggregate.

“Thauvette Affidavit” means the Affidavit of Eric Thauvette, sworn June 17, 2019

“Tobacco Companies” means, collectively, Imperial, JTIM and RBH.

“TM” means JTI-Macdonald TM Corp.

ANNEX II
AUTHORITIES

- Tab 1. *Industrial Properties Regina Limited v Copper Sands Land Corp.*, 2018 SKCA 36
- Tab 2. *Imperial Tobacco Canada Ltd. c. Conseil québécois sur le tabac et la santé*, 2015 QCCA 173
- Tab 3. Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, (Carswell, 2013) at p. 76 (**extract**)
- Tab 4. *Skeena Cellulose Inc. (Re)*, 2001 BCSC 1423
- Tab 5. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327
- Tab 6. *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376
- Tab 7. *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758
- Tab 8. *Hunters Trailer & Marine Ltd., Re* 2000 ABQB 952
- Tab 9. *Alberta Treasury Branches v. Tallgrass Energy Corp.*, 2013 ABQB 432

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF:

JTI-MACDONALD CORP.

Court File No. CV-19-615862-00CL

IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

Court File No. CV-19-616077-00CL

ROTHMANS, BENSON & HEDGES INC.

Court File No. CV-19-616779-00CL

ONTARIO
**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

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